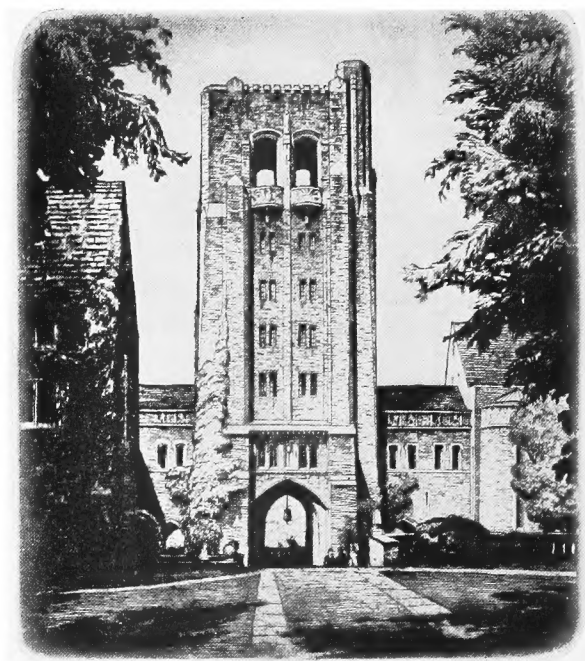


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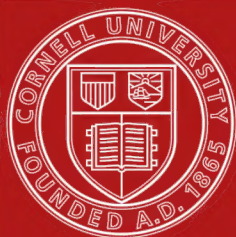
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A TREATISE
ON
THE PRACTICE
OF THE
COURT OF CHANCERY
WITH AN
APPENDIX OF PRECEDENTS.

Second Edition,

REVISED AND ENLARGED; WITH NOTES AND REFERENCES TO
STATUTES AND LATER DECISIONS.

OR ENL.
BY OLIVER L. BARBOUR, LL.D.

IN THREE VOLUMES.

VOL. I.

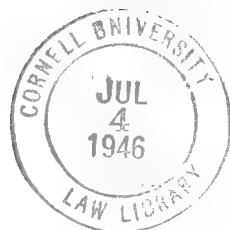
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TRE A T I S E.

BOOK I.

PROCEEDINGS IN A CAUSE FROM ITS COMMENCEMENT TO A DECREE.

CHAPTER I.

BILL OF COMPLAINT.

Sect. 1. NATURE AND OFFICE OF A BILL.

2. DIVISION OF BILLS.

3. CONSTITUENT PARTS OF AN ORIGINAL BILL.

4. MATTER OF A BILL.

5. BY WHOM, AND HOW, BILLS ARE DRAWN.

6. ENGROSSING, SIGNING, AND SWEARING TO.

7. NUMBERING, MARKING FOLIOS, ENDORSING, AND FILING.

8. WHEN TO BE ACCOMPANIED BY AN AFFIDAVIT.

SECTION I.

NATURE AND OFFICE OF A BILL.

A SUIT in chancery is commenced by the filing, in the proper office, of a bill of complaint. (1) This bill of complaint is in the nature of a

(1) Now complaint. Since the *Code*, the first pleading on the part of the plaintiff in an equitable action as well as in one at law, is the complaint. (*Code*, § 141.) By the Code of Procedure, all the forms of pleading previously existing were abolished, and the forms of pleading in civil actions in courts of record, and the rules for determining the sufficiency of pleadings, are now those prescribed by that act. (*Id.* § 140; *Royce v. Brown*, 3 How. Pr. 391; S. C. 7 Barb. 80; *Quintard v. Newton*, 5 Rob. 72.) Yet section 471 of the Code, qualifies this sweeping provision, in some degree, by declaring that "until the legislature shall otherwise provide," the second part of the Code shall not affect certain cases and proceedings specified in that section; among which are "any existing statutory provisions relating to actions, not inconsistent with" the Code, and in substance applicable to the actions thereby provided. Hence, it has been held, that the provision of the Revised Statutes (2 R. S. 458, § 3,) Vol. I.—3.

petition, addressed to the chancellor, and contains a statement of the facts out of which the complainant's claim arises, and prays the relief to which he considers himself entitled.

This petition when preferred by a private citizen, is called in the old [*34] *English books an *English Bill*, by way of distinction from the proceedings in suits within the ordinary or common law jurisdiction of the court, which were entered and enrolled, more anciently, in the French or Norman tongue, and afterwards in Latin. (a) If it is instituted in behalf of the state or of those whose rights are under its particular protection, it is exhibited in the name of the Attorney General, and is styled an Information. (b) An information differs from other bills little more than in name; and the rules of practice incident to ordinary bills may be considered applicable to Informations, except where a distinction is expressly mentioned in the following pages.

An original bill in chancery is in the nature of a declaration at common law. (c)

SECTION II.

DIVISION OF BILLS.

Bills, if they relate to matters which have not previously been brought before the court, are called original bills, and form the foundation of the greater part of the business of the court of chancery.

Besides original bills, there are other bills in use in courts of equity, which are filed when it becomes necessary to supply any defects existing in the form of the original bill, or which may have been produced by events subsequent to the filing of it. Bills of this description are called bills which are not original.

Sometimes a person not a party to the original suit seeks to bring the proceedings and decree in the original suit before the court, for the purpose either of obtaining the benefit of it, or of procuring a reversal of

(a) Mitf. Eq. Pl. 7.

(b) Id. ib.

(c) 3 Black. Com. 442.

dispensing with proof of the existence of corporations in actions by them, unless the defendant pleads that the plaintiff is not a corporation, is not abolished by the Code. (*The Bank of Genesee v. The Patchin Bank*, 13 N. Y. 309.) So as to the provision of the Revised Statutes (2 R. S. 482, § 10, relative to the form of declaring for statute penalties. (*The People v. Bennett*, 5 Ab. 384.) Pleadings in actions against corporations are also unaffected by the Code. (*Bank of Waterville v. Beltzer*, 13 How. Pr. 272; *Johnson v. Kemp*, 11 id. 186; *Union Mu. Ins. Co. v. Osgood*, 7 Duer, 707; S. C. 12 Leg. Obs. 85.

As to the constituent parts, and the form and requisites of a complaint, see notes to sections 3 & 4 of this chapter.

the decision made in it. The bill which he files for this purpose is styled a bill in the nature of an original bill. (*d*)

Original bills are usually divided into 1. Original bills praying relief, and 2. Original bills not praying relief.

1. Original bills praying relief are of two kinds: 1st. Bills praying the decree of the court touching some right claimed by the complainant in opposition to rights claimed by the defendant; and 2d. Bills of interpleader.

2. Original bills not praying relief are also of two kinds: 1st. Bills to perpetuate the testimony of witnesses; and 2d. Bills of discovery. (*e*)

In the present Book the practice upon original bills praying relief, which are those most usually filed in this court, will be considered. In a subsequent Book we propose to treat of the several other sorts of bills and of peculiar practice incident to each class. (*f*)

SECTION III.

CONSTITUENT PARTS OF AN ORIGINAL BILL.

A BILL in chancery consists of nine parts, viz :

First. The *address*. "To the Chancellor of the state of New York," without the addition of his name, or any other title or designation. (2)

Second. The *introduction*. "Complaining sheweth unto your honor." This part contains the name, description, and place of abode of the complainant (3) (who is styled "your orator.") It is necessary the

(*d*) 1 Dan. 402.

(*e*) 1 Dan. 403. Mitf. Eq. Pl. 29.

(*f*) See post, Book IV.

(2) In this country the address of the bill, wherever a bill is still in use, is to the court from which it seeks relief, by its appropriate and technical description, and the address must be varied accordingly. (*Story Eq. Pl.* § 26.)

In the *Circuit Courts of the United States*, bills are addressed "To the Judges of the Circuit Court of the United States for the District of," &c. (*U. S. Equity, Rule 20; Story Eq. Pl.* § 26.)

In *Massachusetts and Maine*, the bill is addressed, "To the Honorable the Justices of the Supreme Judicial Court."

In *New Hampshire*, the address is: "R.—ss. To the Supreme Judicial Court." (*Chancery Rule 2.*)

In *New Jersey*, "To the Honorable, H. W. G. Chancellor of the State of New Jersey." In *Vermont*, "To the Honorable A. B. Chancellor, of the First, &c., Judicial District." (1 *Dan. Ch. Pr. Am. ed.* 1855, p. 332, note 3.)

(3.) Of the nine parts of a bill in chancery, only two are applicable to the present system, viz: the *stating part*, and the *prayer for relief*. These, together with the title of the cause, constitute a complaint, both in equity and common law actions.

The Code (§ 142) requires that a complaint shall contain 1. The *title of the Cause*, which must specify (1.) The *name of the Court* in which the action is brought; (2) The *name of the county* in which the plaintiff desires the *trial to be had*; and (3.) The *names of the parties* to the action, plaintiff and defendant.

place of the complainant's residence should be stated, in order that the defendant may know where to resort to compel obedience to any order or process of the court; especially for the payment of costs, should any

The statute of *Minnesota* respecting "Civil Actions" (Public Statutes, Chap. 60, § (63) LIX, contains a similar provision. The practice Act of *California* (§ 39,) also has it. See also Codes of *Oregon*, *Nevada* and *Arizona*.

1. *Name of the Court.*] Although the Code requires the name of the court to be set forth in the title of the complaint, yet if it be inserted in the summons annexed, the court will disregard the omission of it in the complaint, and hold the statute substantially complied with. (*Merrill v. Grinnell*, 11 How. Pr. 32; *Van Namee v. People*, 9 id. 198; *Van Benthuyzen v. Stevens*, 14 id. 70.) If no name of the court is set forth either in the summons or complaint, no action is commenced in any court, and the judgment would probably be void. (*Ward v. Stringham*, 1 Code Rep. 118;) though, it is said, the Supreme Court will entertain a motion, in such a case, to set aside the summons and complaint as irregular. (*Ib.*; *Hall v. Huntley*, 1 Code Rep., N. S. 21; *Merrill v. Grinnell*, 10 How. Pr. 32.)

2. *Name of the County.*] Naming the county in the title of the action is a sufficient designation of the county in which the plaintiff desires the trial to be had. (*Ab. Forms*, vol. 1, p. 111, note (d); *Davison v. Powell*, 13 How. Pr. 288; *McKenna v. Fisk*, 1 How. U. S. 211; *Tappan v. Powers*, 2 Hall, 277; *State v. Post*, 9 John. 81.) As a name is technically necessary to every traversable fact, when it is once properly laid all matters following refer to it. (*Coke v. Kendall*, Hempst. 236.) It has been held, however, that a name laid in the body of the complaint is sufficient. (*Dwight v. Wing*, 2 McLean, 580.) If the complaint omits to mention the name of the county in which the plaintiff desires the trial to be had, it is irregular. (*Davison v. Powell*, 13 How. Pr. 288;) and the irregularity is not cured by reference to the summons. (*Merrill v. Grinnell*, 10 How. Pr. 32; *Hotchkiss v. Crocker*, 15 id. 336.) The place of trial stated in the complaint determines where motions are to be made, as well as where the trial is to be had. (*ib.*) The statement of the name of the county in the summons does not necessarily show that it is placed there to indicate where the trial is to be. (*Id.*) Where the action is in a court of local jurisdiction, as in a county court, or court of common pleas, the complaint need not state the name of the County in which the plaintiff desires the trial to be had. (*Leopold v. Poppenheimer*, 1 Code Rep. 39.)

A defect of this kind in the complaint, is not fatal. It may be amended. (*Hotchkiss v. Crocker*, 15 How. Pr. 333; *Davison v. Powell*, 13 id. 288.) It is not waived by the omission of the defendant to make the objection until the time for answering has expired; nor by his obtaining orders extending the time to answer. (*Merrill v. Grinnell*, 10 How. Pr. 32.) The proper method of taking advantage of the omission to name a county in the complaint, is by motion to set aside the complaint for irregularity. (*Hotchkiss v. Crocker*, 15 How. Pr. 336; *Hall v. Huntley*, 1 Code Rep., N. S. 21 n; *Davison v. Powell*, 13 How. Pr. 288.) It is not a case for a demurrer. (*Dorman v. Kellam*, 14 How. Pr. 184; 4 Abb. 202.) Where the complaint does not state any county in which the plaintiff desires the trial to be had, the action is triable in the district where either the plaintiff or defendant resides; unless the place is otherwise determined by the nature of the action itself; and the defendant may move to set aside the complaint either in his own or the plaintiffs' district. (*Hotchkiss v. Crocker*, 15 How. Pr. 336.)

There are certain actions which are required by the Code (§ 123) to be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by statute. In actions of this class, the county mentioned in the complaint as the place of trial should be that where the property, or some of it, is situated. Sections 124 and 125 of the Code, prescribe the place of trial in other classes of actions; and section 126 directs that if the proper county be not designated in the complaint, the action may, notwithstanding, be tried therein, unless the defendant demand, in writing, that the trial be had in the proper county.

The place of residence of a corporation, created by the laws of this state, must be ascertained by its place of business; and if it has several places of business, it will be deemed to have several places of residence. (*Pond v. The Hudson River Rail Road Co.* 17 How. Pr. 543.) The word "person," in its legal signification, is a generic term, and intended to include artificial as well as natural persons. (*Douglass v. Pacific M. S. Co.* 4 Cal. 304;) the statute having done away with all distinctions

be awarded; and that if he is a non-resident of the state he may be compelled to give security for costs.

Third. The *stating* part. "That your orator being," &c., or, "That C. D." &c. This part of the bill states the facts upon which the complainant relies for relief. It should be sufficiently full, so that each interrogatory may be supported by the statement. Otherwise the defendant will not be bound to answer the interrogatory. (*g*)

(*g*) Attorney General v. Whorwood, 1 Ves. Sen. 534.

between natural and artificial persons and the rules of pleading applicable thereto. (*an Francisco Gas Co. v. The City of San Francisco*, 9 Cal. 467.)

It has been decided that the statute declaring that a suit must be brought in a county in which some of the parties reside, has reference to parties in interest, and not mere nominal parties, or parties to the record. (*Hart v. Oatman*, 1 Barb. 229.)

In an action for the foreclosure of a mortgage, the proper county for the place of trial is where the mortgaged premises are situated, although the money may be loaned and the mortgage executed and delivered to the mortgagee in another county. (*Milner v. Hull*, 3 How. Pr. 325; S. C. 1 Code Rep. 113.)

It has been held that section 123 of the Code, declaring that actions relating to lands are local and must be tried in the county where the lands are situated, does not apply to actions relating to lands which are situated outside of the state. (*Mursina v. Belden*, 6 Abb. 165.)

If the action is one of those mentioned in section 125 of the Code, the place of trial should be in the county in which some one of the parties to the action resides, regardless of the convenience of witnesses. (*International Life Assur. Co. v. Sweetland*, 14 Abb. 240.)

Where a wrongful act or omission which causes death, occurs in another state, the right of action for such act must depend upon the law of the state in which the act occurred; and the laws of 1847 and 1849 do not give the injured party a right of action therefor, in this state. (*Vanderwerken v. N. Y. & New Haven R. R. Co.* 6 Abb. 239.)

The proper mode of taking advantage of a defect in the statement of the name of the county, is by motion to set aside the complaint, as irregular. (*Hall v. Huntley*, 1 Code Rep. N. S. 21, n.)

3. *Names of the Parties.*] The caption to the complaint must contain the names of all the parties to the action, plaintiff and defendant. (*Code of N. Y.* § 142; *Cal. Prac. Act.* § 39; *Oregon Code*, § 65; *Nevada*, § 39; *Arizona*, § 39; *Pub. Stat. of Minnesota*, 540 § 64; *Code of Ohio*, § 85; *Code of Kansas*, § 94; *Bicknell's Prac. Indiana*, 64; *Code of Wisconsin*, Chap. 125, § 3.) The rule is that the names of the parties must be fully set forth, and the parties must be properly designated, the complaining party as plaintiff, and the adverse party as defendant. (*Cal. Pr. Act.* § 2; *Code of N. Y.* § 70; and see *Codes of Oregon, Idaho, Nevada, Arizona, &c.*)

Where it is not impracticable, the court will require that all the persons interested in the action should appear by their individual and real names. (*Kirk v. Young*, 2 Abb. 453.) But an action may be brought by a party in the name by which he is known, although that is not his true name. (*Cooper v. Burr*, 45 Barb. 10; and see *Bank of Havana, v. Magee*, 20 N. Y. 356.)

Although, properly, the names of all the parties, plaintiff and defendant, should be set forth in the title of the action, at the head of the complaint, yet as the Code does not specify in what part of the complaint they shall be found, if only some of the parties are named in the title, but all are correctly named in the body of the complaint, it will satisfy the requirements of the Statute. (*Hill v. Thaxter*, 3 How. Pr. 407.) The title is a part of the complaint, but the allegations in the body of the complaint should control the title. (*Christy v. Libby*, 35 How. Pr. 119, S. C. aff'd. 5 Abb., N. C. 192.)

If the true name of the defendant or defendants is known to the plaintiff, it must be correctly set forth in the complaint. (*Elliott v. Hart*, 7 How. Pr. 25; *Dale v. Mauley*, 11 id. 138. But if the plaintiff is ignorant of a defendant's name, such defendant may be designated by any other name; and when his true name is discovered, the complaint may be amended accordingly. (*Code*, § 175.) In such a case, however, the rea on for describing the defendant by another name must be stated in the complaint. (*Elliott v. Hart*, 7 How. Pr. 25; *Crandall v. Beach*, id. 271.) It is not allowable to a plaintiff to designate a defendant by a fictitious name at discretion. It

Fourth. The *confederating* part. "But now so it is," &c. This charge is unnecessary, and might as well be omitted. (*h*)

Fifth. The *charging* part. "Whereas, your orator expressly charges," &c. This is used for the purpose of charging the untruth of the pretences set up or intended to be set up by the defendant. This part of the bill concludes with the words, "All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator."

(*h*), 1 Fow. Ex. Pr. 29. Coop. Eq. Pl. 10.

can only be done where the plaintiff is ignorant of the true name. (*Crandall v. Beach, supra.*) The law supposes every person to have a family and a given name, and allows two fictitious names to be inserted when either of the real names is unknown. (*Frank v. Levie*, 5 Rob. 600.) If a person is known as well by one name as by another, he may be sued in either name. (*Eagleston v. Son*, 5 Rob. 640.) Where these persons used a name indicating that they were a corporation, but they were not incorporated, the plaintiff having sued them as a corporation, by the name used by them, was allowed to amend, without costs, by substituting the names of the individuals as defendants. (*Newton v. Milleville Manuf. Co.* 17 Abb. 318, *note.*) But a judgment against an individual, as a defendant, by a name which is not his, in contemplation of law, cannot be enforced against him. Nor will a judgment in an action in which the defendant is denominated, in all the proceedings therein, by a different name from that of a particular existing individual, be of any avail against the latter even if entered up against him by his real name; although process in such action was served upon him when the name of the defendant in such process was not his; because, unless he actually appeared in such action, no jurisdiction over him was obtained therein, by the service of such process. (*Moulton v. De Ma Carty*, 6 Rob. 470.)

After the names have once been stated, it is sufficient, afterwards, to designate them as "the said plaintiff," or "the said defendant." (*Davison v. Savage*, 6 Taunt. 121; *Stephenson v. Hunter*, id. 406; *Stanley v. Chappell*, 8 Cow. 235.) And this rule applies, also, where the plaintiff sues in a special character, and commences the complaint by stating his character. (*Stanley v. Chappell*, 8 Cowen, 235; *Ketchum v. Morrell*, 2 N. Y. Leg. Obs. 58.)

The only way of presenting, as a defence, the misnomer of the plaintiff, under the Code, is by answer. If not so set up, it is not available on the trial. (*Traver v. The Eighth Avenue R. R. Co.* 6 Ab., N. S. 46; S. C. 3 Keyes, 497; 3 Trans. Ap. 203. See *Bank of Havana v. Magee*, 20 N. Y. 355.) It may be corrected on the trial or afterwards, or before the trial, by amendment. (*Barnes v. Perine*, 9 Barb. 202; S. C. 15 id. 250; 12 N. Y. 18; *Bank of Havana v. Magee, supra*; *Walker v. Perkins*, 9 Jur. 665.) It is not a ground of nonsuit. (*Id.*) In *Traver v. The Eighth Avenue Rail Road Co. supra*, it was held by the Court of Appeals that the only mode of presenting the defence of misnomer in bringing an action by a married woman in her maiden name, is by answer; and if it is not set up in the answer, it is unavailable upon the trial.

As regards a misnomer of the defendant, it has been held that when he is sued by a wrong name, his remedy is by plea in abatement; and he cannot move to have the proceedings set aside. (*Miller v. Stettiner*, 22 How. Pr. 518; S. C. 7 Bosw. 692, *contra*, *Elliott v. Hart*, 7 How. Pr. 25; *Dole v. Manley*, 11 id. 138.) An appearance by him, in the action, by attorney, generally, is a waiver of the irregularity. (*Baxter v. Arnold*, 9 How. Pr. 445.) The objection to a misnomer may be raised at any time. (*Elliott v. Hart*, 7 How. Pr. 25; *Dole v. Manley*, 11 id. 138; *Farnham v. Hildreth*, 32 Barb. 277;) and the plaintiff may be allowed to correct. (*Waterbury Manuf. Co. v. Kranse*, 1 Hilt. 560; *Follower v. Laughlin*, 12 Ab. Pr. 105.)

Where an infant sues, by guardian, the complaint should contain an allegation of the appointment of the guardian by the court, or a judge; and this should be stated in a traversable form. (*Hulbert v. Young*, 13 How. Pr. 414; *Grantmore v. Thrall*, 44 Barb. 173.) In such an action the title of the complaint should be "A. B. by C. D. his guardian, v. E. F." (*Hill v. Thaxter*, 3 How. Pr. 407; S. C. 2 Code, Rep. 3. Yet if the complaint contains, in the body of it, the names of the plaintiff and defendant in a manner to be understood "by a person of common understanding," it satisfies the requirements of the Code. (*Id.*) There should be an allegation of the plaintiff's infancy.

The charging part of a bill should not contain any statement which *is not true; as, if the bill is sworn to, it is perjury for the com- [*36] plainant knowingly to make a false charge or averment in the charging as much as if he makes a false statement in the stating part. (i)

Sixth. The clause of *jurisdiction*. "In tender consideration where of, and forasmuch," &c. This is an averment that the complainant has

(i) *Smith v. Clark*, 4 Paige, 368.

Where a complaint was entitled, "J. G. by J. G., his guardian v. G. T.," and commenced thus: "The plaintiff complaining, states," &c., but contained no allegation that the plaintiff was an infant under the age of twenty-one years, or that the guardian was duly appointed, it was held bad, on demurrer. (*Grantman v. Thrall*, 44 Barb. 173.) In *Sere v. Coit*, (5 Abb. Pr. 481,) however, it was held that an objection for insufficiency in the statement of the appointment of the plaintiff's guardian *ad litem* could only be raised by motion to make the complaint more definite and certain.

In designating the parties to the action, except when the suit is brought in an official or representative capacity, no title or other appellation is necessary. If inserted it will be treated as mere surplusage. (*Sheldon v. Story*, 11 How. Pr. 15; *Merritt v. Seaman*, 2 Seld. 168; *Bogert v. Vermilyea*, 10 N. Y. 447; *Root v. Price*, 22 How. 372; *Butterfield v. Macomber*, id. 150; *Forrest v. Mayor of New York*, 13 Ab. 350; *Seranton v. Farmers' Bank of Rochester*, 33 Barb. 527; *Hallett v. Harrower*, id. 537.)

Where a public officer brings an action in his official character, he should sue in his individual name, and add his title of office. (*Paige v. Fazackerly*, 36 Barb. 392; *Hill v. Thaxter*, 2 Code Rep. 3; 3 How. Pr. 407.) When he thus sues, the complaint should, by a proper averment, show that the claim is made by the officer, and not by the individual. (*Guthries v. Fisher*, 3 Stark. 151; *Gould v. Glass*, 19 Barb. 179.)

Actions may be brought by commissioners of highways, in their own names, with the addition of their name of office; (*Gould v. Glass*, *supra*,) merely adding to the names of the plaintiffs in the title of the cause, the words, "commissioners of highways," &c., will not render the action one in favor of the plaintiffs in their official character, unless the necessary averments are inserted in the complaint. The words added will be considered mere *descriptio personæ*. (*Id.*) Thus, where a complaint in the title of the cause described the plaintiffs, as "C. H. G.," &c., "commissioners of highways of the town of L.," but did not, in any other part contain any intimation that the suit was brought by the plaintiffs in their official character, nor aver that the plaintiffs were commissioners of highways, or that they complained as such: nor did they demand judgment as such; it was held that the action was to be deemed as brought in favor of the plaintiffs in their individual character. (*Id.*) Where the complaint gave the names of the plaintiffs in the title of the cause, with the description of them as commissioners of highways, and commenced, "The plaintiffs, commissioners of highways, complain," it was held sufficient to show that they sued as commissioners, and not as individuals. (*Fowler v. Westervelt*, 40 Barb. 374; S. C. 17 Ab. 59.)

An action by commissioners of excise is properly brought by a complaint, stating the individual names of the plaintiffs, describing them as such board of commissioners, and alleging that the penalty accrued to them as such. (*Wait v. Benson*, 18 How. Pr. 302.)

In an action brought by a plaintiff as sheriff, an allegation in the complaint, that "the plaintiff" is sheriff of the city and county of New York, is a sufficient allegation of his official character. (*Kelly v. Breusing*, 33 Barb. 123.) It is not necessary, in order to render a sheriff liable for the acts of his deputy, that he should be sued in his official capacity as sheriff, and facts sufficient to charge him in that relation be set out in the complaint. (*Curtis v. Fay*, 37 Barb. 64.)

If an officer sues in a particular character, such as "chamberlain," and no objection is made at the trial, that he is not such officer, it will be assumed that he is the proper officer; and the court, on appeal, will not reverse the judgment for want of such proof. (*Paige v. Fazackerly*, 36 Barb. 392.)

An action against a county should be brought against the "board of supervisors" thereof, and not against the several supervisors by name. If it be against the supervisors, it should be against them, individually, specifying their names of office. (*Wild v. Supervisors of Columbia county*, 9 How. Pr. 315; *Hill v. Supervisors of Livingston*, 13 N. Y. 52.) A complaint in an action against the "board of supervi-

no remedy, save in a court of equity. The omission of this clause, however, will not render the bill defective; as it cannot confer jurisdiction. The bill must show a state of facts from which it is apparent that the court has jurisdiction. (*k*)

Seventh. The *interrogating* part. "To the end therefore," &c. This contains a prayer that the defendants may answer all the matters contained in the former part of the bill, not only according to their respec-

(*k*) *Mitt. Eq.* Pl. 35.

sors" cannot be set aside, because they are not individually named, as it will be assumed that it is brought against the county; but if it is not against the county, a defence that the wrong party is sued, will be good. (*lb.*) A proceeding to compel supervisors to exercise their discretion in auditing a claim against the county, should not be against the supervisors individually, specifying in the process, pleadings and proceedings, their name of office pursuant to 2 Rev. Stat. 474, § 96. It is not an action against the "officers named in section 92," to which the provision of section 96 refers; but since it is to compel a performance of duty by the board, and not by the supervisors individually, it should be brought against the board. (*People ex rel. Plumb v. Supervisors of Cortland*, 24 How. Pr. 119.) Where the complaint was entitled "S. S. S., supervisor of the town of N. H. v. J. L.," and commenced "the complaint of the plaintiff above named, as supervisor as aforesaid, shows," &c.; and the defendant demurred on the ground that the complaint did not show that the plaintiff had legal capacity to sue, and did not allege that he was the supervisor of the town of N. H., the demurrer was overruled. (*Smith v. Levinus*, 6 N. Y. 474.)

Where an action is duly commenced against commissioners for loaning certain moneys of the United States, under the act of April 4, 1837, it is in effect brought against the State, and not against the commissioners personally. It is therefore absolutely necessary to bring the State before the Court as a party, in the form prescribed by the statute, to enable the court to give any relief to the plaintiff. (*Plumtree v. Dratt*, 41 Barb. 333.) If the complaint describes the defendants as "commissioners of loans of the county of W.," the addition to their names will be considered as merely *descriptio personarum*, and the action will not be deemed as brought against them in their official character as commissioners under the act mentioned. (*lb.*) And if the objection is distinctly taken by demurrer, the plaintiff will not be allowed to proceed in his action, but must amend.

In an action by an officer of a *joint stock company*, under the act of 1849, the complaint must allege that the company is a joint stock company or association, consisting of more than seven stockholders or associates. (*Tiffany v. Williams*, 10 Abb. 204.)

One suing as *trustee* or *agent*, should make a positive and issuable averment of his trust or agency in his complaint. (*Freeman v. Fulton Fire Ins. Co.* 14 Abb. 407.) *Trustees of a religious society* must sue in the corporate name of the society where the action relates to the property of the society. They cannot maintain an action in their own names. (*Bundy v. Birdsall*, 29 Barb. 31.)

Banks created under the general banking law, when suing, should recite the title of the act, and the date of its passage, under which proceedings were had for its incorporation. This is required by section 13 of title 4, chapter 8, of the third part of the Revised Statutes; which is retained by § 471 of the Code. (*Johnson v. Kemp*, 11 How. Pr. 186; *Bank of Havana v. Wickham*, 16 id. 97; S. C. 20 N. Y. 355.) When an *individual* sues, his existence is assumed from the action being in his name; but when a *corporation* sues, it must show how it was created, that the court may judge whether it was created under authority of any law, and whether that law authorizes the contract or cause, for which the action is brought. (*Ibid.*)

If an *individual banker* is a corporation sole, he may take any corporate name he chooses, and sue in that name. (*Bank of Havana v. Wickham*, *supra.*) The prosecution of a suit by him, in a name importing a corporate character, under which he carried on business, is a merely formal error, amendable in the Supreme Court, and to be disregarded in the Court of Appeals. (*Bank of Havana v. Magee*, 20 N. Y. 355.)

Actions brought by or in behalf of a *banking association*, may be prosecuted in the name of the president. (*Laws of 1832*, ch. 260, § 21), or in that of the association. (24 Wend. 345; 1 Sandf. 693; *Leonardsville Bank v. Willard*, 25 N. Y. 574.)

tive knowledge and remembrance of the facts stated, but also according to the best of their several and respective hearsay, information, and belief. The bill usually requires the answer to be upon oath; but the plaintiff may, if he thinks proper, waive the necessity of its being put in upon oath; and in such case the answer will have no other or greater force, as evidence, than the bill. (*l*)

The general interrogatory in a bill is sufficient to entitle a party to

(*l*) Rule 40. 2 R. S. 175, § 49, orig. § 44.

Both are corporate names; and when the action is brought by the association in the name of its president, and that fact appears, the association is the plaintiff, and may be so referred to throughout the complaint, and in all proceedings. (*Root v. Price*, 22 How. Pr. 372.) In such an action the plaintiff sufficiently indicates the character in which he was by describing himself as "A. B., President" of said bank, and then alleging that he prosecutes for the benefit of the bank. (*Ib.*)

Where the plaintiff, in his summons and complaint, described himself as "president of the Bank of H.," and in the body of the complaint it was further alleged that the plaintiff was president of the Bank of H., a moneyed corporation established and doing business at H., and then set out a cause of action accruing to such bank, it was held that upon an answer denying generally and specifically all the allegations in the complaint, the issues were material, and the plaintiff could not recover unless he established such allegations, and sustained his corporate character. That proof that the plaintiff was an individual banker, doing business at H., under the name of the Bank of H., failed to sustain the complaint, or make a case. (*Hallett v. Harrower*, 33 Barb. 537.) Where a member of an *unincorporated association* sues the president or other chief officer for an accounting concerning the property of the association, or for a fraudulent breach of trust in respect thereto, all the members of the association must be made parties, or the plaintiff must sue for the benefit of all others standing in the same situation as himself. (*Warth v. Radde*, 18 Ab. 396. S. C. 28 How. Pr. 230.)

The addition of "junior" to a name is a mere description, and is no part of the name. Neither is the middle letter between the Christian and surname, any part of the name. The law knows only one Christian name; (*The People v. Cook*, 14 Barb. 261; *Smith v. Ross*, 7 Mo. 463); nor the word "senior." These are mere unnecessary additions, and should not be inserted in the complaint. (*Neil v. Dillon*, 3 Mo. 59.)

The addition of the word "survivor" to the name of a defendant sued upon a joint and several obligation is mere surplusage. The promise being laid as an individual one, the action is to be deemed one on the several contract. (*Bogert v. Fermilya*, 10 N. Y. 447.) The addition of the word "surety," or "security," by the endorers of a note, to their names, does not divest them of their character of endorers. The only effect of the addition of these words to their signatures is to give them the privileges of sureties, in addition to their rights as endorers. (*Bradford v. Corey*, 5 Barb. 461.)

Assignee. If it appears that the cause of action accrued to some person other than the plaintiff, the complaint should state in what manner the plaintiff became the owner of the demand. (*Russell v. Clapp*, 7 Barb. 482; *Bentley v. Jones*, 7 How. Pr. 202; *McMurray v. Thomas*, 5 id. 14; *Parker v. Totten*, 10 id. 233; *Thomas v. Desmond*, 13 id. 321; *Freeman v. Fulton Fire Ins. Co.* 12 Abb. 407.) If the plaintiff sues as *assignee* of the demand, the complaint should allege the assignment. But it need not state there was a consideration for the assignment: nor whether it was in writing or by parol. (*Vogel v. Babcock*, 1 Abb. 177; *Horner v. Wood*, 15 Bard. 372; *Martin v. Kanouse*, 2 Abb. 331.) An action on a promissory note, brought by an assignee for the benefit of creditors, in which the complaint describes the plaintiff as "assignee of D. & Co.," is to be deemed as brought by the plaintiff in his individual capacity. (*Butterfield v. Macomber*, 22 How. Pr. 150.) Where the plaintiff alleges in his complaint that he is the "owner and holder" of the notes in suit, and the answer puts that fact in issue, and it appears that the plaintiff holds the notes as *assignee* of the payees, under a general assignment for the benefit of creditors, he is to be deemed in law the holder and owner, so as to entitle him to maintain the action in his *own name*, as plaintiff, without setting out his representative character. (*Ib.*) If the assignment is by a corporation, and the

a full answer to all the matters stated. (*m*) But this fact has not, in practice, precluded the use of special interrogatories; which are sometimes of great importance in enlarging a general charge and extending it to all the minute and collateral circumstances attending the fact.

(*m*) *Jaques v. Methodist Church*, 1 John. Ch. R. 75.

transfer is *prima facie* lawful, the complaint need not aver that the directors were authorized to make the assignment. *Nelson v. Eaton*, 16 Abb. 113. Where a contract has been assigned to the plaintiffs, the fact necessary to be stated in the complaint is the *change of interest* in the contract, so that the plaintiffs may maintain the action as "the parties in interest" under the 111th section of the Code. It is not necessary to state a compliance with each and every particular requisite to render the change effectual. (*Horner v. Wood*, 15 Barb. 372.) An allegation that "C. duly assigned and transferred all his interest in the contract to the plaintiff, G., and that plaintiff, L., became interested by a sale and assignment to him of a part of G.'s interest," is sufficient. (*Ib.*; see also *Fowler v. New York Indem. Ins. Co.*, 23 Barb. 151; *Morange v. Mudge*, 6 Abb. 243.) So, an allegation that A. "sold, and transferred, and set over to the plaintiff, the said judgment," will be construed to mean that the judgment was assigned absolutely. If the assignment was subject to any material condition affecting the plaintiff's right to recover, it is matter to be shown by way of defence. (*Martin v. Kanouse*, 2 Abb. 331.) And an allegation in a complaint that the plaintiff became the owner of the cause of action by purchase, was (in *Prindle v. Caruthers*, 15 N. Y. 427,) held a sufficient allegation of title in the plaintiff as assignee of the party to whom the cause of action accrued. But where the complaint showed that the alleged cause of action accrued to a third party, and the only manner in which the plaintiff showed title in himself was by an allegation that "the plaintiff is now the sole owner of the said demand," it was held that the allegation was of a conclusion of law, and not of a fact, and showed no title in the plaintiff. (*Thomas v. Desmond*, 12 How. Pr. 32.)

In an action by an *executor* or *administrator*, as such, the complaint should show that the action is by the plaintiff, in his representative character, and not as an individual. He need not make profert of the letters testamentary or of administration: it is enough if he avers that he sustains the character either of executor or administrator; and if the averment is denied, he produces on the trial the letters granted to him as evidence of his title. (*Bright v. Currie*, 5 Sandf. 433; *Wells v. Webster*, 9 How. Pr. 251; *Voorhies, Code*, 10th Ed. 151.) But upon a note given to an executor or administrator on account of the estate of his testator or intestate, he may sue either individually or in his representative capacity. (*Merritt v. Seaman*, 6 N. Y. 168; *Bright v. Currie*, 5 Sand. 43; S. C. 10 Leg. Obs. 104.) A complaint, commencing "A. B., administrator of the goods, &c., of C. D.," and containing no other allegation or statement as to the fact of the plaintiff's appointment, does not allege that he is an administrator, or show that he prosecutes in that capacity. The introductory statement is a *descriptio personæ*, merely. (*Sheldon v. Hoy*, 11 How. Pr. 11; *Merritt v. Seaman*, 6 N. Y. 168.) And the action will be deemed to be an action by the plaintiff in his individual, and not in his representative character. The fact that the plaintiff has been appointed administrator, or is executor, is a material and traversable fact, and should be stated in such form as to tender an issue to the other party. (*Ib.*) Where the complaint alleged that the plaintiff was "the executor of the last will and testament of J. W., deceased, and that he had been duly and legally authorized to act as such executor," and further stated that the defendant was indebted to him as such executor, it was held, on demurrer, that the complaint was sufficient. (*Wells v. Webster*, 9 How. Pr. 251.) Where the plaintiff, suing as administrator, alleged that he had been "*duly appointed*" administrator, without stating any fact as to when, or how, or by whom, he had been appointed, it was held insufficient. (*Beech v. King*, 17 Wend. 197; *Gillett v. Fairchild*, 4 Denio, 80; *White v. Joy*, 13 N. Y. 80; *Chautauqua Co. Bank v. White*, 6 N. Y. 236.) An allegation that the plaintiff had "been duly appointed and qualified by the Surrogate of the City and County of New York, to act as sole executor of D. F., deceased," was held insufficient in *Forrest v. The Mayor of New York*, (13 Abb. 350.) Yet where the complaint alleged that the cause of action was due to the plaintiff *as executor*, and that the money was had and received by the defendant for the use of the plaintiff, *as such executor*, it was held sufficient to show that the plaintiff sued in his representative character. (*Scrantom v. Farmers' Bank of Rochester*, 34 Barb. 527.)

The interrogatories must be founded upon the statements or charges in the bill, and cannot be more extensive than these. (n) But upon a general statement of a fact, every circumstance connected with it, and

(n) Id. 76. *Muckleston v. Brown*, 6 Ves. 62.

The word *as* is essential, and cannot be represented by any other word. (*Henshall v. Roberts*, 5 East. 154. In *Merritt v. Seaman*, 6 N. Y. 168) an action commenced prior to the Code it was held that merely describing the plaintiff in the declaration, as "C. H. M., executor of the last will and testament of J. S., deceased, plaintiff," that being the only allegation indicating that the action was brought by the plaintiff in any other than his individual character, and followed by a statement of a cause of action accruing to himself personally, did not make the action one by the plaintiff *as executor*, so as to admit a defence of set-off against the plaintiff's testator, or to warrant a judgment against the plaintiff as executor, to be levied of the testator's goods in his hands.

It being a general rule that executors and administrators can sue and be sued, as such, only in the state in which they were appointed, (*Vermilyea v. Bently*, 6 Barb. 429; *Smith v. Webb*, 1 id. 230; *Sere v. Coit*, 5 Abb. 482; *Warren v. Eddy*, 13 id. 23; *Gulick v. Gulick*, 21 How. Pr. 22; *Robins v. Wells*, 26 id. 15; *Averill v. Taylor*, 5 id. 476; *Campbell v. Tousey*, 7 Cow. 64; *McNamara v. Dwyer*, 7 Paige, 239; *Montalvan v. Clover*, 32 Barb. 190), the fact that the plaintiff was appointed by a surrogate of this state is material to be stated; because the courts of this state cannot take notice of letters testamentary or of administration granted abroad, and such letters give no authority to sue here. (*Morrell v. Dickey*, 1 John. Ch. 156; *Williams v. Storrs*, 6 id. 353; *Campbell v. Tousey*, 7 Cow. 68; *Vroom v. Van Horn*, 10 Paige, 550; *Richtmyer v. Raymond*, 12 Wend. 51.) The time of the plaintiff's appointment should also be stated. (See *King v. Roxbrough*, 2 Cr. and J. 418; *Voorhies' Code*, 10th ed. 152.) Upon a note given to an executor or administrator on account of the estate of his testator or intestate, he may sue either individually or in his representative capacity. (*Merritt v. Seaman*, 6 N. Y. 163; *Bright v. Currie*, 5 Sand. 433; S. C. 10 Leg. Obs. 104.)

One of several executors may cite his co-executor before the surrogate, or maintain an action against him in equity for an accounting. (*Wood v. Brown*, 34 N. Y. 337. But see 41 N. Y. 46.)

A receiver, bringing an action, must state in his complaint the time and mode of his appointment, so that issue may be taken thereon. Describing himself as "having been duly appointed receiver of, &c., and bringing this suit by order of the Supreme Court," is sufficient on demurrer. (*Dayton v. Connah*, 18 How. Pr. 326. See *Bangs v. McIntosh*, 23 Barb. 591.) The words "receiver of the Canal Bank of Albany," in a complaint, are merely *descriptio personæ*. (*White v. Joy*, 13 N. Y. 83.) Where a receiver of a corporation would make title, in pleading, to a chose in action, or other property, which had belonged to the corporation, he must set out, in his complaint, the facts showing his appointment. It will not answer merely to describe himself as receiver, or to aver that on a day named he was *duly* appointed. The *place* must be stated; and it must be distinctly averred that an order was made by the court. The plaintiff must set out the proceedings, so that the court may see that the appointment was legal. In such a case the appointment of a receiver is a part of the plaintiff's title. (*White v. Joy*, 13 N. Y. 85; *Gillet v. Fairchild*, 4 Denio, 8.) Thus, to authorize a receiver appointed in supplementary proceedings, to prosecute an action to set aside an assignment made by the debtor, the judgment and other facts necessary to maintain supplementary proceedings must be set forth. It is not enough to allege in the complaint that the plaintiff was appointed receiver in supplementary proceedings. (*Coope v. Bowles*, 42 Barb. 87.) But it is not necessary for the plaintiff, in his complaint, to set out *all* the proceedings by which he was appointed. It is sufficient if he states the mode of his appointment. (*Stewart v. Beebe*, 28 Barb. 34.) Thus, where the complaint showed the plaintiff to be receiver of the B. Bank, appointed by the Supreme Court, by an order made on a specified day, on condition of filing security; and that such security was given accordingly; it was held that enough was stated to enable the defendant to take issue upon the legality of the plaintiff's appointment, if he chose to do so. (*Id.*) So, where the plaintiff was appointed receiver of a corporation, in an action brought under section 40 of 2 Rev. Stat. 463, the complaint need not show that his appointment was founded on a petition. (*Tuckerman v. Brown*, 11 Abb., 389.) In an action by a receiver of a bank, against the debtor of a bank, an allegation that on a day named,

tending to prove or disprove it, may be inquired into. (o) If there is nothing in the prior part of the bill to warrant an interrogatory, the

(o) *Bullock v. Richardson*, 11 Ves. 376. *Faulder v. Stewart*, id. 296.

the comptroller of the currency appointed the plaintiff receiver of the bank, in accordance with the provisions of the act of Congress, (referring to it,) and that the plaintiff has taken possession of the assets, including the demand in suit, is in substance a sufficient allegation of appointment. (*Platt v. Crawford*, 8 Abb. U. S. 297.) Where it is alleged in the complaint, in terms, that the plaintiff has been duly appointed receiver, and the objection is that the complaint does not state with sufficient precision how he became such receiver, the defect has been held not to be insufficiency, but indefiniteness. (*Voorhies' Code*, 10th ed. 154, and cases there referred to.)

A receiver must state, in his complaint, the equity of the parties whose rights under the order of the court appointing him, he represents, to maintain the action which he attempts to prosecute. (*Coope v. Bowles*, 42 Barb. 87.) A receiver, in general, is not clothed with any right to maintain an action which the parties, or the estate which he represents, could not maintain. He must show a cause of action existing in those parties, and that by the appointment of the court, lawfully made in a matter where the court had jurisdiction, the power has been conferred on him, in his representative capacity as receiver, to prosecute the action. (*Ib.*)

The complaint should agree with the summons, in the description of the parties. Thus, where a plaintiff in the summons, described himself as "administrator," &c., and the complaint did not so describe him, it was held that the complaint was irregular. (*Blanchard v. Strait*, 8 How. Pr. 83.) So, if a plaintiff commences his action in his individual behalf, he cannot afterwards change it into an action for a claim held by him in a representative character. (*McMahon v. Allen*, 12 How. Pr. 46; and see *Eagle v. Fox*, 28 Barb. 475.) Where the complaint does not agree with the summons in the names of the parties, the defendant should not move to set aside all the proceedings, for irregularity, but should confine his motion to setting aside the complaint. (*Allen v. Allen*, 14 How. Pr. 248.) If the complaint varies from the summons, there is the same reason and the same right on the part of the defendant to object to the complaint, that there formerly was to set aside a declaration which varied from the writ. (*Tuttle v. Smith*, 6 Abb. 329; 14 How. Pr. 395.) In contemplation of law, the complaint, although served with the summons, is a subsequent step in the procedure. (*Ib.*)

A corporation cannot sue otherwise than by its corporate name. (*Curtis v. Murray*, 26 Cal., 633; *Crawford v. Collins*, 30 How. 393.)

Where a corporation brings an action by its corporate name, it need not allege, in the complaint, that it is a corporation duly incorporated, and has legal capacity to sue; there being in such a case an implied averment in the complaint, that the plaintiff is a corporation, *aliter*, in a suit by a corporation incorporated by the name of an individual. (*Phoenix Bank of New York v. Donnell*, 41, Barb. 571; S. C. aff'd. 40 N. Y. 410*. *Union Mut. Ins. Co. v. Osgood*, 1 Duer. 607.) Nor need the complaint of a corporation specify by date and title, the amendatory acts relating to the act from which it derives its incorporation. If it designate the act incorporating it, and then refers generally to the acts amending that act, it will be sufficient. (*The Sun Mutual Ins. Co. v. Dwight*, 1 Hilt. 50.) The general allegation, in a complaint, "that the plaintiffs are an incorporated company, organized pursuant to the provisions of the act," &c., is sufficient to show an organization. (*Oswego and Syracuse Plank Railroad Co. v. Rust*, 5 How. Pr. 390; *Stoddard v. Onondaga*, Annual Conference, 12 Barb. 473.) The complaint, in an action by a corporation, need not allege that the plaintiffs are a corporation; nor, in an action against a corporation, need the complaint allege that the defendants are such. (*Lighte v. The Everett Fire Ins. Co.* 5 Bosw. 716.) But where an action is brought by a foreign corporation on a contract not made with them in their corporate capacity and name, the complaint must allege the incorporation of the plaintiffs. Enough must be alleged to show it to be a corporation, and to indicate the state or county to which it belongs. (*Connecticut Bank v. Smith*, 17 How. Pr. 487; S. C. 9 Ab. 163.) A foreign corporation suing in our courts, and not alleging its corporate existence, is bound to prove it, on the trial, where the defendant does not admit it in the answer, but simply denies the indebtedness. (*Waterville Manuf. Co. v. Bryan*, 14 Barb. 182.) A complaint commencing "the plaintiff, a corporation created by the laws of the state of Michigan, for cause of action," &c., sufficiently

defendant is not bound to answer it; (*p*) but if he does answer it, the matter is put in issue; Lord Hardwick having held that a matter may be put in issue by the answer as well as the bill, and if replied to either party may examine to it. (*q*)

Eighth. The *Prayer for relief*. "And that the said defendants may be decreed," &c. This usually consists of two parts, viz. the

(*p*) If a bill contains interrogatories which are not founded upon the previous statements or charges, exceptions will lie to it for impertinence. *Small v. Atwood*, cited in *Wigram on Disc.* 74.

(*q*) *Attorney Gen. v. Whorwood*, 1 Ves. sen. 534, 538. *Mitt. Eq. Pl.* 38.

states the corporate existence of the plaintiff. (*Michigan State Bank v. Taintor*, 3 Clint. Dig. 2590.)

In an action *against* a corporation, the plaintiff admits the defendant's existence, by suing it by its corporate name. (*People v. Ravenswood Turnpike and Bridge*, 20 Barb. 518.) The complaint in such an action need not refer to the defendant's act of incorporation, or mention any of its officers. (*Acome v. The American Mineral Co.* 11 How. Pr. 24.) In an action by stockholders against an agent of a corporation, for moneys collected by him as such agent, the complaint should allege that the officers of the corporation have refused to bring the action. (*Vanderbilt v. Garrison*, 3 Abb. 361; S. C. 5 Duer. 689.)

The complaint in an action by *one or more of a numerous class*, may state that the plaintiffs sue for the benefit of those interested who may "come in and contribute to the expenses." Under the established practice, the words of the Code (§ 119),—"for the benefit of the whole," mean no more. (*Dennis v. Kennedy*, 19 Barb. 517.) Four joint-owners of a vessel leased her; two of them afterwards brought an action for her hire. *Held*, that though a legal action could only be maintained by all suing together, yet fewer than all might proceed upon equitable rights, and enforce them, in equity; but that, to entitle them to do so, they must show, in their complaint, facts which excused them from joining the co-owners as plaintiffs, and must join them as defendants; unless it were shown that they had ceased to have any interest in the matters in controversy. (*Carter v. The N. Y. & Erie R. R. Co.* 3 Abb. 332; S. C. 6 Duer. 43.)

In an action which concerns the separate property of a *married woman*, the Code of Procedure (sec. 114) authorizes her to sue alone without the intervention of a guardian or next friend. The fact of coverture has ceased to have any relation to the technical right of maintaining an action by a married woman, in respect to her separate property; and the allegation of coverture, in the complaint, is no longer necessary. (*Peters v. Fowler*, 41 Barb. 467.) But it *seems* that in an action *against* a married woman, it is still necessary to allege in the complaint, the facts creating her peculiar liability for an act relating to her separate estate, or relating to trade carried on by her for her own benefit. (*Baldwin v. Kimmel*, 16 Abb. 353.)

In respect to the plaintiff's *place of residence*, it has been held that in an action in the superior court of the city of New York, against a foreign corporation, where the complaint sates a cause of action of which the court has jurisdiction, it is unnecessary to aver that the plaintiff resides within the city of New York. (*Spencer v. Rogers' Locomotive Works*, 17 Ab. 110.)

In the *United States' Courts*, it is required by rule of court that every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought, thus: "A. B., of —, and a citizen of the state of —, bring this his bill against C. D., of —, and a citizen of the state of —, and," &c. (Equity Rule 20; See Story Eq. Pl. s. 26; *Dodge v. Perkins*, 4 Mason, 435; 1 Dan. Ch. Pr., Am. ed. 1865, p. 362, vol. 4.) It is indispensable, in all cases where the right to bring the suit in the courts of the United States is founded on the fact that the plaintiffs and defendants are citizens of different states, to allege that fact distinctly in the bill. (See *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Peters, 148.)

In *New Hampshire*, it is necessary that "every bill," in the introductory part, shall contain the names, places of abode, and proper description of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "A. B., of, &c., complains against C. D., of, &c., and E. F., of, &c., and says, &c." (1 Dan. Ch. Pr., Am. ed., p. 363, note 4.)

[*37] *prayer for such specific relief as the complainant considers himself entitled to, and a prayer for such relief in the premises as the court shall think proper to grant, and as shall be agreeable to equity.

The prayer for special relief is usually inserted, for greater caution; and as a matter of convenience, it is better that it should be introduced, in connection with the general prayer. Yet it is not absolutely essential to the validity of the bill; as, under the prayer for general relief, the complainant may claim, at the hearing, a particular relief. But such relief must be consistent with the relief specifically prayed, and the case made by the bill. (*r*)

Ninth. The *prayer of process*. "May it please your honor, the premises considered, to grant unto your orator, &c." This part prays the court to enforce the appearance and answer of the defendants by the writ of subpœna. If the plaintiff wishes an injunction against the defendant, he must not only pray for it in the prayer for relief, but also in the prayer of process. (*s*)

An injunction cannot be granted unless expressly prayed by the bill. (*t*) A prayer for general relief will not be sufficient to authorize it. (*u*) If only a temporary injunction is wanted, the bill must also contain a formal prayer for it. (*v*) And where an injunction is sought, not as a provisional remedy, but as a continued protection to the rights of the complainant, the prayer of the bill must be framed accordingly. (*w*)

A writ of *ne exeat* may also be asked for in this prayer of process. The prayer for this writ resembles that for an injunction, *mutatis mutandis* and, like that, it usually precedes the prayer for process. (*x*) But though it is usual, it is not necessary that the bill should pray for this writ; as the intention to go abroad may arise in the progress of the

(*r*) *Wilkinson v. Beal*, 4 Madd. 408. *Guines v. French*, 2 Atk. 141. *Cook v. Martyn*, id. 3. *English v. Foxall*, 2 Peters. 595. *Partridge v. Haycraft*, 11 Ves. 570. *Colton v. Ross*, 2 Paige, 396, and cases there cited as to proper forms of prayer for relief.

(*s*) *Wood v. Beadell*, 3 Sim. 274.

(*u*) *Wright v. Atkins*, 1 Ves. & B. 314.

(*w*) *Mitt. Eq.* Pl. 38.

(*t*) *Savory v. Dyer*, Amb. 70.

(*v*) *Walker v. Devereux*, 4 Paige, 229.

(*x*) *Hinde*, 18.

In *Griffith v. Ricketts* (5 Hare, 195,) where the question of title to the subject matter in dispute was involved in the description of the plaintiff, the court refused, on motion, to order either that the bill should be taken off the file, or that the plaintiff should give security for costs.

As to a change in the address of a plaintiff, after bill filed, see *Rex v. Gillespie*, (7 Bear. 269.)

When the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. (Code, § 119.) In *Cole v. Reynolds*, (18 N. Y. 74,) the defendant's firm was indebted to the plaintiff's firm upon an account stated and settled between them. In an action upon the account, one of the individuals, who was a member of both firms, refusing to be joined as plaintiff, was made a defendant, and the joiner was sustained.

cause. And if, when the bill is filed, the defendant does not intend to leave the country, it would be highly improper to pray the writ; as a groundless suggestion that the defendant means to abscond would press too harshly, and would also operate to create the very mischief which the court, in permitting the motion for it to be made without notice, means to prevent. (*y*)

The prayer for process indicates the persons who are intended to be *made defendants to the suit. It was formerly held that they [*38] only are defendants to a bill against whom process of subpoena is prayed. (*z*) But it has been decided in this state that persons may be impleaded and treated as defendants by a clear statement in the bill to that effect, without praying for a subpoena against them by name. (*a*) It is, however, much the most convenient in practice, that the parties should be named in the prayer for process.

In England it is said not to be necessary to pray process against persons who are charged to be out of the jurisdiction of the court; but it is the practice, where any of the defendants are out of the jurisdiction, for the plaintiff to state the fact and pray process against them when they shall come within the jurisdiction. (*b*) In this state no special provision in the prayer of process seems necessary to reach such a case; as under the rules of the court relative to publication of orders to appear against absent defendants, they are bound to enter their appearance without any service of process upon them.

Where a corporation is made defendant, the bill should pray that it may appear according to law. (*c*)

When the United States or a state is a party defendant, the bill does not pray any subpoena against them, but that the District Attorney of the United States, or the Attorney General of the state, on being attended with a copy of the bill, may appear and put in an answer thereto, &c. (*d*)

(*y*) *Collinson v. —*, 18 Ves 353.

(*z*) *Fawkes v. Pratt*, 1 Peere Wms. 593. *Windsor v. Windsor*, 2 Dick. 70

(*a*) 2 John. Ch. Rep. 345. *Elmendorf v. Delancy*, Hopk. 555.

(*b*) 1 Smith, 45.

(*c*) 1 Hoff. Pr. 53.

(*d*) *Id.* App. X. Mitf. Eq. Pl. 37. *Willis' Eq.* Pl. 7.

SECTION IV.

MATTER OF A BILL.

Degree of certainty.] The bill must have a reasonable certainty, but need not set out the matter with that decisive and categorical certainty which is requisite in pleading at common law. (e) (4) It should,

(e) 3 Woodes. Lect. 55, p. 370.

(4) The Code of New York directs that a complaint shall contain, in addition to the title of the cause, "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition." (Code sec. 1, 142.)

The Codes of Ohio, Wisconsin and Kansas, and probably other States contain the same provision. (Code of Ohio, sec. 85, 192; Swan's Plead. and Prac. 130; Seney's Code, 100; Wis. Code, sec. 47; Code of Kansas, sec. 94. See *Green v. Palmer*, 15 Cal. 413; *Reconillat v. Riene*, 32 id. 455; *Wilson v. Cleveland*, 30 id. 192.) In Massachusetts, rule 4, of the rules of practice in chancery, requires that "the bill shall contain a clear and explicit statement of the plaintiff's case." In Maine, the bill must "set forth clearly, succinctly and precisely the facts and causes of complaint, without circumlocution or repetition." (Rule 1, 37 Maine Rep. 581, App.)

The nature of the action and the cause of action, are shown by the facts stated in the complaint. (*Graves v. Spier*, 58 Barb. 349.) The plaintiff is required to state therein the facts which constitute his cause of action, and which he is required to prove; and nothing more. (*Clark v. Harwood*, 8 How. Pr. 472; *Dunning v. Thomas*, 11 id. 281; *Bracket v. Wilkinson*, 13 id. 102; *Wade v. Rusher*, 4 Bosw. 537; *Cole v. Blunt*, 2 Bosw. 116; *Smith v. Lockwood*, 13 Barb. 209; *Mann v. Morewood*, 5 Sandf. 558.) A general averment that the acts of the defendant are contrary to the statute without setting forth in what manner, is not sufficient. (*Smith v. Lockwood*, supra.) A statement that the contract sued on was made payable in a specific kind of money is an allegation of a material fact. (*Wallace v. Eldridge*, 27 Cal. 498.)

Facts extrinsic to the cause of action, which are relied on as a ground of arrest, should not be alleged in the complaint. (*Elwood v. Gardner*, 10 Abb., N. S. 238.)

The theory of the present system of pleading is, that the plaintiff should know before hand what are the facts upon which he will rely, and that the complaint shall contain these facts, stated plainly and concisely, without unnecessary repetition. Whatever more a complaint contains is unauthorized and may be stricken out. Hence a variety of counts, or statements of causes of action, founded upon one and the same cause, is no longer allowed. (*Churchill v. Churchill*, 9 How. Pr. 552; *Nash v. McCauley*, 9 Abb. 159; *Fern v. Vanderbilt*, 13 id. 72; *Lackey v. Vanderbilt*, 10 How. Pr. 155; *Dunning v. Thomas*, 11 How. Pr. 281.)

It is the office of a complaint to state facts alone, and even then not always in detail. (*Kelly v. Breusing*, 32 Barb. 601; 33 id. 123.) Nor should the evidence of those facts be stated. (*Cahill v. Palmer*, 17 Abb. 196; *Floyd v. Dearborn*, 2 Code R. 17; *Butler v. Viele*, 44 Barb. 166; *Harlow v. Hamilton*, 6 How. Pr. 479; *Shaw v. Jayne*, 4 id. 119; S. C. 2 Code R. 69; *Boyce v. Brown*, 7 Barb. 80; *Knowles v. Gee*, 8 id. 300; *Milliken v. Cary*, 5 How. Pr. 272; S. C. 3 Code R. 250.) Yet the statement should be full enough to enable the court on proof or admission, of the facts set forth, to grant the relief sought. (*Tallman v. Green*, 3 Sandf. 438.)

Care must be taken that every averment necessary to entitle the plaintiff to the relief prayed for should be contained in the stating part. (Story's Eq. Pl. sec. 32; *White v. Yaw*, 7 Verm. 357; *Wright v. Dame*, 2 Pick. 55.) The plaintiff must show a good cause of action (*Russell v. Ford*, 2 Cal. 85; *Little v. Mercer*, 9 Mo. 216) and facts sufficient to constitute it (*Summers v. Furrish*, 10 Cal. 347; *Maguire v. Vice*, 20 Mo. 429; *Barsch v. Dittrick*, 19 id. 129.) All the facts which constitute the cause of action must be stated, and every fact on which the right of action depends must be deemed constitutive; in the sense of the Code. (*Gurney v. Fowler*, 4 Sandf. 655.) The abolition of the forms of pleading, made by the Code, does not excuse a party from stating clearly and concisely the facts necessary to entitle him to maintain an action. He cannot assume to state the law of the case, in a complaint, and omit the

however, state the right, title, or claim of the complainant, with accuracy and clearness; and it should in like manner state the injury or grievance complained of, and the relief asked in the court. The other

facts upon which the law is calculated to operate in determining his cause of action. (*Phinney v. Phinney*, 17 How. Pr. 197.)

The complaint should contain an allegation as to every fact which the plaintiff is bound to prove upon the trial, as part of his case to maintain his action. (*Cole v. Blunt*, 2 Bosw. 116; 9 Barb. 158; 1 Duer. 707, 2 id. 670.) If it does this, it will be sufficient. (*Safford v. Drew*, 3 Duer. 632; *Outline v. Gunter*, 1 id. 253. *Allen v. Patterson*, 7 N. Y. 476; *Height v. Child*, 34 Barb. 186.)

If it appears from the facts alleged in the complaint, that if they are established on a final hearing, the court, in the exercise of equity jurisdiction, would not refuse the relief sought, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, cannot be sustained. (*Hillman v. Hillman*, 14 How. Pr. 456.)

If the stating part does not show the equity of the plaintiff's case, the defect cannot be supplied by inference, or by reference to averments in other parts of the complaint. (*Wright v. Dame*, 22 Pick. 55; *Shepard v. Shepard*, 5 Conn., 57; *Hood v. Inman*, 4 John. ch. 437; *Estep v. Watkins*, 1 Bland. 486; *Townshend v. Duncan*, 2 id. 45.) The plaintiff will not be permitted to offer or require evidence of any material fact not distinctly stated in this part of the complaint. (See Story's Eq. Pl. §§ 28, 257; *Crockett v. Lee*, 7 Wheat. 522; *Jackson v. Ashton*, 11 Peters, 229; *Sprigg v. Albin*, 6 J. J. Marsh. 158; *Bristol v. Rensselaer and Saratoga Railroad Co.* 9 Barb. 158.) Thus, if he would hold the defendants as common carriers, he must state that they were common carriers; and if he does not allege that they received or were to receive, a compensation for the carriage of the goods, their contract must be regarded as made without a consideration, and if a demand is necessary, it must be proved. (*Bristol v. Rensselaer and Saratoga Railroad Co. supra.*) Nor can he recover on a case different from that alleged. (*Sanborne v. Kittredge*, 20 Verm. 632; *Gibson v. Carson*, 3 Ala. 421; *Harding v. Hardy*, 11 Wheat. 103; *Jackson v. Ashton*, 11 Peters, 229; *Bristol v. Rensselaer and Saratoga Railroad Co.* 19 Barb. 158.) In equity proceedings, the plaintiff must recover, if at all, *secundum allegata* as well as *probatum*. He cannot recover upon grounds not stated in the complaint. (*Bailey v. Ryder*, 10 N. Y. 363.) Facts proved, but not pleaded, are not available to the party proving them. (*Allen v. Mercantile Mu. Ins. Co.* 46 Barb. 642; *Currie v. Cowles*, 6 Bosw. 452.) Facts may be alleged according to their legal effect, but if the facts proved are directly different from those alleged, there will be a fatal variance. (*Gasper v. Adams*, 25 Barb. 441.) A general statement or charge, however, of the matter of fact, is sufficient; it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs. (Story's Eq. Pl. § 28; *Nesmith v. Calvert*, 1 Woodb. and Minot, 34.)

The words "facts constituting a cause of action," mean the facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts. (*Wooden v. Straw*, 10 How. Pr. 48.) The facts required by the Code to be stated, are in general such facts as were required to be stated in pleadings at common law; that is, issuable facts, facts essential to the cause of action, and not the facts and circumstances which merely go to establish such facts. (*Knowles v. Gee*, 8 Barb. 300.) They should be facts from which the law alone, without the aid of a jury, draws the conclusion that the cause of action, or defence exists. (*Page v. Boyd*, 11 How. Pr. 415.) The facts constituting the cause of action, spoken of in the Code, are not merely the facts upon which the plaintiff's right to ask relief is founded, but these words include all such facts as are necessary to found the particular relief demanded, and to enable the court to give the proper judgment in the action. (*Howard v. Tiffany*, 3 Sandf. 695.) The Code has not changed the substance of the old rules of equity pleading. A complaint seeking equitable relief, should set forth the facts as much at large as was required in a well drawn bill in equity, and include facts bearing on the question of costs. (*Ibid.*) The statement of facts should be in conformity with the nature of the action. If the case, and the relief sought, be of an equitable nature, the rules of chancery pleading are to be applied: otherwise those of the common law. The pre-existing rules of pleading not abrogated by the Code are still in force. (*Rochester City Bank v. Suydam*, 5 How. Pr. 216.) The facts which are requisite to be stated can only mean real, traversable facts, as distinguished from propositions or conclusions

material facts ought to be plainly yet succinctly alleged, and with all [*39] *necessary and convenient certainty as to the essential circumstances of time, place, manner, and other incidents. (*f*)

(*f*) Story's Eq. Pl. 206; Mitf. Eq. Pl. 44; Cooper's Eq. Pl. 5.

of law, since it is the former, not the latter, that can alone, with any propriety, be said to constitute the cause of action. (*Mann v. Morewood*, 5 Sandf. 556.) The facts which the Code requires to be set forth are physical facts, capable, as such, of being established by evidence, oral or documentary, and from which, when so established, the right to maintain the action, or the validity of a defence, is a necessary conclusion of law; a conclusion which the court will draw, and which it is quite unnecessary that the pleader should state. (*Lawrence v. Wright*, 2 Duer. 674.)

The statement must be of *facts*, and of facts only. The complaint cannot be used for purposes of discovery, as was formerly the practice in respect to bills of complaint, by means of the charging and interrogating clauses. (*Clark v. Harwood*, 8 How. Pr. 470.)

The facts themselves, as they really occurred, and not the *legal conclusions* to be drawn from them, ought in all cases to be pleaded. (Whittaker's Pr. 151; Van Sant. Eq. Pr. 93; *Van Rensselaer v. Bonesteel*, 24 Barb. 365.) This rule is approved in *Van Shaick v. Winne*, (16 Barb. 95.) It is not a sufficient allegation of a breach of an agreement, to say that the defendant "has failed to fulfil his obligations, by virtue of said instrument." That is no more than saying that he has broken his contract, or that the plaintiff is entitled to judgment. It is not an issuable fact, but a conclusion of law, to be derived from the facts when they are made to appear. (*Van Shaick v. Winne*, 16 Barb. 95.) A statement that by means of a contract set out in the complaint, it became the duty of the defendant to perform certain acts, is likewise a statement of a conclusion of law. (*City of Buffalo v. Holloway*, 7 N. Y. 493.) So as to an averment that a settlement made by the plaintiff with his guardian had no reference to the claim in this suit, nor was the same in any way released, discharged or affected thereby. (*Jones v. Phoenix Bank*, 8 N. Y. 223.) Whether, on a given state of facts, the transaction constitutes an account stated between the parties, is a question of law. (*Lockwood v. Thorne*, 11 N. Y., 170.) And a general allegation, in a complaint, that the defendant has received money, or property, to the use of the plaintiff, is bad on demurrer; because, whether the money or property was so received as to render the defendant liable, is a question of law; and all the material facts necessary to present, and enable the court to determine the question, as facts constituting the cause of action, must be stated in the complaint. (*Lienan v. Lincoln*, 2 Duer. 670.)

Where, from certain facts, the law implies a promise, in pleading, a promise should be alleged, and not merely the facts from which the law will imply that promise. The averment is not a fiction of pleading, but a statement of a fact which may be proved by presumption of facts, arising from other circumstances shown on the trial. (*Hall v. Southmayd*, 15 Barb. 35.)

A complaint need not allege a promise where an implied promise is relied on. It is sufficient to allege facts from which a promise may be implied. (*Cropsey v. Sweeney*, 27 Barb. 310; S. C. 7 Abb. 129.) In an action to recover for goods sold and delivered, the *sale and delivery* are the issuable facts, which alone, are necessary to be alleged in the complaint; and a *promise* (implied from the sale) to pay, is a mere legal inference which cannot be alleged, and if controverted, would form an immaterial issue. (*Glenny v. Hitchins*, 4 How. Pr. 98.) Yet the *delivery* itself is not purely a *fact*, but a mixed question of law and fact; for it may be a constructive instead of a manual delivery. (*Dowes v. Hotchkiss*, 10 Leg. Obs. 281.) Hence it has been held that though a delivery of goods sold, under authority of the purchaser, to a third person, for the use of such person, is in judgment of law a delivery to such purchaser, yet it is not so as a fact, but a mere *conclusion of law*, and the facts constituting the delivery must be averred. (*Smith v. Leland*, 2 Duer. 497. See *Eno v. Woodworth*, 4 N. Y. 247; Van Sant. Pl. 241, 254.) Yet in an action to recover damages for the breach of a contract for the purchase of stock, the complaint need not allege that the contract was in writing, or that the plaintiff owned any stock at the time of making the contract. (*Washburne v. Franklin*, 28 Barb. 27; S. C. 7 Abb. 8.) So it is not bad pleading to allege that an act was done by another as the plaintiff's agent, instead of averring that it was done by the principal. And there is no objection to the plaintiff's stating, in addition, what he considers to be the legal effect of the act, viz.: An agreement by

Statement of complainant's residence.] The bill should commence

him to execute a lease. (*St. John v. Griffith*, 1 Abb. 39.) Such a statement may or may not, be an unnecessary repetition, according to circumstances. (*Ib.*) The averment of a mere conclusion, without any fact to warrant it, is always disregarded. (*Schenck v. Naylor*, 2 Duer. 678.) And if such conclusion is at variance with admitted facts, the facts will be regarded and the conclusion disregarded. (*Jones v. The Phoenix Bank*, 8 N. Y. 236.) If the plaintiff wishes to show that he is the holder and owner of a promissory note or bill, he must do something more than aver that he is so. He must allege the indorsement and transfer to him of the note or bill. (*Appleby v. Elkins*, 2 Sandf. 388; *Mitchell v. Hyde*, 12 How. Pr. 460; *Bank of Lowville v. Edwards*, 11 id. 217.) The allegation that the plaintiff is the owner, is only a legal conclusion. Some issuable fact by which it would appear that the plaintiff is the owner, should be stated. (*Adams v. Holley*, 12 How. Pr. 326.) So also as to a statement that "the said sum is due and owing to the plaintiff." This is a statement of an inference of law, and is not a sufficient averment of a breach of the promise by the defendant. (*Keteltas v. Myers*, 3 E. D. Smith, 83.) It is not sufficient to allege that the plaintiff is the "sole owner of the demand;" or that he is "duly authorized to bring the suit," but he must state the facts which establish his ownership or authority. (*Myers v. Machado*, 6 Abb. 198; S. C. 14 How. Pr. 149; *Thomas v. Desmond*, 12 id. 321.) Thus an averment in a complaint upon a protested bill of exchange, that the plaintiff is duly authorized to bring an action in behalf of a foreign banking company (the owner of the bill) as one of its registered officers, is a conclusion of law merely. The plaintiff should set forth the existence and terms of the act under which the bank was organized, and an authority given to him as one of its registered officers, to sue on its behalf. Without this, the complaint is insufficient. (*Myers v. Machado*, *supra*.)

If the plaintiff intends to rely on facts which excuse the service of notice, presentment and non-payment, he must allege such facts in his complaint. An averment of due notice will not be sustained by evidence of facts excusing notice. (*Garvey v. Fowler*, 4 Sandford, 665; *Oakley v. Morton*, 1 Kern. 26.) If the complaint founds the right against the defendant upon the fact of his having notice, it should charge with such notice directly, otherwise it is not matter in issue upon which the court can act. (Story's Eq. Pl. sec. 263 and cases cited in note.)

If the plaintiff would show that he is entitled to the possession of chattels or real estate, he must set forth the facts showing himself to be so entitled. (*Patterson v. Adams*, 7 Hill. 126; *Lawrence v. Wright*, 2 Duer. 674; *Adams v. Holley*, 12 Howard, Pr. 330; *Thomas v. Desmond*, id. 321.) Yet if the complaint in an action to recover the possession of personal property, states facts sufficient to show that in law the defendant's holding of the property is unlawful, that is sufficient, especially after judgment. (*Fullerton v. Dalton*, 58 Barb. 236.) An omission to allege in such a complaint a demand of the property, before suit brought, will be cured by proof of the fact, by the report of the referee finding the fact of a demand, and by the judgment. (*Ibid.*)

A complaint upon a policy of insurance which does not, on its face, import any interest in the plaintiff in the subject of the insurance, should aver that the assured had an interest to be protected thereby, in such a sense that the insurance operated as a security or indemnity, to protect him from loss by the perils insured against. (*Williams v. Ins. Co. of North America*, 9 How. Pr. 373.) If he intends to rely upon a constructive delivery, he must not plead merely that the thing was delivered, but must allege the facts which he claims constitutes a delivery. (*Smith v. Leland*, 2 Duer. 497; Van Sant. Eq. Pr. 92, 93.) If he relies upon a mere right or legal obligation, or duty, it will not be sufficient to allege generally such right, or legal obligation or duty, but he must state the facts which raise or constitute it, and the circumstances out of which it arises. (Van Sant. Eq. Pr. 94, and cases cited.) If a contract has been executed, or any act done by an agent or attorney, though its legal effect be that it is the act of the principal, still the facts to establish the legal conclusion should be set forth in the complaint. (*Ib.*) If the contract or act is void for fraud, the facts which it is claimed constitute the fraud should be alleged. (*McMurray v. Thomas*, 5 How. Pr. 14; *Wells v. Jewett*, 11 id. 242; *Fish v. Fredenhall*, 21 Barb. 84.) If it be claimed that the plaintiff, or any adverse party has an interest in the subject matter of the controversy, the complaint should contain the facts showing the nature or extent of such interest, and which will enable the court to determine that such interest really exists. (*Aldrich v. Lapham*, 6 How. Pr. 129.) Thus, in an action under the Code, to recover the possession of real estate, the facts set forth in the complaint must show that the plaintiff has a legal title to

with stating the residence of the complainant. If this statement is

the premises in question. The mere averment that he *has* such a title, is insufficient. (*Laurence v. Wright*, 2 Duer. 673.)

Facts must also be pleaded as affirmative or positive facts, and not by way of mere argument or inference. Hypothetical pleading, conditional statements, or allegations in the alternative are not allowed. (*Corbin v. George*, 2 Abb. 465; *Porter v. McGreeley*, 1 Code Rep., N. S. 88; *Lewis v. Acker*, 11 How. Pr. 164; *Weis v. Fanning*, 9 How. Pr. 544; *Arthur v. Brooks*, 14 Barb. 533; *Dovan v. Dinsmore*, 33 Barb. 86; *Van Sant. Eq. Pl. 94*.) And whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged *positively*. (1 Dan. Ch. Pr. 365, 3d. Am. Ed.; *McIntyre v. Union College*, 6 Paige, 239; *Darthey v. Clements*, 6 Beav. 165; *Truscott v. Dale*, 7 How. Pr. 221.) Thus it has been held that it is not a sufficient averment of a fact, to state, in a bill, that the plaintiff "is so informed." (*Lord Uxbridge v. Staveland*, 1 Ves. 256; *Lucas v. Oliver*, 34 Ala. 626; *Cameron v. Abbot*, 30 id. 416; *Jones v. Cowles*, 26 id. 612,) or to say that one defendant alleges, and the plaintiff believes, a statement to be true. (*Egremont v. Cowell*, 5 Bear. 620.) Nor is an allegation that the defendant sets up certain pretences, followed by a charge that the contrary of such pretences is the truth, a sufficient allegation or averment of the facts which make up the counter statement. (1 Dan. Ch. Pr., 3d. Am. Ed. 366. By this, however, it is not meant that the allegations must be set forth absolutely in form, upon the personal knowledge of the plaintiff. Facts may be set forth on information and belief, and even upon belief alone. (*Howell v. Frazer*, 6 How. Pr. 221; *N. Y. Marble Iron Works v. Smith*, 4 Duer. 362; *Radway v. Mather*, 5 Sandf. 654; *Van Sant. Eq. Pl. 94*;) unless in particular cases, as where the fact is presumptively within the knowledge of the plaintiff. (*Richardson v. Wilton*, 4 Sandf. 707.) That a party "believes" a fact to exist, is equal to the allegation that "the fact exists, as he believes." (*Howell v. Frazer*, 6 How. Pr. 221; *S. C. 1 Code R., N. S. 270*.) In *Truscott v. Dale*, (7 How. Pr. 221,) the words "as the plaintiff is informed and believes," in a verified complaint, were stricken out as redundant. And it was held in that case that allegations should be positively made, in order to prevent immaterial issues. The plaintiff need not distinguish, in his complaint, the allegations which are therein made on information and belief; as the ordinary jurat to the complaint supersedes the necessity of so doing. (*Ricketts v. Green*, 6 Abb. 82.)

Alternative pleading was never good, under any system of practice, and is not now warranted by the Code. (*Corbin v. George*, 2 Abb. 465.)

It has been seen that the Code requires the complaint to contain a statement "of the facts constituting a cause of action." The complaint must be sufficiently full to enable the court, upon the proof or admission of all the facts set forth in it, to grant the relief sought; otherwise it will be objectionable, on demurrer, for insufficiency. (*Tullman v. Green*, 3 Sandf. 437.) It must set forth all the material and issuable facts which, if controverted, the plaintiff will be bound to prove in the first instance, in order to show himself entitled to the judgment demanded. (*Garvey v. Fowler*, 4 Sandf. 665; *Safford v. Drew*, 3 Duer, 632; *Allen v. Patterson*, 3 Seld. 478.)

Where an injunction is sought, as a part of the final relief, it is necessary for the complaint to set forth all the facts upon which the right to it depends, and any other facts which bear upon the particular relief sought, although they may not be absolutely essential to, or decisive of, the right of action. (*Van Sant. Eq. Pr. 96*; *Minor v. Terry*, 6 How. Pr. 208; *Howard v. Tiffany*, 3 Sandf. 695.) And as costs, in equitable actions, are in the discretion of the court, and may be awarded as part of the plaintiff's final relief, it is proper to state, in the complaint, facts which may be proved on the trial as bearing upon that subject. (*Ib.*)

The Code (of Kentucky) does not authorize a recovery on any state of facts which, before its adoption, did not authorize a recovery in some form of action; and therefore former precedents, rules and adjudications may be resorted to as authoritative, except so far as they relate to the distinctions between the different forms of actions, or to formal and merely technical allegations. (*Wintersmith v. Barrett*, 14 B. Monroe, 84.)

It has been decided, in *Indiana*, that a complaint for an injury suffered by a passenger from the negligence of a Rail Road Company, should contain an allegation that the plaintiff did not contribute to the injury. (*Jeffersonville R. R. Co. v. Hendrick's Adms.* 26 Ind. 228; *Toledo, &c., R. R. Co. v. Bevin*, id. 443.) But it has been held, in *Wisconsin*, that it is enough for the complaint, in such a case, to allege that the injury happened through the negligence of the defendant, without alleging

omitted, the defendant may apply to the court and obtain an order that the complainant give security for costs. (g)

(g) *Howe v. Harvey*, 8 Paige, 73.

also that the plaintiff was free from negligence, on his part. (*Potter v. Chicago, &c., R. R. Co.*, 20 Wis. 533.)

If the time when a fact happened is material to constitute the cause of action, it should be stated. The fact, without the time, would be insufficient to constitute the cause of action; but if the time is immaterial, a demurrer will not lie for omitting to state it. (*People v. Ryder*, 12 N. Y. 437.) An allegation that the plaintiff "afterwards, to wit," on a day specified, paid certain monies, does not preclude him from showing that the payment was made at an earlier day, for the purpose of claiming interest. The allegation of time, in such a case, is immaterial. (*Lyon v. Clark*, 8 N. Y. 748; *Lester v. Jewett*, 11 id. 460.) Where the time stated under a *videlicet* is inconsistent with the previous allegation, it should be rejected as surplusage. (*Lester v. Jewett*, 11 N. Y. 460.) Where the time of making a contract is material and essential to the plaintiff's cause of action, and is presumptively within his knowledge, it ought to be alleged positively and with precision. It is not sufficient to allege that it was "on or about" a certain day. (*Lockwood v. Bigelow*, 11 Minn. 113. In *Lane v. Thelwell*, (3 Cr. M. & R. 140,) a declaration for goods sold, &c., which did not allege the time of the sale, was held sufficient, on special demurrer. So as to a declaration making profert of letters testamentary, but omitting the date when the letters were granted. (*Hughes v. Williams*, 2 Cr. M. & R. 331.) The day on which it is alleged, in a declaration in trespass for *mesne profits*, that the plaintiff was ejected, and that on which possession was recovered by him, are not material. (*Ive v. Scott*, 9 Dowl. P. C. 993.) By not material is meant, that it may be departed from, in evidence; but allegations in respect to time, like all other allegations, are evidence against the party making them, as his admissions. (*Andrews v. Chadbourne*, 19 Barb. 149.) The plaintiff may allege any time after the debt accrued, and give evidence of the true time. (*Moffet v. Sackett*, 18 N. Y. 522; *Farron v. Sherwood*, 17 id. 227.) If the time of performance is not stated, the law imports a reasonable time thereafter. (*Fickett v. Price*, 22 How. Pr. 194.)

When the place where an event occurred is material to be alleged, and the pleading is ambiguous, in that respect, the presumption is against the pleader. (*Beach v. The Bay State Company*, 10 Ab. 71.) Thus, where a statute giving a remedy for a wrongful act does not extend to acts done out of the State, a complaint, under the statute must allege that the act complained of occurred within the State of New York. (*Id.*) So where a party seeks to enforce, in the courts of this State, a contract which, by its laws, is forbidden and declared void, he must aver and prove where it was made, and that by the laws of that place it was authorized and valid. (*Thatcher v. Morris*, 11 N. Y. 437.) It is a general rule of pleading that if the matters alleged are local in their nature, the truth of the venue is material, and of the substance of the issue. And if it appears upon the face of the pleading that the venue is untrue, it is a defect which may be taken advantage of by demurrer. (*Vermilya v. Beaty*, 6 Barb. 429.) Where one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment, by the purchaser, of a readiness and willingness to receive and pay at that place, in case he sues for a non-delivery, is indispensably necessary to a good complaint. But the omission to make this averment is a defect which is cured by a verdict. (*Clark v. Dales*, 20 Barb. 42.)

Whenever *special damages* are recovered, it must be on a distinct and definite statement in the complaint. (*Low v. Archer*, 12 N. Y. 282.) General damages are such as necessarily result from the injury complained of, and may be recovered without any special averment in the complaint. But such damages as are the natural, but not the necessary result of the injury, are special, and must be averred in the complaint. Therefore, where, in an action for the breach of a contract, certain special damages were alleged and proved, but there was no proof of general damage, it was held that it was erroneous to charge the jury that, besides the special damage proved, they might give such general damages as they considered naturally resulted from the injury. (*Vanderslice v. Newton*, 4 N. Y. 130.)

Where a pleading alleges the existence of an agreement, which would be void if not in writing, within the statute of frauds, it should be treated, in pleading, like any other fact, and assumed to be true unless controverted by the adverse party. That is, it is not essential that the pleading should show affirmatively that the agreement was in writing. It will be assumed to be an agreement having a legal existence. If,

Must state a case within the jurisdiction of the court.] It must also

on an issue upon such an agreement, stated in the complaint, the party does not prove his allegation by producing written evidence of the agreement, he must fail, not for want of sufficient allegations to sustain his action, but for want of sufficient evidence to sustain such allegations. (*Livingston v. Smith*, 14 How. Pr. 490.)

In an action for *false and fraudulent representations*, the complaint must state what the representations were, that the court may judge if they were sufficient to mislead; otherwise the plaintiff does not show a cause of action. It should also state that they were made with intent to deceive and defraud the plaintiff, (*Wells v. Jewett*, 11 How. Pr. 242.) and were untrue when made. (*Bell v. Mali*, 11 How. Pr. 254.)

If it is claimed that a contract or act is void for *fraud*, the facts constituting the fraud should be alleged. (*McMurray v. Thomas*, 5 How. Pr. 14; *Wells v. Jewett*, 11 id. 242; *Fish v. Fredenhall*, 21 Barb. 81.) If no charge of fraud is made in the complaint, the plaintiff cannot avail himself of evidence tending to prove a transaction fraudulent. (*Chautauque County Bank v. White*, 6 N. Y. 236.) In an action to overhual a sale of corporate property, alleged to have been procured by the defendants through the appointment of a receiver, and his collusively acting in their interest, the complaint should allege the specific manner in which the fraud was perpetrated, or agreed to be perpetrated, so as to enable the defendant to take issue upon it. A general allegation of a fraudulent or corrupt agreement injurious to the plaintiff, is not sufficient on demurrer. (*Libby v. Rosekrans*, 55 Barb. 202.)

Where the gist of a cause of action is fraud, while it is not necessary or proper for the plaintiff to spread out, in his pleading, the evidence on which he relies, he must, nevertheless, aver fully and explicitly the facts constituting the alleged fraud. Mere conclusions will not avail. (*Butler v. Fiele*, 44 Barb. 166.) The complaint, in an action for deceit or fraud in the purchase and sale of property, induced or procured by false representations, must in substance state the representations, and aver their falsity, and that they were made with intent to deceive the plaintiff, and induce him to make the purchase or trade in question, and that they did induce such trade to the plaintiff's injury. (*Barber v. Morgan*, 51 Barb. 116.) Where, in such an action, there was nothing in the first count of the complaint which amounted to an allegation or averment that the defendant made the representations to induce the plaintiff to make the purchase of the property, or with intent to defraud or deceive him, it was held, on demurrer, that the count was defective in these particulars. (*Ib.*)

Although the forms of pleading previously in use are not now applicable, particularly to the description of actions, yet the manner of stating the claim or defence, as required by the Code, with that exception, and that of certain formal parts still remains. (*Boyce v. Brown*, 7 Barb. 80.) The pleader may use his own language, but the pleading must contain the necessary matter, and it must be stated in an issuable and intelligible form, capable of trial. Facts must still be set forth according to their legal effect and operation, and not the mere evidence of those facts, nor arguments, nor inferences, nor matter of law only, nor should pleadings be hypothetical, nor in the alternative, nor destitute of truth and certainty. (*Ibid.*) The facts should be set forth in a plain, direct, definite, certain and traversable manner, according to their legal effect. Any number of facts constituting one cause of action may be combined, but each cause of action should be separately stated and numbered so as to be capable of trial. (*Ibid.* *Blanchard v. Strait*, 8 How. Pr. 83; Rule 19, Supreme Court.) A failure to comply with this rule subjects every allegation not essential to a single cause of action to be stricken out as redundant; (*Benedict v. Seymour*, 6 How. Pr. 295) or the opposite party may move to have the pleading made more definite and certain; (*Wood v. Anthony*, 9 How. Pr. 78; *Colton v. Jones*, 7 Rob. 164,) or perhaps, have the pleading set aside for irregularity. (*Blanchard v. Strait*, 8 How. Pr. 83.) He cannot demur. (*Burr v. Comstock*, 38 N. Y. 21; 36 How. Pr. 322.)

There is no particular mode in which separate causes of action are to be separated and distinguished from each other. Any mode which apprises the defendant of what is intended is sufficient. (*Hall v. McKechnie*, 22 Barb. 244.) A plaintiff will not be allowed to state a single cause of action in his complaint in several different counts. (*Fern v. Vanderbilt*, 13 Abb. 72.)

In actions given by statute, or upon any special statutory provision, the complaint should follow the wording of the statute, and refer to the statute by its title. (*Schreyer v. Corning*, 2 N. Y. 132.) In pleading a statute, the form and manner of its passage need not be stated. (*People v. Supervisors of Chenango*, 8 N. Y. 317.) In pleading a public statute (as the statute of frauds,) it is not necessary to refer to it, but it is sufficient to set forth the facts which bring the case within it. Under the

Code, an express reference to the statute would perhaps, be redundant. (*Goelet v. Coudrey*, 1 Duer. 132; *Brown v. Harmon*, 21 Barb. 508.) It is necessary to state all the facts constituting the cause of action under it; and if the statute be recent, the cause of action should be laid as of a time subsequent to its taking effect. (*Brown v. Harmon*, *supra*.) A plaintiff need not insist on his rights under a statute, or draw any legal conclusions. (*Height v. Child*, 34 Barb. 186.) When there is an exception in the enacting clause of a statute, a plaintiff suing under it must show that the defendant is not within the exception; but an exception in a subsequent clause is a matter of defence, and must be shown by the defendant, to exempt himself from the penalty. (*Great Western Railroad Company v. Hanks*, 36 Ill. 281.) Where a statute has changed a form of action as it existed at common law, a complaint (petition) containing a statement of facts showing a right on the part of the plaintiff to recover, will be sufficient, without bringing it within any one of the forms of action of the common law. (*Ahern v. Collins*, 39 Mo. 145.) When the plaintiff relies, to maintain his action, on the statute laws of another State, he must aver those laws in his pleadings in the same manner as other facts are required to be averred. A general averment that by the laws of such other State, such a conclusion results, as for example, that by the laws of that State certain specified trusts are valid, is not permissible. (*Throop v. Hatch*, 3 Abb. 25. See *Phinney v. Phinney*, 17 How. Pr. 197; *Ford v. Babcock*, 2 Sandford, 523; *Cole v. Jessup*, 10 How. Pr. 524.) It is sufficient in a pleading to aver generally that a contract sought to be enforced is in violation of some municipal ordinance or enactment, when such ordinance or enactment is founded upon a statute. It is not necessary to plead the statute specially. (*Beman v. Tugnot*, 5 Sandford, 153.) A statute which is private or local in many of its provisions, may contain a section which is of a public or general character, in which case the court will take judicial notice of such section, without its being pleaded. (*Bretz v. The Mayor, &c., of New York*, 4 Ab., N. S. 258.)

The Code (sec. 163) provides that in pleading a *private* statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

Public statutes the courts are bound to notice. But a *private* or *local* statute must be set out, or referred to in the pleadings; if it is not, the court will not regard it. (*Bretz v. The Mayor, &c., of New York*, 4 Ab., N. S. 259.)

A complaint need not allege that the plaintiff has a legal capacity to sue. (*Phoenix Bank v. Donnell*, 41 Barb. 571; S. C. *aff'd*. 40 N. Y. 410.) If the facts stated in it are sufficient to sustain the judgment against a defendant in one capacity, it is sufficient, although the pleader evidently contemplated that the defendant was liable in another capacity. (*Wright v. Hooper*, 10 New York, 51.) A complaint is not defective in substance because it omits to state conclusions which are to be implied from other facts which are sufficiently stated therein. (*Case v. Carrol*, 35 New York, 385.) If it contain allegations which under any reasonable view of them constitute a cause of action, although informal, it should not be dismissed. (*Simmons v. Eldridge*, 29 How. Pr. 309.)

It is not necessary or proper for the plaintiff to set up in his complaint facts which he relies on to avoid an anticipated defence. (*Sands v. St John*, 35 Barb. 628; S. C. 23 How. Pr. 140; *Van Demark v. Van Demark*, 13 How. Pr. 372; *Butler v. Mann*, 16 id. 546; S. C. 5 Ab. 40; *Williams v. Tilt*, 36 New York, 319.) Yet it was held in *Brckett v. Wilkinson*, (13 How. Pr. 102) that a plaintiff may in his complaint state facts connected with the cause of action which avoid an anticipated defence, as for example, that he had been induced by false representations to receive in payment a worthless check. (See also *Wade v. Rusher*, 4 Bosw. 537.)

When an *account* is alleged in a complaint, it is not necessary to set forth the *items*; but the plaintiff is obliged to deliver to the defendant a copy of the account within ten days after a demand thereof in writing, (Code, § 158) and if the account furnished is defective, a "further account" may be ordered. (*Id.*)

The Code (§ 144) specifies the causes of *demurrer* to a complaint. Among these causes is, that it appears on the face thereof that it does not state facts sufficient to constitute a cause of action. (*Subd. 6.*)

The complaint to be overthrown by a demurrer under this subdivision, must present defects so substantial that taking all the facts to be admitted, they furnish no cause of action whatever. (*The People v. Mayor, &c., of New York*, 8 Abb.,) or no cause of action against the defendant demurring. (*Sinclair v. Fitch*, 2 E. D. Smith, 677; *Richards v. Edick*, 17 Barb. 260; *Graham v. Camman*, 5 Duer. 697; *Hammond v. Hudson River Iron & Machine Company*, 20 Barb. 386; *Bank of Lowville v. Edwards*, 11 How. Pr. 218; *Hillman v. Hillman*, 14 id. 456; and see *Richards v. Leavis*, 28 English Law and Equity 157.)

state a case within the appropriate jurisdiction of a court of equity. (b) If it fails in this respect, the error is fatal in every stage of the cause,

It is entirely optional with a defendant whether he will demur or not, for the cause stated in the 6th subdivision, and his election not to avail himself of that right does not preclude himself from taking advantage of the defect in the complaint at any stage of the case. (*Gould v. Glass*, 19 Barb. 186; *Montgomery County Bank v. Albany City Bank*, 7 New York, 464; *Higgins v. Freeman*, 2 Duer. 650; *Budd v. Bingham*, 18 Barb. 494; *Gray v. Palmer*, 3 Rob. 500.) If two persons are made defendants, and the complaint does not state facts sufficient to constitute a cause of action against one of them, and there is no demurrer, the objection may be made upon the trial and the complaint be dismissed as to such defendant. (*Montgomery County Bank v. Albany City Bank*, 7 New York, 464.) Upon a demurrer under this subdivision, the defendant cannot object that there is an improper joinder of parties. (*Mann v. Marsh*, 35 Barb. 68; *Walrath v. Handy*, 24 How. Pr. 353; *Eldridge v. Bell*, 12 id. 547) or that the plaintiff had not legal capacity to sue; (*Viburt v. Frost*, 3 Abb. 120; *Hobart v. Frost*, 5 Duer. 671; *Phoenix Bank v. Donnell*, 40 New York, 411; *Fulton Fire Insurance Company v. Baldwin*, 37 id. 648) or that the court has no jurisdiction; (*Wilson v. Mayor, &c., of New York*, 6 Abb. 6; *Hotchkiss v. Elting*, 36 Barb. 39) or that the complaint shows the right to sue is in a third person not a party; (*Myers v. Machado*, 6 Abb. 198) or that the complaint by a corporation does not show its authority to sue. *Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Bank of Havana v. Wickham*, 7 Abb. 134) or that the prayer for relief is too extensive. (*The People v. Mayor, &c., of New York*, 8 Abb. 19; 4 E. D. Smith, 706 n.; *Lord v. Vreeland*, 24 How. Pr. 316; 13 Abb. 195.)

See further as to demurrer to complaint, Post. chap. vi. sec. 3 and notes.

(5.) JURISDICTION.

By the constitution of the State of New York, which went into effect on the 1st day of January, 1847, the office of chancellor was abolished, from and after the first Monday of July, 1847; at which time the Court of Chancery ceased to have a separate existence, and its powers and functions were transferred to a Supreme Court, having general jurisdiction in law and equity. (Const. Art. 6, § 3; Art. 14, § 8.)

Art. 6 of the constitution of 1867-8 (the only portion of said constitution which was adopted) also provides that "there shall be an existing Supreme Court, with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or may be prescribed by law." (Sec. 6.) The justices of the Supreme Court are to be chosen by the electors of their respective judicial districts. (Sec. 13.)

It has been decided that the Supreme Court is a court of general jurisdiction; and that every intendment is in favor of its jurisdiction. (*Bangs v. McIntosh*, 23 Barb. 601; *Foot v. Stevens*, 17 Wend. 483; 9 John. 437.) It has all the powers of the Supreme Court, and the former Court of Chancery. (*Onderdonk v. Mott*, 34 Barb. 106; *Myers v. Rasback*, 4 How. Pr. 83; Const. Art. vi., § 3-6; 2 R. S. 259, § 1; 234, § 60; Laws of 1847, p. 323, § 16; Laws of 1848, p. 232; Laws of 1849, p. 27; Id. pp. 117, 150; Laws of 1850, pp. 9, 20; Laws of 1851, p. 308; Laws of 1852, p. 591; Laws of 1853, p. 526.) When the Code of Procedure became a law, the Supreme Court lost none of its chancery jurisdiction. Although the distinction between actions at law and suits in equity was abolished, yet the suit in equity survived in the form of a "civil action," prosecuted by summons and complaint. The old suit in equity for the partition of lands, may now be prosecuted in the form of a civil action, under the Code, in the same manner as every other suit of equity cognizance. (*Myers v. Rasback*, 4 How. Pr. 83, 84.) The court may decree the cancellation of a void mortgage which is a cloud on property out of the state. (*Williams v. Ayrault*, 37 N. Y. 444.) It may determine the validity of an actual or alleged devise or will of real estate. (Laws of 1853 p. 526;) and may vacate the entry of satisfaction of a final decree of the Court of Chancery, entered prior to 1846. It has power to authorize the leasing or sale and conveyance of the real estate of benevolent, charitable, scientific or missionary societies, or orphan asylums. (Laws of 1861, ch. 58.) And it has power to exercise such control over every proceeding in it as to protect every person interested from injustice and fraud; and will not allow itself to be made the instrument of wrong. (*Lowber v. Mayor, &c., of New York*, 26 Barb. 252; *Barton v. Butts*, 32 How. 456.) The whole power of the court to order the sale of the lands of infants is derived from the statute. (*Onderdonk v. Mott*, 34 Barb. 106.) An application to sell the real estate of a religious corporation may be made to the

and cannot be cured by any waiver or course of proceedings by the parties; for consent cannot confer a jurisdiction not vested by law. (h)

(h) Story's Eq. Pl. 8; Mitf. 141.

Supreme Court. (*Wyatt v. Benson*, 23 Barb. 327; 4 Ab. 182.) The vestry or trustees of a religious corporation may apply to the court for an order to mortgage or sell its real estate, without any express vote of the corporation, where the good faith and propriety of the application are unquestioned. (Matter of St. Ann's Church, 14 Ab. 424; 23 How. Pr. 285.) As to the power of the court over the real estate of religious corporations, see *Madison Avenue Baptist Church v. Baptist Church*, 19 Ab. 105; 2 Ab., N. S. 254; 3 Rob. 570; 5 id. 649; *St James' Church v. Church of the Redeemer*, 45 Barb. 356; 11 N. Y. 243; 20 How. Pr. 324.)

In proceedings by attachment the Supreme Court acquires jurisdiction from the time of the allowance of the attachment. (*Burkhardt v. Sandford*, 7 How. Pr. 329.)

In respect to the equity jurisdiction of the *Superior Court of the City of New York*, and of the Court of *Common Pleas*, for the *City and County of New York*, section 33 of the Code declares that the jurisdiction of those courts shall extend to the actions enumerated in sections 123 and 124, when the cause of action shall have arisen, or the subject of the action shall be situated in that city, and "to all other actions, where all the defendants shall reside, or are personally served with the summons" within the city and county of New York. It was accordingly held, in *Forrest v. Forrest*, 6 Duer. 102, that the Superior Court had jurisdiction of an action for divorce, by reason of an adultery committed in this state, when the parties were inhabitants of the state, and residing in it when the offence was committed, and continued to reside in it up to the time of suit brought, and the defendant then resided in that city. The court there said that if the proceeding to obtain a divorce was an "action," within the meaning of that word, as used in the Code, there could be no doubt that the court had jurisdiction. (See also *McIvor v. McCabe*, 16 Ab. 319.)

In *Bowen v. The Irish Presbyterian Congregation*, (5 Bosw. 264,) the court said: "The question of jurisdiction, in so far as it depends upon the inquiry whether this court has a general jurisdiction in equity cases, is not, in this court, open to discussion. It was considered in the case of *Forrest v. Forrest*, 6 Duer. 114.) Such jurisdiction was long before that time asserted and expressed. It has constantly since been exercised. Numerous cases in equity, originating in this court, have been considered in the court of last resort, and the repeated affirmance of the judgments of this court, in such cases suggests that no serious doubt on this subject exists." (Citing 5 Seld. 253; 15 N. Y. 587; 16 id. 12; id. 392; 17 id. 9; 18 id. 481; 19 id. 208, 499.) See also *McIvor v. McCabe*, 16 Ab. 319.

It was held, in that case, that a suit to compel the specific performance of a contract was within the ordinary jurisdiction of a court of equity.

In all actions except those mentioned in sections 123 & 124 of the Code, where there is only a single defendant, he must, to give the Superior Court, or Court of Common Pleas jurisdiction, reside in the City of New York, or be served with the summons therein. (*Kerr v. Mount*, 28 N. Y. 659; see *Zerega v. Benoist*, 7 Rob. 199; 33 How. Pr. 129.) These courts have jurisdiction to compel an executor to account. (*Christy v. Libby*, 35 How. 119.) And they have the same powers to compel a discovery by the parties to a suit pending therein, which are conferred by the revised statutes on the Supreme Court. (*Gould v. McCarthy*, 11 N. Y. 575.)

It is not essential that the complaint should show a statement of facts from which it will be apparent that the court has jurisdiction. (Van Sant. Eq. Pr. 185; *Koenig v. Mott*, 8 Ab. 304; *Spencer v. Rogers' Locomotive Works*, 17 id. 110.)

It is only where it appears on the face of the complaint that the court has no jurisdiction of the person of the defendant, or the subject of the action, that a demurrer will be allowed. (Code, § 144.) This has been expressly decided; and further, that on a demurrer specifying for cause, that the complaint does not state facts sufficient to constitute a cause of action, the question that the court has not jurisdiction of the subject of the action, cannot be raised. (*Wilson v. Mayor, &c., of New York*, 6 Abb. 6.)

An objection of this description must be fully made out, and no presumption will be indulged against the jurisdiction of an inferior tribunal, where enough is shown to bring the case within the general language of the statute conferring jurisdiction. (*Foster v. Hasen*, 12 Barb. 547.) But though the want of jurisdiction be not raised, either by demurrer or answer, yet whenever such want of jurisdiction appears, in any

And the case stated in the bill must not only be of a nature properly within the cognizance of a court of equity, but the amount claimed

subsequent stage of the suit, the question may be raised, and judgment, if entered, will be set aside. (*Valerino v. Thompson*, 7 N. Y. 576.)

If the defendant, in a court of equity, take an objection, in his answer, on the ground of jurisdiction, he must ask to have the benefit of the defence, as if he had demurred. (*Ketchum v. Hawks*, 2 Y. Y. Leg. Obs. 384.)

Where an action is brought in the New York Superior Court, the complaint need not aver facts independent of the cause of action, the existence of which is, in certain cases, necessary to confer jurisdiction, such as the residence of the plaintiff. (*Spencer v. The Rogers' Locomotive Works*, 17 Abb. 210; S. C. 8 Bosw. 612.) And if the complaint, in an action upon a note which it alleges was payable in New York city, and is in an action against a foreign corporation, a cause of action will be stated which is within the jurisdiction of the court, although the plaintiff is a non-resident. (*Ib.*) In a suit brought in a county court, where civil jurisdiction is limited to a certain sum, the complaint need not specially allege the jurisdiction of the court, if the amount claimed therein does not exceed that sum. (*Meshke v. Van Doren*, 16 Wis. 319.)

The rule is well settled that a tax-payer, as a general rule, cannot maintain an injunction suit to restrain the collection of an alleged illegal tax; especially where he has a perfect remedy at law. (*Thurston v. The City of Elmira*, 10 Abb. N. S. 119.) The court, in the proper exercise of its equity power, does not review and correct the errors of subordinate tribunals. (*Ib.*)

The Code (sec. 144, sub. 1,) provides that the defendant may demur to the complaint, when it shall appear upon the face thereof that the court has no jurisdiction of the person of the defendant, or the subject of the action. It has been decided that the meaning of this provision is, that the person of the defendant is not subject to the jurisdiction of the court; not that original process has been improperly served. (*Notes v. Hope Mutual Ins. Co.* 5 How. Pr. 96.)

Where a court of equity takes jurisdiction for one purpose, it will retain it in order to do complete justice between the parties. (*Prescott v. Everts*, 4 Wis. 314.)

The court which first acquires jurisdiction will retain the writ for a final determination of the rights of the parties; and, if the ends of justice require it, will restrain the parties from suing or proceeding elsewhere. (*Akerly v. Vilas*, 15 Wis. 401.)

To be entitled to the assistance of a court of equity, the party applying must show that he is in danger of losing a substantial right, and that he is in no fault. (*Warden v. Sups. of Fond du Lac Co.* 14 Wis. 618.) He must show that clear, positive reasons for relief do exist, not merely that they may possibly exist. (*Converse v. Ketchum*, 18 Wis. 202.)

The facts necessary to give the court jurisdiction must be clearly set forth in the bill; and a bill by a judgment creditor, before execution, to set aside a fraudulent transfer of property, by the debtor, between the commencement of the suit and the rendition of judgment, must show clearly that the judgment might have been enforced at law, against the property in question, but for the act complained of. (*McElwain v. Willis*, 9 Wend. 548.)

The Code provides (§ 139) that from the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. And that a voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him. It is settled by decisions, also, that in every case a voluntary appearance by the defendant (even without any service of summons) gives the court jurisdiction of the person. (*Watson v. The Cabot Bank*, 5 Sandf. 423; See *Harriott v. New Jersey R. R. Co.* 2 Hilton, 262; 8 Ab. 284; *Smith v. Dipeer*, 2 Code Rep. 70.)

Although the Court has no jurisdiction of a suit against a foreign corporation, such corporation may confer jurisdiction by appearing and answering, without objecting to the jurisdiction. (*Paulling v. Hudson Manuf. Co.* 2 E. D. Smith, 38.)

Every court is primarily the judge of its own jurisdictional powers, and may assume them in the exercise of a sound discretion, in all cases; subject only to correction by an appellate court. (*McIvor v. McCabe*, 16 Ab. 323.)

Since the Code, there is no distinction between suits at law and suits in equity, as respects the jurisdiction of the court. (*The General Mutual Ins. Co. v. Benson*, 5 Duer. 168.) When the sufficiency of a complaint is denied, as not stating facts constituting a cause of action, the only question is whether the plaintiff, upon the

must be such as not to be beneath its dignity. For the court of chancery will not entertain jurisdiction of a suit concerning property where the matter in dispute, exclusive of costs, does not exceed the value of \$100. (i) (6)

Bill must state a sufficient matter.] The bill must also state sufficient matter to entitle the complainant to a decree; as no relief can be granted except for matters stated therein. (k) (7)

Interest of parties.] And the bill must show that the complainant

(i) 2 R. S. 173, § 40, (orig. § 37.)

(k) Crockett v. Lee, 7 Wheat. 522; Norbury v. Mead, 3 Bligh. 211.

facts stated, is entitled to the relief which he claims; and it is immaterial whether that relief be legal or equitable. (*Ibid.*)

In an action on a judgment obtained in another State, if the transcript shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction. (*Low v. Burrows*, 12 Cal. 181.) In pleading the judgment of a court of general jurisdiction of another State, if the defendant therein was served, or appeared, the facts upon which jurisdiction is founded, need not be averred. Want of jurisdiction is matter of defence. (*Wheeler v. Raymond*, 8 Cowen. 311.)

(6.) The Constitution of 1846, and the Code, have abolished every limitation in regard to the amount in controversy, in actions of an equitable nature. Consequently the court will now take jurisdiction of an action where the amount is less than \$100. (Laws of 1862, p. 859, § 39; Laws of 1863, p. 664, § 2; *Sarsfield v. Van Vaughner*, 38 Barb. 444; S. C. 15 Ab. 65; *Marsh v. Benson*, 34 N. Y. 358; *Mallory v. Norton*, 21 Barb. 424-437; *Braman v. Johnson*, 26 How. 27; *Cobine v. St. John*, 12 id. 333; *Durham v. Willard*, 19 id. 425, 429; Contra, *Shepard v. Walker*, 7 How. Pr. 46.) Yet, where the amount in controversy is less than \$100, this may affect the question of costs. (*Sarsfield v. Van Vaughner*, *supra.*)

(7.) In general, every bill must contain in itself sufficient matter of fact to maintain the case of the complainant, so that the same may be put in issue by the answer, and established by the proofs. (*Gale v. Cutler*, Burnett, (Wis.) R. 92.) The complainant must recover, if at all, upon the case made by his bill. (*Whiting v. Gould*, 2 Wis. 552.) No relief can be granted upon a bill which is essentially defective in substance, whatever may be the proof; for the reason that no facts are properly in issue unless charged in the bill, and no evidence is competent except such as is pertinent to the issue. (*Johnson v. Johnson*, 4 Wis. 135.)

If a bill does not exhibit a case for the interference of a court of equity, it may be dismissed on demurrer for want of equity. (*Reed v. Johnson*, 24 Maine, 322; *Morel v. Houston*, Chase, R. M., 284.) It will not be dismissed, however, on demurrer for that cause, unless it is radically such that no discovery or proof can make it a proper subject of equitable jurisdiction. (*Le Roy v. Feeder*, 1 John. Ch. 417.) It is not necessary to plead or demur, if the bill contains no equity. (*Travis v. Waters*, 12 John. 500.) Where a bill shows grounds for relief, but states them insufficiently, it may be aided by the proofs or admissions. (*Edwards v. Massey*, 1 Hawks. 359; *Fisher v. Stone*, 3 Scam. 68.) If, however, the facts stated in a bill are not sufficient to entitle the plaintiff to relief, he cannot resort to the defendant's answer, to the proof taken in the case, or to any extraneous matter, to supply the defect. (*West v. Hall*, 3 Har. and J. 221; *Edwards v. Massey*, *supra.*) In some of the States, a motion to dismiss a bill for want of equity may be made at any stage of the proceedings; it admits the allegations of the bill to be true, and is to be determined on inspection of the bill only. (*Bryant v. Peters*, 3 Ala. 160; *Raker v. Biddle*, Baldw. 394; *Edwards v. Beard*, Beard, 41; *Fisher v. Stone*, 3 Scam. 68.) In Alabama, a bill may be dismissed at the final hearing, for want of equity on its face, though not demurred to, and though the answer does not insist on the want of equity, by way of demurrer. (*Herbert v. Hobbs*, 3 Sten. 9; *Moore v. Dial*, 3 id. 155.)

The rule that a party must recover according to the case made by the complaint, or not at all, *secundum allegata*, as well as *probata*, is not affected by the Code. No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some parts of the pleading and evidence. (*Rome Exchange Bank v. Eames*, 1 Keyes, 188.)

has an interest in the suit; (*l*) as well as that the defendant has an interest, and is liable to answer to the complainant therefor. (*m*) (*8*)

(*l*) Mitf. Eq. Pl. 156, 7.

(*m*) Att'y Gen. v. Whorwood, 1 Ves. sen. 534.

[8.] PARTIES.

1. *Plaintiffs.*
2. *Defendants.*
3. *Joinder of parties.*
 - (*a*) *Plaintiffs.*
 - (*b*) *Defendants.*
4. *Defect of parties; how taken advantage of*
5. *Ordering other parties to be brought in.*
6. *Substitution of parties.*

It seems that in respect to *parties*, the Code has not changed the rules which existed prior thereto, in courts of equity. (*Brownson v. Gifford*, 8 How. Pr. 389.)

A party to an action is one who is named plaintiff or defendant, and appears on the record as such. (*Woods v. De Figanieri*, 16 Ab. 1.)

The term "parties" includes all who are directly interested in the subject matter of the action, having a right to make a defence, control proceedings, examine and cross-examine witnesses, and appeal from the judgment. (*Robbins v. Chicago City*, 4 Wallace, U. S. 567.) The party complaining is known as the plaintiff, and the adverse party as the defendant. (Cal. Pr. Act. § 2.)

A person named as defendant but not served with process, is not a party to the action. (*Robinson v. Frost*, 14 Barb. 536; *Steigers v. Gross*, 7 Mo. 261; *Norton v. Hayes*, 4 Denio, 245; *East River Bank v. Cutting*, 1 Bosw. 636.) Neither is a guardian *ad litem* a party to the action. (*Brown v. Hull*, 16 T. R. 673; *Jarvis v. Boyd*, 5 Porter, (Ala.) 388; *Millink v. Collyer*, 14 Jurist, 621.) A suit on the part of infants cannot be maintained by a person who is not a party in interest, but who describes himself as guardian of the parties who are interested; unless there is an averment that such parties are minors. The law presumes them to be adults. (*Maxedon v. State*, 24 Ind. 370.)

The same person cannot be plaintiff and defendant in the same action at law, either solely or in connection with others. (*Eastman v. Wright*, 6 Pick. 316; *Warren v. Stearns*, 19 id. 73; *Thayer v. Buffum*, 11 Met. 393; *Belknap v. Gibbens*, 13 id. 471; *Sherwood v. Barton*, 23 How. 537; *Meth. E. Church v. Stewart*, 27 Barb. 553.) Therefore a man cannot sue himself. (*Cole v. Reynolds*, 18 N. Y. 76.) But one may sue in two capacities, if they are not inconsistent. (*Ketcham v. Morrell*, 2 N. Y. Leg. Obs. 58;) or be sued in two capacities. (1 Estee Pr. 51; *Savings and Loan Society v. Gibb*, 21 Cal. 595.)

The general rule is that all persons who have any material interest in the subject matter should be joined as parties, either as complainants or defendants. (*Mechs. Bank of Alexandria v. Seton*, 1 Pet. 299; *Vattier v. Hinde*, 7 id. 252; *Story v. Livingston*, 13 id. 259; *Van Reimsdyke v. Kane*, 1 Gal. 371, 630; *West v. Randall*, 2 Mass. 181; *Joy v. Wirtz*, 1 Wash. C. C. 517; *Platt v. Oliver*, 2 McLean, 267; *North-ern Indiana R. R. Co. v. Mich. Cent. R. R. Co.* 5 id. 444; *Elmendorf v. Taylor*, 10 Wheat. 152.) The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural. (*Douglas v. The Pacific M. S. S. Co.* 4 Cal. 304.)

If it be claimed that the plaintiff, or any adverse party, has an interest in the subject matter of the controversy, the complaint should contain the facts showing the nature or extent of such interest, and which will enable the court to determine that such interest really exists. (*Aldrich v. Lapham*, 6 How. Pr. 129.) It is sufficient, in a bill, to set out the interests of the parties, so far as the plaintiff knows what they are, and, as to others, to say that he cannot state what their interests are. (*Hungerford v. Cushing*, 8 Wis. 332.)

1.—PLAINTIFFS.

Prior to the Code, actions on contract were brought in the name of the party in whom the legal interest was vested, (1 Chit. Pl. 2; 1 East 497; *Commercial Bank v. French*, 21 Pick. 489; *Warden v. Burnham*, 8 Vt. 390;) or whose legal interest had been affected. (1 Chit. Gen. Pr. 6, 7; *Britten v. Perrot*, 2 Cromp. & Mee. 597; *Foreman v. Jervis*, 5 Barn. & Ad. 335.) The legal interest was vested in him to whom the promise was made, and from whom the consideration passed. (*Hall v. Huntoon*, 17 Vt. 244; *Lapham v. Green*, 9 id. 407; *Weathers v. Ray*, 4 Dana, 474; *Clark v. McFarland*, 5 id. 45.)

The statement showing the rights of the complainant, by whom and in what manner he is injured, or in what he wants the assistance

This rule of the common law has now been changed by the *Code*, (§ 111,) which requires that every action shall be prosecuted in the name of the *real party in interest*; except as otherwise provided in section 113, viz.: that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. But section 111 shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land, in the name of the grantor or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

A trustee of an express trust, within the meaning of the exception contained in the 111th section, is to be construed to include a person with whom, or in whose name, a contract is made, for the benefit of another. (*Code*, § 113.)

The rule of the common law, that actions must be brought in the name of the party in whom the legal interest is vested, has been changed by statute, not only in New York, but in every state, wherein a *Code* has been adopted. (*Cal. Pr. Act*. § 4; *Nash's Ohio Pl.* 8; *Seney's Code*, Ohio, p. 56, § 25; id. p. 59, § 27; *Code of Iowa*, § 2757; *Oregon*, § 27; *Idaho*, § 4; *Arizona*, § 4; 1 *Estee Pr.* 54; *Wisconsin*, §§ 15, 17; *Kansas*, §§ 32, 34.) And now actions must be brought in the name of the real party in interest; and the practice has been made to conform to the rule of equity, with but slight modifications. (1 *Estee*, Pr. 54; *Wiggins v. McDonald*, 18 *Cal.* 126; *Wedderspoon v. Rogers*, 32 id. 569; approved in *Poorman v. Mills*, 35 id. 118. See *Wallace v. Eaton*, 5 *How*, Pr. 99.)

The interest which will warrant making a person a party is not an interest in the question involved, merely, but some interest in the subject matter of litigation. (*Fallette v. Whitewater Valley Canal Co.* 4 *McLean*, 192. See *Kerr v. Watts*, 6 *Wheat.* 550.) The rule should be restricted to parties whose interests are in issue and are to be affected by the decree. (*Mechs. Bank of Alexandria v. Seton*, 1 *Pet.* 299; *Elmendorf v. Taylor*, 10 *Wheat.* 152; *Story v. Livingston*, 13 *Pet.* 359; *United States v. Parrott*, 1 *McAll.* 271.)

The following classes of persons have been held to be trustees of an express trust: An agent contracting as such without disclosing the name of his principal. (*Morgan v. Reid*, 7 *Ab.* 215;) an auctioneer (*Bogart v. Regan*, 1 *E. D. Smith*, 590;) an agent for a foreign principal (*Considerant v. Brisbane*, 22 *N. Y.* 339; *Habicht v. Pemberton*, 4 *Sandf.* 657;) the assignee of an insurance policy in trust (*St. John v. Am. Mu. Life Ins. Co.* 2 *Duer.* 419;) the officers of a foreign bank (*Myers v. Machado*, 6 *Duer.* 678;) or of a foreign government (*Peel v. Elliot*, 16 *How*, Pr. 483; *Republic of Mexico v. Arrangois*, 11 *How*, Pr. 1;) the nominal proprietor of an individual bank (*Burbank v. Beach*, 15 *Barb.* 326;) a mercantile factor (*Grinnell v. Schmidt*, 2 *Sand.* 706; the outgoing trustees of an association (*Davis v. Garr*, 2 *Seld.* 124; a contractor for the benefit of third parties (*Rowland v. Phalen*, 1 *Bosw.* 43;) the president or treasurer of an incorporated association (*Tibbetts v. Blood*, 21 *Barb.* 650.)

A trustee for the benefit of creditors is also trustee of an express trust. (*Mellen v. Hamilton Fire Ins. Co.* 5 *Duer.* 101. *Myers v. Farwell*, 9 *Barb.* 615; *Lewis v. Graham*, 4 *Ab.* 106; *Fletcher v. Derrickson*, 3 *Bosw.* 181.) Trustees for the benefit of creditors must sue jointly. (*Brinckerhoff v. Wemple*, 1 *Wend.* 470.) When there is but a single assignee he may sue individually as holder of a promissory note. (*Butterfield v. Macomber*, 22 *How*, Pr. 150; *Ogden v. Prentiss*, 33 *Barb.* 160.)

The capacity of a plaintiff to sue is independent of a cause of action. The facts showing the former are not facts constituting the cause of action. (*Bank of Louisville v. Edwards*, 11 *How*, Pr. 216; *Vibert v. Frost*, 3 *Ab.* 120; *Myers v. Machado*, 6 id. 198; *Hobart v. Frost*, 5 *Duer.* 672.) Hence the objection that the complaint shows the plaintiff has not legal capacity to sue, cannot be entertained where the only cause of demurrer stated is that the complaint does not state facts sufficient to constitute a cause of action. (*Ibid.*)

Two directors of an incorporated company cannot maintain an action, in which other of the directors, some of the preferred stockholders, and the company itself, are made defendants, to restrain the prosecution of an action against the company, and to receive an accounting and the distribution of earnings, &c.; because the

of the court, and a prayer for relief suitable to his case, and for that purpose that the process of the court may issue to bring the defend-

plaintiffs are not the real parties in interest. The company, alone, can maintain such action, if any be maintainable. (*Gould v. Thompson*, 39 How. 5.)

A plaintiff who has an absolute right to the money due on a note is the real party in interest, although the payee of the note may be interested in the event of the suit in such wise that if the note be not collected, he will not receive any thing by reason of his endorsement and sale of it. (*Cummings v. Morris*, 3 Bosw. 560; S. C. 25, N. Y. 625.) The fact that the plaintiff has not actual possession of the note sued upon, does not affect his right to sue upon it. (*Selden v. Pringle*, 17 Barb. 463; *Hastings v. McKinley*, 1 E. D. Smith, 273.) Whether the plaintiff's title be legal or equitable is immaterial; if he have the whole interest, he may maintain the action. (*Ibid.*)

The people of the State, to maintain an action, must show an interest in the subject matter of the litigation. (*The People v. Booth*, 32 New York, 397.) Describing in the complaint the property which is the subject matter of the action, as belonging to the city of New York, does not assert such a title or interest in the property as to enable the people to maintain such an action. (*Ib.*)

A mortgagor after having parted with all his interest in the mortgaged premises, is no longer a necessary party to a suit instituted to make the mortgage debt a charge upon the subsequently acquired legal title. (*Stewart v. Hutchinson*, 29 How. Pr. 181.)

As to the test prescribed in section 111 of the Code—that the action must be prosecuted in the name of the real party in interest—it may be stated as a rule that if the defendant will be perfectly protected by responding to the plaintiff, and if there is no substantial equity in protecting the fund against the plaintiff himself, if recovered, then the plaintiff may be regarded as the party in interest within such section. (*Myers v. McChado*, 6 Abb. 198.)

A carrier can maintain an action in his own name for an injury to property entrusted to him to carry. (*Merrick v. Brainard*, 38 Barb. 574.) So the master of a ship, although not an owner, may sue for freight. (*Kennedy v. Eilan*, 17 Abb. 33; 36 Barb. 197.) No one individual can maintain an action for the specific performance of a public duty imposed for the public benefit. (*Getty v. Hudson River Railroad Company*, 21 Barb. 617.)

Where a trustee takes in his individual capacity, security for trust funds and dies, an action on such security cannot be maintained in the name of his successor as trustee. The action should be by his personal representatives. (*Renaud v. Conselyea*, 5 Abb. 346.) In a bill to enforce a trust in land, it is not necessary to aver that it was created by deed or otherwise, because the court will infer that it was created in the manner required by law, unless the contrary appears. But if the answer denies the existence of any trust, the complainant must prove its creation or existence by competent evidence. (*Whiting v. Gould*, 2 Wisconsin, 552.) One who holds a thing in action as collateral security, may enforce the payment of it. (*Nelson v. Edwards*, 40 Barb. 280.) And it seems the payment of the principal debt would not affect the continuance of the action in his name. (*Greene v. Tullman*, 20 New York, 197.)

Where an agent makes a contract in writing in his own name and without disclosing his principal, the principal may sue in his own name. (*Erickson v. Compton*, 6 How. Pr. 471; *St. John v. Griffith*, 2 Abb. 198,) or the action may be in the name of the agent. (*Morgan v. Reid*, 7 Abb. 215; *Nelson v. Nixon*, 13 id. 104.) But a mere agent cannot prosecute a suit in his own name for the benefit of his principal. (*Redfield v. Middleton*, 17 Bosw. 649; *Poor v. Guilford*, 10 New York, 273; *Newberry v. Garland*, 31 Barb. 121.) Thus a mere merchandize broker, not acting under a *del credere* commission, cannot maintain an action in his own name to recover the price of goods sold by him for the owner, unless he has advanced upon the goods or guaranteed the sale. (*White v. Chouteau*, 10 Barb. 202.)

A complaint upon a policy of insurance, which does not on its face import any interest in the plaintiff in the subject matter of the insurance, should aver that the assured had an interest to be protected thereby, in such a sense that the insurance operated as a security or indemnity to protect him from loss by the perils insured against. (*Williams v. Insurance Company of North America*, 9 How. Pr. 373.) Where a policy is issued to A., loss, if any, payable to B., in case of loss, B. may sue in his own name. (*Frink v. Hampden Insurance Company*, 1 Abb., N. S. 343; *Ripley v. Astor Insurance Company*, 17 How Pr. 444.) If the loss is made payable to a

ant before it, form the substance and essence of every bill; and must

mortgagee of the premises, the latter, in case of loss, is the proper party to bring the action, unless the mortgage has been paid, in which case the owner of the premises must bring the action, alleging that the mortgage has been paid. (*Ennis v. The Harmony Fire Insurance Company*, 3 Bosw. 516.) And where a policy insured two individuals by name, and then the words, "or whom it may concern," were added, and a clause was inserted in the policy that the loss, if any, should be paid to the persons named, it was held that an action might be maintained in their own names, and that they were entitled to recover the whole sum insured, although it appeared that they were owners of only one-half of the building insured, the other half belonged to a third person not joined as plaintiff. (*Jefferson Insurance Company v. Cothrel*, 7 Wend. 73.) If a mortgagor takes a policy in his own name, with a clause making the loss payable to the mortgagee, the latter, in case a loss occurs before his debt is paid, is the proper person to sue, and the mortgagor cannot assign the claim to another, so as to enable the assignee to sue for a loss. (*Ripley v. Astor Insurance Company*, 17 How. Pr. 441.) Nor can he maintain an action in his own name as sole plaintiff, without alleging in his complaint, that the mortgagee has been fully paid, and has ceased to have any interest in the policy. (*Ennis v. The Harmony Fire Insurance Company*, 3 Bosw. 516.) Where an insurance was effected on A.'s property by B. as his agent, the policy providing that the loss, if any, should be paid to B. only, it was held that A., being the real party in interest, might maintain an action on the policy in his own name. (*Lane v. Columbus Insurance Company*, 2 Code Rep. 65.)

Possession of a note or bill of exchange, is presumptive evidence of title. (*Mottram v. Mills*, 1 Sandf. 37; and see *Wiltie v. Northum*, 5 Bosw. 423; *Camden Bank v. Rogers*, 4 How. Pr. 63; *East River Bank v. Judah*, 10 id. 135; *Williams v. Brown*, 2 Keyes, 486.) The presumption is not repelled by showing that the note came into the plaintiff's hands after maturity. (*James v. Chalmers*, 5 Sandf. 52; 6 N. Y. 214; and see *Farrington v. The Park Bank*, 39 Barb. 645; *Potter v. Chadsey*, 16 Abb. 146.) Yet, the mere holder of a promissory note, who has no interest in it, cannot now maintain an action upon it. Such action can only be prosecuted in the name of the owner of the note, or the real party in interest. (*Parker v. Totten*, 10 How. Pr. 233.) A plaintiff, in an action on a promissory note, has not legal capacity to sue, when it appears on the face of the complaint, that he holds the note as a collateral security, under a trust to sell it, but which does not authorize him to sue upon it. (*Nelson v. Eaton*, 7 Ab. 305.) Where indorsers received a note for a special purpose, which wholly failed, paid no value for the note, did not retain possession of it, and did not direct a suit to be commenced, it was held that they were not to be regarded as *bona fide* holders, nor the real parties in interest; and hence that, under the Code, the action could not be maintained in their names. (*Prall v. Hinchman*, 6 Duer. 351.) An action on a promissory note, brought by an assignee for the benefit of creditors, the complaint in which describes the plaintiff as "assignee of D. & Co.," is to be deemed as brought by him in his individual capacity. (*Butterfield v. Macomber*, 22 How. Pr. 150.) When the plaintiff alleges, in his complaint, that he is the "owner and holder" of the notes in suit, and the answer puts that fact in issue, and it appears that the plaintiff holds the notes as assignee of the payees, under a general assignment for the benefit of creditors, he is to be deemed in law the holder and owner, so as to entitle him to maintain the action in his own name, as plaintiff, without setting out his representative character. (*Id.*) The indorsee of a note for a consideration not to be paid until the note should be collected, is the real party in interest to maintain an action thereon. (*Cummings v. Morris*, 25 N. Y. 625; see *Killmore v. Culver*, 24 Barb. 656; *Anon.* 16 Abb. 423; *Lewando v. Dunham*, 1 Hilton, 114; *Durgin v. Ireland*, 14 N. Y. 322.) Where an account, together with a note given by the debtor for a part of the amount, are assigned to a third person, the latter has his election to sue, in his own name, upon the note,—or the original indebtedness. (*Armstrong v. Cushney*, 43 Barb. 340.) Where it appears on the face of the complaint, that although the note in suit is in the possession of the plaintiff, it is nevertheless the property of another, the complaint does not state a cause of action in the plaintiff. (*Palmer v. Smedley*, 6 Ab. 205; 23 Barb. 463.) And so, where it appears on the face of the complaint, that the plaintiff held the note as trustee, under an instrument which expressly authorized him to sell it, but did not expressly authorize him to sue upon it, the complaint was, on demurrer, held insufficient. (*Nelson v. Eaton*, 7 Ab. 305.) The allegation that the plaintiff, an officer of a bank, is duly authorized to sue upon a bill of exchange, on behalf of the bank, is not sufficient. (*Myers v. Machado*, 6 Ab. 193.) An allegation that the note in suit "for value re-

not, by any means be omitted. (n) There are also other parts which,

(n) 1 Dan. 412.

ceived lawfully come to the possession of" the plaintiffs, has been held a sufficient allegation of title in the plaintiffs. (*Lee v. Ainslie*, 4 Ab. 463; 1 Hilton, 277. See *Taylor v. Corbiere*, 8 How. Pr. 388.) An allegation that the plaintiff is now the "bona fide holder and owner," without showing how he acquired such ownership, is sufficient. (*Holstein v. Rice*, 15 How. Pr. 1.) So, in an action by the assignee of a chattel note, an allegation of the indorsement of the note, by the payee, to the plaintiff, and that he, the plaintiff, is the holder and owner, is a sufficient averment of the assignment thereof to the plaintiff. (*Brown v. Richardson*, 20 N. Y. 472.) Ownership of a note is sufficiently shown by alleging the making, indorsement, and delivery thereof to the plaintiff, though coupled with the statement "that it was by the Bank of Commerce, which then held the same, presented for payment." Such a statement only imports a holding for collection. (*Farmers' Bank, &c. v. Wadsworth*, 24 N. Y. 547.) So where the complaint alleged that the note in suit was delivered to S. for "said bank" (the plaintiff), and that such note was held and owned by the plaintiff, it was held to be a sufficient averment of ownership. (*Camden Bank v. Rodgers*, 4 How. Pr. 63. See *Peets v. Bratt*, 6 Barb. 632; *Parker v. Totten*, 10 How. Pr. 234; *White v. Brown*, 14 id. 282; *Thomas v. Desmond*, 12 id. 321.)

But an allegation that the plaintiff is holder and owner, is unnecessary. (*Keteltas v. Myers*, 10 N. Y. 231; *Conn. Bank v. Smith*, 9 Ab. 163; 17 How. Pr. 437) and embarrassing. (*Chadwick v. Booth*, 13 Ab. 249; 22 How. Pr. 23.) An allegation that the instrument was delivered, indorsed, and assigned to the plaintiff, implies that he is owner and holder. (*Mitchell v. Hyde*, 12 How. Pr. 460; 24 N. Y. 547; *Billings v. Jane*, 11 Barb. 620; *Bank of Lowville v. Edwards*, 11 How. Pr. 217; *Griswold v. Laverty*, 3 Duer. 691; *N. Y. Marbled Iron Works v. Smith*, 4 id. 362; *Conn. Bank v. Smith*, 9 Ab. 163; 17 How. Pr. 437.)

A plaintiff may recover without being in fact the holder of the instrument sued upon; as where it is destroyed or lost, (2 R. S. 406; *Supervisors of Livingston v. White*, 30 Barb. 70; *Desmond v. Rice*, 1 Hilton, 330; *Des Artes v. Leggett*, 16 New York, 582,) or in possession of the defendant. (*Smith v. McClure*, 5 East. 476; *Selden v. Pringle*, 17 Barb. 463.) The question is, whether he is the real party in interest, or trustee of an express trust, or person authorized to sue by statute. If he is, he may recover. (*Root v. Price*, 22 How. 372; *Butterfield v. Macomber*, id. 150.)

When a contract has been assigned to the plaintiffs, the fact necessary to be stated in the complaint is the *change of interest* in the contract, so that the plaintiffs may maintain the action as "the parties in interest," under the 111th section of the Code. It is not necessary to state a compliance with every particular requisite to render the change effectual. (*Horner v. Wood*, 15 Barb. 372.) An allegation that "C. duly assigned and transferred all his interest in the contract to the plaintiff G.; and that the plaintiff L. became interested by a sale and assignment to him of a part of G.'s interest," is sufficient. (*Ib.*; See also *Fowler v. New York Indemnity Insurance Company*, 23 Barb. 151; *Morange v. Mudge*, 6 Abb. 243.) So an allegation that A. "sold and transferred and set over to the plaintiff the said judgment," will be construed to mean that the judgment was assigned absolutely. If the assignment was subject to any material condition affecting the plaintiff's right to recover, it is matter to be shown by way of defence. (*Martin v. Kanouse*, 2 Abb. 331.) And in (*Prindle v. Caruthers*, 15 N. Y. 427.) an allegation in a complaint, that the plaintiff became the owner of the cause of action by purchase, was held a sufficient allegation of title in the plaintiff, as assignee of the party to whom the cause of action accrued. But where the complaint showed that the alleged cause of action accrued to a third party, and the only manner in which the plaintiff showed title in himself was by an allegation that "the plaintiff is now the sole owner of the said demand," it was held that the allegation was of a conclusion of law, and not of a fact, and showed no title in the plaintiff. (*Thomas v. Desmond*, 12 How. Pr. 321.)

When a receiver of a corporation would make title in pleading to a chose in action or other property, which had formerly belonged to the corporation, he must set out in his complaint the facts showing his appointment, his appointment being a part of his title. (*White v. Joy*, 13 N. Y. 86; *Gillett v. Fairchild*, 4 Denio, 80.) But he need not set out all the proceedings by which he was appointed. It is sufficient if he states the mode of his appointment. (*Stewart v. Beebe*, 23 Barb. 34. See *Platt v. Crawford*, 8 Abb. N. S. 297.) A receiver, in general, is not clothed with any right to maintain an action which the parties or the estate he represents could not maintain. He must show a cause of action existing in those parties, and that by the

although of a more formal nature, are nevertheless, as we have seen in the next preceding section, necessary to the constitution of a bill.

appointment of the court lawfully made in a matter where the court had jurisdiction, the power has been conferred on him in his representative capacity as receiver to prosecute the action. (*Coope v. Bowles*, 42 Barb. 87.)

If it be claimed that the plaintiff or any adverse party has an interest in the subject matter of the controversy, the complaint should contain the facts showing the nature and extent of such interest, and which will enable the court to determine that such interest really exists. (*Aldrich v. Lapham*, 6 How. Pr. 129. See *Lawrence v. Wright*, 2 Duer. 673; *Appleby v. Elkins*, 2 Sandford, 388; *Mitchell v. Hyde*, 12 How. Pr. 460; *Bank of Lowville v. Edwards*, 11 id. 217.) It is not sufficient to allege that the plaintiff is the "sole owner of the demand," or that he is "duly authorized to bring the suit;" but he must state the facts which establish his ownership or authority. (*Myers v. Machado*, 6 Abb. 198; S. C. 14 How. Pr. 149; *Thomas v. Desmond*, 12 id. 321; *Adams v. Holley*, id. 326.) In a complaint for the wrongful detention of personal property, an allegation of ownership in the plaintiff is necessary; and if such allegation is omitted, the complaint is fatally defective. (*Scofield v. Whitelegge*, 10 Abb. N. S. 104.) Property taken on execution is, in law, in the possession of the sheriff, and for any wrong done in respect to such property, the action must be in the name of the sheriff. (*Terwilliger v. Wheeler*, 35 Barb. 620.) If a consignor of goods is the owner, an action against a carrier for their loss is properly brought in his name. (*Price v. Powell*, 3 New York, 322.)

A plaintiff who sues as the assignee of a cause of action in which he has no interest at the time the suit is brought, cannot maintain his action by purchasing after issue joined the cause of action described in his complaint. (*Garrigue v. Loescher*, 3 Bosw. 579.)

Where the stockholders of a corporation have become individually liable for the corporate debts, one who is a stockholder of such corporation and also a judgment creditor thereof in an amount exceeding his liability as a stockholder may bring an action against the corporation, its other stockholders and creditors to determine the rights and liabilities of the parties and to procure a set-off of his liability against his judgment; and in the meantime may restrain other litigation among the parties and prevent payments by the stockholders on their individual liability to the creditors. (*Gerry v. New York & Liverpool Steamship Co.* 12 Abb. 268.)

A bill which alleges the placing of obstructions in the bed of a navigable river in front of the complainant's lot and dock, thereby blocking up and obstructing the channel of the stream and creating a nuisance, sufficiently shows special damage to the complainant distinct from the public injury, and indicates the manner in which it is to be accomplished to entitle him to an injunction to restrain such injury. (*Walker v. Shepardson*, 2 Wis. 334.)

Although as a general rule a cause of action in favor of two partners or joint contractors survives to the survivor and an action upon it cannot be continued in the name of the personal representative of one deceased, nor can such representative be joined in an action, yet where a judgment recovered by two partners has been satisfied as against one and not as against the other, and the latter dies, the action may be continued in the name of the legal representative of the latter. (*Hackett v. Belden*, 10 Abb., N. S. 123.)

The Code provides (*sec. 144, sub. 2*) that when it shall appear upon the face of the complaint that the plaintiff has not legal capacity to sue, the defendant may demur to the complaint for that cause.

The objection that it appears by the complaint that the plaintiff is a foreign administrator, should be taken by demurrer on the ground of want of capacity to sue, and an omission to demur is a waiver of the objection. (*Robbins v. Wells*, 18 Abb. 191.)

When title is once shown in the plaintiff the continuance is presumed, and need not be alleged. (*Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Taylor v. Corbiere*, 3 How. Pr. 388.)

2. DEFENDANTS.

The Code (§ 118) provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover the possession of real estate the landlord and tenant may be joined as defendants; and any person claiming title or a right of possession to real

The complainant must not only show an interest in the subject matter

estate may be made parties plaintiff or defendant, as the case may require, to any such action.

The complaint must contain the requisite facts to show the *defendants*, as well as the plaintiff's interest. A mere general allegation that one or more of several defendants is or are "interested," is insufficient. (Van Sant. Eq. Pr. 97.) In the case of *infant* defendants, especially, this is essential. The facts entitling the plaintiff to judgment, which, in their case are never admitted, must be stated, and sustained by legitimate proof. (*Ib.*; *Aldrich v. Lapham*, 8 How. Pr. 129.) Where an infant is a party to a contract, it is necessary to make him a party to an action thereon. (*Slocum v. Hooker*, 13 Barb. 536; *Butler v. Morris*, 1 Bosw. 333.)

When an action is brought by the assignee of a demand, it is not, in general, necessary to make the *assignor* a party defendant. (*Allen v. Smith*, 16 N. Y. 415.) But the court may order the alleged assignor of a claim in suit to be brought in as a party. (*Freeman v. Newton*, 3 E. D. Smith, 246.) In *Stryker v. Lynch*, (11 Leg. Obs. 116,) which was a partition suit, a general allegation in the complaint, that certain of the defendants claimed some right, interest, estate or title to the lands in question, adverse to the plaintiff and the other defendants, was held bad on demurrer; the court saying that "something more is necessary than merely to state that the defendants claim such interest, especially if the claim is controverted. The nature of the claim should be stated; otherwise there would be no method of ascertaining whether it could be joined with the main subject of the litigation."

So, in a complaint in a *foreclosure suit*, it is a customary practice, where subsequent incumbrancers are made parties defendants, merely to allege that they "have or claim some interest in the premises, by judgment, decree or otherwise." The more correct practice is said to be to allege that such defendants have obtained judgments, which have been docketed, &c., or a mortgage which has been duly recorded in the county where the premises are situated, &c., or otherwise, as the case may be, so as to show the nature of the defendants' interest or claim. (Van Sant. Eq. Pr. 59.) The owner of the equity of redemption is a necessary party to a suit for the foreclosure of a mortgage, and the objection that he is not made a party, may be made by the mortgagor. The fact that the deed from the mortgagor to the present owner of the equity of redemption was not recorded at the time of the commencement of the suit, and of the filing the notice of *lis pendens*, does not excuse the omission to make the owner of the equity of redemption a party. (*Hall v. Nelson*, 23 Barb. 88; 14 How. Pr. 32; and see *Griswold v. Fowler*, 6 Abb. 113.) Where the mortgage has parted with all his interest in the premises, and the owner of the equity of redemption is personally liable for any deficiency, it is not necessary to make the mortgagor a party defendant. (*Drury v. Clark*, 16 How. Pr. 424; see *Crooke v. O'Higgins*, 14 How. Pr. 154.) The wife or widow of the mortgagor must be made a party, to bar her dower. (*Mills v. Van Voorhis*, 23 Barb. 125; 10 Abb. 152.) And every party interested in the division of the proceeds of the estate should be made a party defendant. (*Denton v. Nanny*, 8 Barb. 618.) One who claims adversely to the mortgagor, and prior to the mortgage, cannot properly be made a party defendant for the purpose of trying the validity of such adverse claim. (*Corning v. Smith*, 12 N. Y. 82.) But prior incumbrancers may be made parties, to have the amount due them liquidated. (*Holcomb v. Holcomb*, 2 Barb. 20; and see *Chapman v. Draper*, 10 How. Pr. 367.)

It is provided by Sec. 167 of the Code, that in actions to foreclose mortgages, the court shall have power to adjudge and direct the payment, by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation, of any person other than the mortgagor, the plaintiff may make such person a party to the action; and the court may adjudge payment of the residue of such debt remaining unsatisfied, after a sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases.

In an action by *creditors* against an *assignee for the benefit of creditors*, for an account, and to have the assignment reformed, the assignors and the persons to be affected by the alteration of the assignment, are necessary parties defendant. (*Garner v. Wright*, 24 How. Pr. 144.) Where the complaint in an action against the original debtors and their assignees, seeks to set aside an assignment made by the former to the latter, for the benefit of creditors, it is not necessary to make all the creditors parties defendants. (*Bank of British North America v. Suydam*, 6 How. Pr. 379; S. C. 1 Code Rep., N. S. 325. See *Cox v. Platt*, 32 Barb. 126.) One who has accepted

of the suit, but it must be an actual existing interest. A mere *possibil-*

the conveyance in good faith, and transferred the property in accordance with the trust, need not be made a party. (*Spicer v. Hunter*, 14 Ab. 4.) But in such an action the judgment debtor (*Lawrence v. Bank of the Republic*, 35 N. Y. 320; S. C. 31 How. 102; (*Wallace v. Eaton*, 5 How. Pr. 99; S. C. 3 Code Rep. 161.) and all the incumbrancers or grantees of the estate (*Morton v. Weil*, 33 Barb. 30; 11 Ab. 421) should be united as defendants. And an incumbrancer should be made a party though he resides out of the State. (*Gray v. Schenck*, 4 N. Y. 460.) In *Shaver v. Brannard*, (29 Barb. 25,) which was an action brought to set aside certain conveyances from the judgment debtor to one of the defendants, and from such grantee to another of the defendants, it was held the judgment debtor was a necessary party. (And see 6 N. Y. 190.) In *Garner v. Wright*, (24 How. 144; S. C. 28 How. 92) in an action against assignees, to have an accounting, and to substitute certain preferences in the distribution of the trust fund, it was held that the assignors and creditors of a lower class than the proposed substitution were necessary parties defendants.

The words *next of kin*, as used in the statute authorizing actions against the next of kin of any deceased person, to recover the value of any assets paid to them by an executor or administrator, means those to whom, under the statute of distributions, the personal estate of the deceased would pass, and includes the widow of the deceased. (*Merchants' Insurance Company v. Hinman*, 34 Barb. 410.) In an action by one of two executors to call his co-executor to an account, the *creditors, legatees and next of kin*, are not necessary parties; except it be a final accounting. (*Wood v. Brown*, 34 N. Y. 337.)

In an action by a residuary legatee for his share of the residue, all persons interested in the residue must be made defendants. (*Townelle v. Hall*, 3 Ab. 205. And see *Towner v. Tooley*, 38 Barb. 598.)

In an action authorized by the laws of this State against the *stockholders* of any *corporation or joint stock company*, organized under our laws, it is sufficient to name as defendants the persons appearing as stockholders on the stock books of the corporation or company, by the name or names there appearing. But the court may, at any time before final judgment, permit the process, pleadings and proceedings in such action to be amended on motion of either party, by striking out the the name of any deceased stockholder, or the name of any person wrongly inserted, and by inserting the proper name of the party intended, or the name or names of the proper heir, executor, administrator or personal representatives of any deceased party. Such amendment may be allowed by the court at any time, without costs and without prejudice to the previous proceedings. (Laws of 1869, ch. 157.)

Where the cause of action is the same, viz.; the fraudulent disposition of the debtor's property to the several defendants, although in separate parcels, all the grantees and incumbrancers should be brought before the court in the same action. (*Durand v. Hamkerron*, 39 N. Y. 287; *Morton v. Weil*, 33 Barb. 30; S. C. 11 Ab. 421; *Sage v. Mosher*, 28 Barb. 287; *Jacot v. Boyle*, 18 How. Pr. 106; *Keed v. Stryker*, 12 Ab. 47.)

3. JOINDER OF PARTIES.

The Code (§ 119) provides that of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

The test of the unity of interest referred to in this section is, that joint connection with, or relation to the subject matter, which by the established practice of the common law courts, will preclude a separate action. It refers to such cases as joint tenants, co-trustees, partners, joint-owners, or joint-contractors, simply. (*Jones v. Felch*, 3 Bosw. 63; *Bucknam v. Brett*, 35 Barb. 596; S. C. 22 How. 233; 13 Ab. 119.)

The defendants' firm was indebted to the plaintiffs' firm upon an account stated and settled between them. In an action on the account, one of the individuals, a member of both firms, refusing to be joined as plaintiff, was made a defendant, and the joinder was sustained. (*Cole v. Reynolds*, 18 N. Y. 4.)

When a *married woman* is a party, her husband must be joined with her, except : 1. When the action concerns her *separate property*, she may sue alone. 2. When the action is between herself and her husband, she may sue or be sued alone, and in no case need she prosecute or defend by a guardian or next friend. (Code, § 114.)

ity, or even probability of a future title will not be sufficient to sustain a

(a) *Plaintiffs.*

Section 117 of the Code provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in that title.

This section furnishes the rule as to the parties plaintiff in all cases. (*Loomis v. Brown*, 18 N. Y. 76.) except in actions for partition. (See Code, § 448.) Parties not united in interest should not be joined as plaintiffs. (*Garner v. Wright*, 28 How. Pr. 92.) There must be among plaintiffs one distinct general right—a community of interest; not merely in the subject matter involved, but also in the relief demanded. (Id.) Persons having distinct claims against another cannot unite to enforce such claims in one action. (*Wood v. Perry*, 1 Barb. 114; and see *Mead v. Mali*, 15 How. Pr. 347.) Several creditors of a corporation having a common interest in the relief sought, may unite in the same complaint. (*Conro v. Port Henry Iron Company*, 12 Barb. 28. See *Dix v. Briggs*, 9 Paige, 595.) And several persons owning separate tenements affected by a nuisance, may join in a suit to restrain by injunction the continuance of the nuisance. (*Peck v. Elder*, 3 Sand. 126; *Brady v. Weeks*, 3 Abb. 157. But see *Hudson v. Madison*, 35 Eng. Ch. R. 352, *contra*.) In an action for use and occupation of real estate tenants in common may sue jointly or separately. (*Porter v. Bleiler*, 17 Barb. 149; *Jones v. Felch*, 3 Bosw. 63.) To recover the proceeds of a sale of real estate of tenants in common, each tenant may maintain a separate action for his share. (*Van Wart v. Price*, 14 Abb. 4. note. See *General Mutual Insurance Company v. Benson*, 5 Duer. 168.) But a tenant in common of a chattel must join in an action for its conversion, (*Merritt v. Walsh*, 33 N. Y. 43.) or for hire of a vessel. (*Coster v. New York & Erie Railroad Company*, 3 Abb. 332.)

The terms of section 111 of the Code, that "every action must be prosecuted in the name of the real party in interest," are imperative, and are subject to no exception other than those stated in section 113. Hence, since the Code, even a *dormant partner* is a necessary party plaintiff in an action for the recovery of a partnership debt founded on a partnership contract, whether the relief sought be legal or equitable. (*Secor v. Keller*, 4 Duer. 416.) Suits in relation to the business of a limited copartnership may be brought and conducted by and against the general partners in the same manner as if there was no special partner. (1 R. S. 766, § 14. See *Schulten v. Lord*, 4 E. D. Smith, 206; *Laws of 1864*, ch. 43.)

Co-executors must all join in actions to recover debts due to the estate, if letters testamentary have been issued to them, and they have properly qualified. (*Seranton v. Farmers' and Mechanics' Bank of Rochester*, 33 Barb. 527; S. C. 24 N. Y. 424.) But those to whom letters have not been granted, and who have not qualified, need not be joined. (*Laws of 1838*, ch. 149; *Moore v. Willett*, 2 Hilton, 522.)

If the contract between the plaintiff and defendant is entire, and the plaintiff alone can enforce it, he is the only proper party plaintiff. (*Yerby v. Kirkpatrick*, 2 Rob. 227; *Hastings v. McKinley*, 1 E. D. Smith, 273; *Cummings v. Morris*, 3 Bosw. 560; S. C. 25 N. Y. 625.)

As a general rule, when a fund is in the hands of a trustee, which he is bound to distribute to different persons in unequal proportions, all interested in the distribution are necessary parties to an action against the trustee. But when the sum that each is entitled to receive has been ascertained, by a proceeding binding on the trustee, each may maintain a separate action for his proportionate share, thus ascertained. (*The General Mutual Ins. Co. v. Benson*, 5 Duer. 168.)

It is said that hostile interests will prevent the joining of parties plaintiff; but this occurs only when one of the plaintiffs has a claim in the case, which is antagonistic to the claim of another. (*Brooks v. Peck*, 3S Barb. 519; *Grant v. Van Schoonhoven*, 9 Paige, 254.)

Husband and wife cannot be joined as parties plaintiff, in an action on a demand belonging to the husband. (*Dunderdale v. Grymes*, 16 How. Pr. 195.)

It is settled, by several decisions under section 114 of the Code, that married women may now sue and be sued, in all matters relating to their separate estates, in the same manner as *femes sole*. (*Barton v. Beer*, 21 How. Pr. 309; 35 Barb. 81; *Morrell v. Cawley*, 17 Ab. 76.)

When an interest in real estate is vested in the wife, as her separate property, an action to establish and ascertain her rights, or to recover the possession, should be brought in the name of the wife alone, and the husband should not be joined as a party. (*Brownson v. Gifford*, 8 How. Pr. 389; *Durby v. Callaghan*, 16 N. Y. 71.) So as to actions upon contracts relating to her separate estate, (*Draper v. Stovenal*, 35 N. Y. 507; *Palmer v. Davis*, 28 id. 242,) or actions for the conversion of her sep.

bill. (o) And this interest must not be capable of being defeated by the

(o) Mitf. Pl. 127.

arate property. (*Ackley v. Tarbox*, 35 N. Y. 564; *Spies v. Accessory Transit Co.* 5 Duer. 632.) But if there is a joint interest in the husband and wife, the husband should join, or the suit will be defective; (*Smith v. Kearney*, 9 How. Pr. 438; *Ingraham v. Baldwin*, 12 Barb. 9; *Conde v. Shepherd*, 4 How. Pr. 75; *Ripple v. Gilbert*, 8 id. 476; *Goclet v. Gori*, 31 Barb. 314; *Hillman v. Hillman*, 14 How. Pr. 456.)

By the Revised Statutes a married woman may sue alone, if her husband be sentenced to the state prison for life. In such a case he is to be deemed civilly dead, and as having forfeited all his civil rights. (2 R. S. 701 §§ 19, 20.)

An action by a shareholder of an unincorporated joint stock company against one as president and treasurer of the company, to compel an accounting as to the property, and an investigation into the entire business of the company, cannot be sustained without making all the shareholders parties: or unless it be commenced for the benefit of himself and all others standing in the same situation. (*Worth v. Radde*, 28 How. Pr. 230; 18 Abb. 396.) Where several legacies are given, and they are a charge upon lands devised for their payment, but the fund is not sufficient to pay all the legacies in full, an action will not lie by one legatee alone to recover his legacy. He must join all the legatees, or bring the action for the benefit of all parties interested as legatees (*Towner v. Tooley*, 33 Barb. 598.)

Where a stockholder in a corporation sues its officers for over issuing stock of the company in such a manner as to make his stock valueless, he need not join as plaintiffs with him all the other stockholders who are in the same condition; but he can maintain his action against them alone. (*Mead v. Mali*, 25 Barb. 578.) The corporation is not liable for the stock thus over issued, and therefore it is not the only party to maintain the action. The stockholder can maintain the action, for he is damaged. (*Id.*)

Where the parties are so numerous that it would be impossible to bring them all in, or, if brought in, to prevent the action being continually abated by death, or a change of interest, one of the parties in interest may commence a suit in behalf of himself and all others equally interested with him. This must be distinctly stated in the outset, by a proper averment in the complaint. (*Smith v. Lockwood*, 13 Barb. 218; S. C. 1 Code Rep., N. S. 319; 10 N. Y. Leg. Obs. 12; see *Wood v. Draper*, 4 Abb. 322; *Bouton v. City of Brooklyn*, 15 Barb. 375; *Kirk v. Young*, 2 Abb. 453; *Roosevelt v. Varnum*, 12 How. Pr. 469; *McKenzie v. L'Amoreaux*, 11 Barb. 516; *Towner v. Tooley*, 33 id. 598; *Green v. Breck*, 10 Abb. 42; *Brooks v. Peck*, 33 Barb. 519; *Habicht v. Pemberton*, 4 Sandf. 657.)

The reason of the rule allowing an action to be thus brought is founded on necessity, and it is established to prevent a failure of justice, which could not be otherwise avoided. (*Bouton v. City of Brooklyn*, 15 Barb. 375, 391; S. C. 7 How. Pr. 193; *Smith v. Lockwood*, 13 Barb. 209; S. C. 10 Leg. Obs. 232; 1 Code Rep., N. S. 319; *McKenzie v. L'Amoreaux*, 11 Barb. 576; *Roosevelt v. Varnum*, 12 How. Pr. 469; *Wood v. Draper*, 4 Abb. 322; 24 Barb. 187; *Kirk v. Young*, 2 Abb. 453; *Towner v. Tooley*, 33 Barb. 598.)

Section 119 of the Code does not apply to a case where the right to assert or protect which the suit is brought, is not one which exists against all, or the obligation which it is sought to enforce is not common to all. (*Reed v. The Evergreens*, 21 How. 319.)

Although the number of the plaintiffs be thirty-five, yet it is still practicable for them to appear, though inconvenient, and they should appear in their individual and real names. (*Kirk v. Young*, 2 Ab. 453; *Habicht v. Pemberton*, 4 Saud. 657; *Coe v. Beckwith*, 10 Ab. 296; S. C. 31 Barb. 339; 19 How. 398.)

When creditors seeking to set aside an assignment are so numerous as to make their appearance impracticable, an action may be brought by preferred creditors, in behalf of themselves and the rest. (*Brooks v. Peck*, 33 Barb. 519.) A dissatisfied creditor may bring his action alone, to set aside an assignment. He need not sue for the benefit of himself and the other creditors. (*Greene v. Breck*, 32 Barb. 73.)

An action by a tax-payer to restrain the imposition of an illegal tax, must be brought in behalf of himself and of all others similarly situated. (*Wood v. Draper*, 4 Abb. 322; S. C. 24 Barb. 187.) Yet in a later case (*Thurston v. The City of Elmira*, 10 Abb., N. S. 119,) it was held that a party against whom a local assessment has been imposed cannot join with himself all other persons, against whom similar assessments have been made, as parties plaintiff in an action to restrain the collection of the tax; since such tax gives no lien upon any common property owned by the plaintiffs, but only upon their separate lots.

[*40] *act of the defendant. (p) The bill must also aver the perform-
(p) Lord Dursley v. Fitzhardinge, 6 Ves. 262.

(b.) *Defendants.*

An action against *heirs*, to recover debt of their ancestor, must be brought against the heirs jointly, and not separately. (*Kellogg v. Olmstead*, 6 How. Pr. 437.) Lessees and under lessees may be joined as defendants in an action for violating the covenants in a lease, as to user of the demised premises. (*Gillilena v. Norton*, 6 Rob. 546.) Where the plaintiff, while a passenger in the cars of the Harlem Rail Road Company, was injured by the conjoint negligence of the servants of the New Haven Rail Road Company, it was held that he could join both companies as defendants. (*Colegrove v. The N. Y. & Harlem Rail Road Co.* 20 N. Y. 492.) So master and servant may be joined as defendants, in an action to recover for the negligence of the servant. (*Montford v. Hughes*, 3 E. D. Smith, 591.)

In an action against *partners* all must be joined; that the statute of limitations is a defence as to one partner is no excuse for omitting to make him a defendant. (*Hyde v. Van Valkenburgh*, 1 Daly, 416; and see *Briggs v. Vose*, 15 N. Y. 417; *Hurlbut v. Post*, 1 Bosw. 28.) A secret partner may be joined as a defendant. (*Brown v. Birdsall*, 29 Barb. 549.) But in an action on a contract made with the ostensible members of a firm the defendants cannot avail themselves of the non-joinder of a secret partner, unless the plaintiff knew of such secret partner. (*New York Dry Dock Co. v. Treadwell*, 19 Wend. 525; cited in *Van Valen v. Russell*, 13 Barb. 592; and see *Bishop v. Edmiston*, 16 Abb. 466; *Cookingham v. Lasher*, 2 Keyes, 454.) Where one of several partners makes a joint and several promissory note and subscribes to it the name of his firm, he may be sued on such note, alone, without joining the other partners. (*Snow v. Howard*, 35 Barb. 55.) In an action by a partner against his co-partner, for a dissolution of the partnership, partly upon the ground of his fraudulent sale of partnership property to a third person, it is proper to make the fraudulent vendee a party. (*Webb v. Helion*, 3 Rob. 625.) The personal representative of a deceased partner cannot be joined as a party defendant with the surviving partner in an action for a partnership debt, unless it be shown on the face of the complaint that the plaintiff cannot procure satisfaction from the survivor. (*Voorhies v. Child's, Ex'r.* 17 N. Y. 354; *Copcutt v. Merchant*, 4 Bradf. 18; *Higgins v. Freeman*, 2 Duer, 650; *Voorhies v. Baxter*, 1 Abb. 45, 18 Barb. 592; *Morehouse v. Ballou*, 16 Barb. 259; *Tracy v. Suydam*, 30 id. 110; *Dubois case*, 3 Abb. 177; *McVean v. Scott*, 46 Barb. 334.)

In an action to charge *stockholders* personally with debts of their corporation, judgment creditors of the corporation are not proper parties defendant without showing why they were not made plaintiffs. (*Young v. New York and Liverpool Steamship Co.* 10 Abb. 229.) In such an action the corporation is not necessarily a party defendant. (*Perkins v. Church*, 31 Barb. 84.) In an action against stockholders of a corporation to recover illegal dividends received by them, creditors of the corporation may be joined as defendants. (*Osgood v. Laytin*, 3 Keyes, 521.)

Creditors, legatees and next of kin, are not necessary parties to an action by an executor against his co-executor for an account, except in case of a final accounting. (*Wood v. Brown*, 34 N. Y. 337.) In an action against an executor for the recovery of a legacy which the executor alleges has been paid by him to a stranger, for the benefit of the legatee, the stranger need not be joined as a defendant. (*Gleason v. Thayer*, 24 Barb. 82.) But in an action by a residuary legatee for his share of the residue, all persons interested in the residue must be made defendants. (*Tonnelle v. Hall*, 3 Abb. 205; and see *Towner v. Tooley*, 38 Barb. 598.) In the *Theological Seminary of Auburn v. Kellogg*, (16 N. Y. 84,) where the executor of H. died, leaving funds of his testator's estate mingled with his own, and they passed, so mingled, into the hands of his executor; it was held that in an action by a legatee named in the will of H., the residuary legatees named in said will should be parties.

In an action for the *foreclosure of a mortgage*, the owner of the equity of redemption is a necessary party. And the objection that he is not made a party may be made by the mortgagor. The fact that the deed from the mortgagor to the present owner of the equity of redemption, was not recorded at the time of commencing the suit, and filing the notice of *lis pendens*, will not excuse the omission of the owner of the equity of redemption as a party. (*Hall v. Nelson*, 23 Barb. 88; 14 How. Pr. 32; and see *Griswold v. Fowler*, 6 Abb. 113.) But where the mortgagor has parted with all his interest in the premises, and the owner of the equity of redemption is personally liable for any deficiency, it is not necessary to make the mortgagor a party defendant. (*Drury v. Clark*, 16 How. Pr. 424; and see *Crooke v. O'Higgins*, 14 id.

154.) One who claims adversely to the mortgagor and prior to the mortgage, cannot properly be made a defendant for the purpose of trying the validity of such adverse claim. (*Corning v. Smith*, 12 N. Y. 82.) But prior incumbrancers may be made parties to have the amount due them liquidated. (*Holcomb v. Holcomb*, 2 Barb. 20. See *Chapman v. Draper*, 10 How. Pr. 367.)

The receiver of a bank should not be joined as a party defendant in an action against the bank, in a mere money demand. (*Arnold v. Suffolk Bank*, 27 Barb. 424.)

In an action to stay proceedings on a judgment against three defendants, brought by one of such defendants against the plaintiff in the first suit, and a general assignee of such defendants, it was held that the other two defendants in the first judgment should have been made parties. (*Bowers v. Tullmadge*, 16 How. Pr. 325.) Where, after a vendor of real estate has conveyed it with covenants for title and warranty, a mortgage is discovered unsatisfied of record, but which the vendor insists is satisfied, the purchaser of the land may in an action to have the mortgage satisfied of record, join his vendor and the holder of the mortgage as defendants. (*Wandle v. Turney*, 5 Duer. 631.) In *Chapman v. Draper*, (10 How. Pr. 367,)—an action for the specific performance of a contract to convey land, part of a tract owned by one of the defendants, and upon which he had given mortgages prior to the contract to sell—it was held that the prior mortgagees were improperly made parties defendants.

Where goods have been obtained by fraud, and the purchaser has assigned them in trust for the benefit of creditors, an action may be maintained against such purchaser and his assignee to recover said goods. (*Jessop v. Miller*, 1 Keyes, 321.)

Where a principal and surety are liable on the same instrument, they may be sued jointly in one action. (*Carman v. Plass*, 23 N. Y. 286; *LeRoy v. Shaw*, 2 Duer. 626.) If the liability arises on different instruments, although on the same paper, they cannot be sued jointly. (*Ib.*; *De Ridder v. Schermerhorn*, 10 Barb 633; *Allen v. Fosgate*, 11 How. Pr. 218.)

The Code (§ 120) provides that persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action at the option of the plaintiff.

The contract of indorsers is independent and distinct from that of the makers; and although the statute gives the right of action against all parties to the note, in a single suit, it preserves the relations of the parties, and does not make them joint debtors. (*Farmers' Bank of Amsterdam v. Blair*, 44 Barb. 642; *Kelsey v. Bradbury*, 21 id. 531.)

Although the several parties to a bill or note may be sued in one action, yet their being so sued does not make them jointly liable, (*Alfred v. Watkins*, 1 Code R., N. S. 343,) or joint debtors, (*Kelsey v. Bradbury*, 21 Barb. 531; *Farmers' Bank v. Blair*, 44 id. 642.) An action may be brought against the maker and the indorser of a promissory note, although the maker is solvent; but separate judgments must be entered. (*Churchill v. Trapp*, 3 Abb. 360.) An action by a subsequent indorser against prior indorsers, to recover the amount he has been compelled to pay in a suit brought upon the note, is an action for money paid for the use of the defendants, and not an action on the note, and therefore such an action cannot be maintained. (*Barker v. Cassidy*, 16 Barb. 167.) Where a promissory note had a guaranty written upon it, the court held that the maker of the note and the guarantor could not be included in the same action. (*Carman v. Plass*, 23 N. Y. 286; *Phalen v. Dingee*, 4 E. D. Smith, 379; *Brewster v. Silence*, 8 N. Y. 214.)

The fact that certain parties in interest are numerous and unknown is a sufficient excuse for not joining them as defendants. (*Coe v. Beckwith*, 10 Abb. 293.) The rule that persons only severally and not jointly liable cannot be joined as defendants has not, as a general rule, been altered by the Code; the only exceptions are those prescribed by section 120. No exception is created by section 167. (*Le Roy v. Shaw*, 2 Duer. 626.) Persons having adverse or conflicting interests in relation to the subject matter of the litigation, ought not to be joined. (*Grant v. Van Schoonhoven*, 9 Paige, 255.) But where the right is common, but there is a question as to its enforcement, that does not constitute a conflicting interest. (*Brooks v. Peck*, 38 Barb. 519; see *Bishop v. Edmiston*, 16 Abb. 466.) One may not prosecute or defend "for the benefit of the whole" where the right to be enforced is not common to all. (*Reid v. The Evergreens*, 21 How. Pr. 319.) In *Kirk v. Young*, (2 Abb. 453,) it was held that the fact of the parties being thirty-five in number, was not an excuse for one suing in behalf of all.

It is the right of a party who is sued, to require that any other person jointly liable with him shall be made a co-defendant. (*Wooster v. Chamberlin*, 23 Barb. 602; *Van Name v. Van Name*, 23 How. Pr. 253.) But where joint debtors reside in different States, they may be sued separately in the States having jurisdiction of their respective persons or property. (*Brown v. Birdsall*, 29 Barb. 549.)

The executor or administrator of a deceased joint debtor or owner of real or personal property cannot be joined in an action with the survivor of a debt due the joint debtors, or for an injury to their real property. (*Bucknam v. Brett*, 22 How. Pr. 233; 13 Abb. 119; 35 Barb. 596.)

When a married woman is a party, her husband must be joined with her; except that, 1. Where the action concerns her separate property, she may sue alone; 2. Where the action is between herself and her husband, she may sue or be sued alone. In no case need she prosecute or defend by a guardian or next friend. (Code, § 114.)

It is settled, by several decisions under this section, that married women may now sue and be sued, in all matters relating to their separate estates, in the same manner as *feme sole*. (*Barton v. Beer*, 21 How. Pr. 309; 35 Barb. 81; *Morrell v. Cawley*, 17 Abb. 76.) In an action against a wife upon a contract relating to her separate estate, her husband should not be joined. (*Draper v. Stovenal*, 35 N. Y. 507; *Palmer v. Davis*, 23 N. Y. 242.) For a debt of the wife contracted before marriage, an action may be maintained against husband and wife jointly. (Laws of 1853, p. 1057.)

Judgment cannot be rendered against the husband in an action concerning the separate property of the wife. (*Walker v. Swayzee*, 3 Abb. 136; *Brownson v. Gifford*, 8 How. 389; see *Ackley v. Tarbox*, 31 N. Y. 564.) In such cases the husband cannot be joined. (*Smith v. Kearney*, 9 How. Pr. 466; *Swart v. Comstock*, 24 Barb. 411.)

In an action for necessities furnished to the wife during coverture, she should not be joined as a party; the husband alone being liable therefor. (*Main v. Stephens*, 4 E. D. Smith, 86.)

If a husband voluntarily abandons his wife, she may be treated as a *feme sole*. The burden of proof will rest upon the party maintaining the right of the wife to act as such. (*Chapman v. Lemon*, 11 How. Pr. 235.)

If a married woman, with the consent of her husband, contracts a debt founded on her separate property, the creditor can sue both if he wishes to bind her property, and sue him alone if he seeks to bind him personally. (*Smith v. Scribner*, 12 How. Pr. 501.) In an action to charge the separate real estate of a married woman where the plaintiff is entitled to the relief demanded in his complaint, the husband is properly a defendant. (*Goelet v. Gori*, 31 Barb. 314.)

Where the object of an action is to charge legacies upon real estate devised for the payment of the legacies, all the owners of the lands should be made parties defendant, so that a decree may be made against them, in case the personal estate of the testator or of the devisee should be insufficient to pay all the legacies. (*Towner v. Tooley*, 33 Barb. 598.) A receiver appointed for a judgment debtor may sue in his own name to recover usurious premiums paid by the debtor, without making the debtor a party to the action. (*Palen v. Bushnell*, 18 Abb. 301.) If such receiver sues to set aside as fraudulent, contracts made by the debtor, the latter has an interest in the action, and should be made a party. (*Id.*)

When an action is brought by the assignee of a demand, it is not, in general, necessary to make the assignor a party defendant. (*Allen v. Smith*, 16 N. Y. 415.) But the court may order the assignor of a claim in suit to be brought in as a party. (*Freeman v. Newton*, 3 E. D. Smith, 246.)

4. DEFECT OF PARTIES; HOW TAKEN ADVANTAGE OF.

The Code (§ 144, sub. 4) allows the defendant to demur to the complaint when it shall appear, upon the face thereof, that there is a defect of parties, plaintiff or defendant.

Under this subdivision it has been decided that a defect of parties plaintiff is a good cause of demurrer by all the defendants. (*Brownson v. Gifford*, 8 How. Pr. 392; *Walrath v. Hundy*, 24 id. 353.) A demurrer is proper only when the ground therefor appears on the face of the complaint. (*Getty v. Hudson River R. R. Co.* 8 How. Pr. 177; *Wilson v. Mayor, &c.*, of New York, 15 id. 500; S. C. 6 Ab. 6; 4 E. D. Smith, 675; 1 Ab. 4; *Coe v. Beckwith*, 31 Barb. 339; S. C. 19 How. Pr. 398; 10 Ab. 296.)

In an action for a debt contracted by partners, where a surviving partner and the personal representatives of a deceased partner are joined as defendants, and the fact appears on the face of the complaint, the objection to such joinder must be raised by demurrer. (*Higgins v. Freeman*, 2 Duer. 650.)

If husband and wife sue together for a cause of action in the husband alone, it is a defect of parties for which a demurrer will be sustained. (*Brownson v. Gifford*, *supra*; *Dunderdale v. Grymes*, 16 How. Pr. 195. And see *Acogardo v. Bull*, 4 E. D. Smith, 384; *Bartow v. Draper* 5 Duer. 130.)

The defect of parties defendant for which a demurrer is allowed, is a deficiency of, and not too many, parties. (*Peabody v. Wash. Mu. Ins. Co.*, 20 Barb. 342; *Gregory*

v. *Oaksmith*, 12 How. Pr. 134; *Pinckney v. Wallace*, 1 Ab. 82; *Voorthies v. Barter*, id. 44; *Crosby v. Berger*, 4 Edw. Ch. 210; *Churchill v. Trapp*, 3 Abb. 306; *Davy v. Betts*, 16 id. 446, n.; 23 How. Pr. 395; *Bank of Havana v. McGee*, 20 N. Y. 359; *Allen v. City of Buffalo*, 33 id. 230; *Richtmyer v. Richtmyer*, 50 Barb. 55.) The mere joinder of too many defendants is not a ground of demurrer by any one of them against whom the complaint sets forth a good cause of action. (*New York & New Haven Railroad Company v. Schuyler*, 17 N. Y. 592; S. C. 7 Ab. 41; *Manning v. The State of Nicaragua*, 14 How. Pr. 517; *Kolls v. De Leyer*, 17 Ab. 312; S. C. 41 Barb. 208; 26 How. 463.)

To sustain a demurrer under this subdivision, for the non-joinder of a defendant, it must appear that the party demurring has an interest in having such other party made a defendant. (*Hillman v. Hillman*, 14 How. Pr. 460; *Newbold v. Warren*, 14 Abb. 80.)

An improper joinder of parties plaintiff is not a subject of demurrer. (*Allen v. City of Buffalo*, 33 N. Y. 280.) So, where a creditor commences an action in his own behalf against a judgment debtor, the fact that there are other creditors who are not joined as plaintiffs, is not a ground of demurrer. (*Hammond v. Hudson River Iron Company*, 20 Barb. 378.)

A demurrer for non-joinder of parties lies where the court cannot determine the controversy before it without prejudice to the rights of others, nor by saving their rights. (*Wallace v. Eaton*, 5 How. Pr. 99.) Section 122 of the Code is to control, in determining whether a demurrer for defect of parties is well taken. (*Ib.*)

But a demurrer is not the *only* method of objecting to a complaint on the ground that there is a defect of parties. If the objection does not appear on the face of the complaint, it may be taken in the answer. (Code, § 147.) It is the right of a party who is sued to require that any other person jointly liable with him for the debt, shall be made a co-defendant, and the omission of the plaintiff to sue all the joint contractors may be set up in the answer, and is a complete defence to the suit. (*Wooster v. Chamberlain*, 28 Barb. 602.) If the relief be equitable in its nature, but cannot properly be granted without the presence of other parties, the objection of a defect of parties must be taken by demurrer or answer; and if not so taken, it must be held to be waived. (*The General Mutual Insurance Company v. Benson*, 5 Duer. 168.) It cannot be taken on the trial in the form of an objection to the complaint, as not stating facts sufficient to constitute a cause of action. (*Ib.*)

If the defendant intends to insist that his liability is joint, and that others who are jointly liable with him should be joined in the action, he must not only plead the non-joinder, but in so doing, must point out all those who, as he claims, should be made parties defendants. (*Fowler v. Kennedy*, 2 Abb. 347, 351; *Wigand v. Sichel*, 3 Keyes, 120; 33 How. Pr. 174.) If he fails so properly to plead the non-joinder, he cannot set up such non-joinder afterwards; and if the plaintiff establishes a cause of action, he will be entitled to judgment, even though there are others jointly liable who are not sued. (*Ibid.*) Yet if the answer setting up such a defence is defective in not averring that the other joint contractor is still living, the defect may be cured by the proof on the trial. (*Wooster v. Chamberlin*, 28 Barb. 602.) After full proof of the answer, and of all the facts essential to sustain the defence, without objection, it is too late to overrule the answer on the technical ground that it does not contain the averment that the joint debtor omitted to be joined is still alive. (*Ib.*) If the answer setting up such a defence is defective, in not averring that the other joint contractor is still living, the defect may be cured by the proof on the trial. (*Eaton v. Balcom*, 33 How. Pr. 80.) Unless it appears on the face of the complaint that the omitted defendant is dead, it will be presumed he is alive; and a demurrer is proper. (*Ib.*) So if the answer states the residence of the party omitted, his being alive will be inferred. (*Taylor v. Richards*, 9 Bosw. 679.)

If husband and wife sue together to recover a debt due to the husband alone, a demurrer for the improper joinder of parties will be sustained. (*Dunderdale v. Grymes*, 16 How. Pr. 195; *Avogardo v. Ball*, 4 E. D. Smith, 384; *Bartow v. Draper*, 5 Duer, 160.)

To sustain a demurrer on the ground of non-joinder of a defendant it must appear that the parties demurring have an interest in joining such other party. (*Hillman v. Hillman*, 14 How. Pr. 456; *Newbould v. Warrin*, 14 Ab. 80.) As that the party not joined is jointly liable with the one sued. (*Wooster v. Chamberlin*, 28 Barb. 602.) And when there is a non-joinder of parties defendant, it must appear from the complaint that such parties were living when the action was commenced; otherwise the objection must be taken by answer and not by demurrer. (*Scofield v. Van Syckle*, 23 How. 97.)

Section 122 of the Code, is the controlling section in determining whether a demurrer for defect of parties is well taken. (*Wallace v. Eaton*, 5 How. Pr. 99;

S. C. 3 Code R. 161.) If the court cannot determine the controversy before it without prejudice to the rights of others, or by saving their rights, then a demurrer for non-joinder is well taken. (*Ibid.*)

5. ORDERING OTHER PARTIES TO BE BROUGHT IN.

Section 122 of the Code provides that the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but directs that when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in. And when in an action for the recovery of real or personal property, a person not a party to the action but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by proper amendment.

Under this section it has been held that the court may determine any controversy between the parties before it; but where each of the defendants merely asks to have the complaint dismissed, no other relief can be gained on appeal. (*Garvey v. Jarvis*, 54 Barb. 179.) When a complete determination of the controversy cannot be had without the presence of other parties, is where there are persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. (*McMahon v. Allen*, 12 How. Pr. 39; S. C., Ab. 89; 1 Hilt. 103.) Frequently those who are named parties must be made parties by the service of process in order properly to determine the controversy. (*Powell v. Finch*, 5 Duer. 636.)

Section 122 of the Code renders it the imperative duty of the court to bring in additional parties when a complete determination of the controversy cannot otherwise be had. (*Shaver v. Brainard*, 29 Barb. 25; *Davis v. The Mayor, &c., of New York*, 2 Duer. 663.)

The court will not allow the plaintiff to bring in a new party defendant when the presence of such party is the condition of his recovery. Such a proceeding would be equivalent to the commencement of a new action. In such a case the defendant would have the right to ask that other parties be brought in for his protection, but he may waive the right. (*McMahon v. Allen*, 12 How. Pr. 39.)

In an action against the indorsers of a promissory note, the court cannot make an order compelling the plaintiff to bring in other parties to the note. (*Sawyer v. Chambers*, 11 Ab. 110.)

The court may order non-residents to be made parties. (*Sturtevant v. Brewer*, 17 How. Pr. 571; S. C. 9 Ab. 414, 4 Bosw. 628.) When the cause stands over to allow other parties to be brought in, the defendant should not be allowed costs unless he has pleaded the objection. (*Mitchell v. Bailey*, 3 Mad. Ch. 61.) The court may order the assignor of a claim in suit to be brought in as a party. (*Freeman v. Newton*, 3 E. D. Smith, 246.)

6. SUBSTITUTION OF PARTIES.

The Code (§ 122) provides that a defendant against whom an action is pending upon a contract, or for specific, real or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct. And the court may in its discretion make the order.

The provision of this section for the substitution of parties is founded on the English statute; and the decisions under that statute seem to have settled the rule that it is only when no other question than the right of property is to be litigated, that an interpleader can be allowed. (*Sherman v. Partridge*, 1 Ab. 256; S. C. 11 How. Pr. 154; 4 Duer. 646.) This is a concurrent remedy with the action of interpleader, but can only be taken advantage of after an action has been commenced. (*McKay v. Draper*, 27 N. Y. 256, 260; *Patterson v. Perry*, 14 How. Pr. 505; S. C. 6 Duer. 686; *Beck v. Stephani*, 9 How. Pr. 193.) The section provides a summary mode of relief, but introduces no new cause of interpleader. (*Ibid.*; *Vosburgh v. Huntington*, 15 Ab. 254.)

In an action to recover specific personal property, it is a sufficient objection to an application for substitution, that the property in question cannot be brought into court. (*Vosburgh v. Huntington*, 15 Ab. 254.) In *McKay v. Draper*, (27 N. Y. 256.) where money was deposited with a party to be paid on certain conditions, and an action was brought against such bailee by a third party, the court said that the proper

ance of all preliminary acts necessary to complete the complainant's title. (q) (9)

(q) *Walburn v. Ingilby*, 1 Mylne & Keen, 61.

way for the bailee to protect himself, and the person who was entitled to the money, was by obtaining an order of substitution under the above section of the Code. In *Fletcher v. Troy Savings Bank*, (14 How. Pr. 383) a party deposited money in a savings bank, and then transferred his interest to another. A receiver of the property of the depositor claimed the deposit, and the one to whom it had been transferred, brought an action against the bank, therefor: *Held*, that on payment of the money into court, the receiver should be substituted as defendant, in place of the bank.

An action was brought by the assignees of a depositor to recover the deposit, and those who held it were served with an attachment in another action commenced by parties who claimed the fund. *Held*, a proper case for substitution. (*Wilson v. Duncan*, 8 Ab. 354.) But where a third party, *not in privity with the depositor*, claims money which has been deposited in a savings bank, such bank will not be allowed to implead the adverse claimants. (*Lund v. The Seamen's Bank for Savings*, 20 How. Pr. 461; S. C. 23 id. 258.)

A condition of granting an order substitution is, that the applicant has no interest in the subject of controversy. Hence, an order will not be granted in an action against the consignee of goods, who has sold the same, and holds a balance of the fund in his hands, making a claim for interest, which is contested. (*Patterson v. Perry*, 14 How. Pr. 505; S. C. 6 Duer. 686. See also *Wakeman v. Dickey*, 19 Ab. 24; *Moore v. Usher*, 7 Sim. 384; *Braddick v. Smith*, 9 Bing. 84; *Mitchell v. Hayne*, 2 Sim. and Stu. 63.)

The defendants being common carriers, certain property placed in their charge for transportation, was claimed by two different parties having distinct and separate interests; and one brought an action for the recovery of the goods, and the other threatened an action. *Held*, that it was a proper case for an order to substitute the latter as defendant. (*Schuyler v. Hargous*, 3 Rob. 673.)

The successful applicant for an order of substitution is entitled to his costs out of the fund in question. (*Van Buskirk v. Roy*, 8 How. Pr. 425.) The unsuccessful applicant is liable for costs in all cases, except where special circumstances have induced the court to exercise its discretion in his favor. (*Miller v. De Peyster*, 1 Ab. 234, 235; S. C. 4 Duer. 203; *Richards v. Salter*, 6 John. Ch. 448; *Mason v. Hamilton*, 1 Sim. 19.) Thus, in *Miller v. De Peyster*, *supra*, an order was made that the party who had failed to obtain an order of substitution should pay the costs recovered by the plaintiff and those of his co-defendant, both in the suit and in an action at law commenced by him in relation to the same matter.

An order of substitution is appealable. (*Wilson v. Duncan*, 11 Ab. 3.)

(9) A plaintiff must allege in his bill that he has done, or offered to do, or is ready to do, everything necessary to entitle him to the relief he seeks, or sufficient excuse for its non-performance. (*Oliver v. Palmer*, 11 Gill and John. 426.)

The Code (§ 162) provides that in pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. It has been decided that the rule established by this section is as applicable to cases relating to negotiable paper as to any other case. (*Ferner v. Williams*, 37 Barb. 9; S. C. 14 Abb. 215.)

Section 162 of the Code also provides that in an action founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon, a specified sum which he claims.

It has been held that under this clause of the section, where a note was written in the French language, it might be set out in that language. (*Noury v. Dubosty*, 12 Abb. 128.) Under the same clause, a complaint against the maker of a promissory note is sufficient as a pleading where it sets forth a copy of the note, and alleges that a specified sum is due thereon to the plaintiff, although it was drawn payable to a third person, and there is no allegation in the complaint of an indorsement by him. (*Continental Bank v. Bramhall*, 10 Bosw. 595.)

In *The Butchers' and Drivers' Bank v. Jacobson*, (24 How. Pr. 204; S. C. 15 Abb. 215; 9 Bosw. 575,) a complaint drawn under this section, alleging an amount due to the plaintiff from the defendants on a written instrument, setting out a copy of a

The same precision in showing an interest, which is required in set-

promissory note signed by the defendants, payable to the order of the makers, indorsed by them in blank, and claiming judgment for the amount, was held sufficient under the decision in *Prindle v. Caruthers*, (15 N. Y. 425.) In that case the complaint stated that the defendant made "his contract in writing," and set forth a copy thereof, in which the defendant, "for value received, promised to pay," but the complaint did not aver any consideration for the contract in direct terms. It also stated that such contract became the property of the plaintiff by purchase, without stating when, for whom, or upon what consideration. *Held*, that these defects were not of such a substantial nature as to be available under a ground of demurrer that the complaint did not state facts sufficient to constitute a cause of action; but that the remedy was by motion, to make the faulty pleading more definite and certain. It was also held in that case, that if the complaint was insufficient as a common law pleading, on the ground that the plaintiff did not make title to the contract, the defect was cured by its setting out a copy thereof under section 162 of the Code.

Whichever party seeks to enforce a contract against the other, must show performance, or a tender of performance, on his part. (*Dunham v. Mann*, 8 N. Y. 503; *Pickett v. Brice*, 22 How. Pr. 194; *Lester v. Jewett*, 11 N. Y. 458; *Smith v. Wright*, 1 Abb. 243.) Where the plaintiff, in a bill for the specific performance of a contract to convey, has partially performed the contract on his part, a formal allegation in the bill, that he is ready to complete performance is unnecessary. (*Hatcher v. Hatcher*, 1 McMullen's Ch. 311.) So where each party has in part performed. (*Grant v. Johnson*, 5 Barb. 161; *Wallace v. Warren*, 1 Dowl. and L. 60. And see 8 Barb. 535; 4 id. 36; 29 id. 316.)

Where, to entitle a plaintiff to recover, he must show performance of a condition precedent, or a valid excuse for its non-performance, and there has been no performance, but the plaintiff intends to rely upon the excuse, the complaint should state the facts in excuse, and not state that he duly performed; for, under an allegation of performance, evidence in excuse of non-performance is not admissible. (*Oakley v. Morton*, 11 N. Y. 33; *Garvey v. Fowler*, 4 Sandf. 665; *Clark v. Crandall*, 27 Barb. 73; *Holmes v. Holmes*, 9 N. Y. 525; *Hosley v. Black*, 28 N. Y. 438.) In *Rowland v. Phalen*, (1 Bosw. 44,) a complaint which alleged that the plaintiff had "fully and faithfully" performed, was held equivalent to alleging that he had *duly* performed.

In an action upon a policy of insurance, the complaint stated that on account of war between the communities in which the parties to the policy resided, "all payments of premiums was impossible," and that "communication was suspended." *Held*, that this was not a pleading of impossibility, so as to excuse a non-payment of the moneys due on the policy. (*O'Reilly v. Mutual Life Insurance Company*, 2 Abb., N. S. 167.)

If the complaint founds the right against the defendant upon the fact of his having had notice, it should charge such notice directly; otherwise it is not matter in issue upon which the court can act. (Story Eq. Pl. § 263, and cases in notes.) In *Adams v. Sherrill*, (14 How. Pr. 297,) it was held that a complaint against the maker and indorser of a promissory note, which alleged the making of the note, and its indorsement and transfer by the payee, the indorser, to the plaintiff, and that payment of the note was *duly* demanded at maturity, and it was thereupon *duly* protested for non-payment, and notice thereof *duly* given to the indorser, would have been insufficient to charge the indorser previous to the Code; but that under the 162d section, it must be regarded as a general statement of the performance of the condition precedent to the plaintiff's right to recover, and was therefore sufficient.

So where a note was payable at a particular place, and the complaint did not allege presentment at that place, but only that it was *duly* presented, this was held sufficient. (*Gray v. Paine*, 5 How. Pr. 103; *Ferner v. Williams*, 14 Abb. 315.) In a suit to enforce an equitable title to lands, it is not necessary that the complaint should charge the defendant with notice of the plaintiff's equity. If the defendant claims as a purchaser without notice, he should set up by way of answer, the facts which entitle him to protection as such. (*Makepeace v. Davis*, 27 Ind. 352.)

In some cases it is necessary to allege a demand of the property before bringing the suit. If, in such a case the plaintiff omits to allege a demand in his complaint, the omission will be cured by proof of the fact, by the report of a referee finding the fact of a demand and by the judgment. (*Fullerton v. Dalton*, 58 Barb. 236.) The plaintiff is only bound to allege a request when it is the object of the request to oblige the defendant to do something. (18 Eng. Com. Law Rep. 355.) If a defendant is liable to pay without any request, no request need be alleged. (*Smith v. Emery*,

ting out the complainant's case is not requisite in setting out that of

7 Halst. 53, 61.) So when a plaintiff is entitled to a conveyance on request, he may bring his action without any request. (*Bruce v. Tilson*, 25 N. Y. 194.) Where one engages to pay on demand the debt of another, no debt is due from him until demand has been made; and in such a case, a prior demand must be alleged. (*Milliken v. Byerly*, 6 How. Pr. 224.) So a request must be alleged on a claim payable "after demand." (1 R. and M. 388,) or at a particular place, (*Ferner v. Williams*, 14 Abb. 215.) but not on a note payable "on demand," as the commencement of the action is a demand. (4 B. and C. 327; 2 Scott, 334; and see 24 Barb. 300; 36 id. 629.) So where the defendant came by chattels wrongfully, or has converted them, no demand is necessary. (*Pilsbury v. Webb*, 33 Barb. 213.) But otherwise where the defendant came lawfully by the possession. (*New York Car Oil Company v. Richmond*, 6 Bosw. 213; *Powers v. Bassford*, 19 How. Pr. 309; *Fuller v. Lewis*, 3 Abb. 384; *Gurney v. Kenny*, 3 E. D. Smith. 132; *Barrett v. Warren*, 3 Hill, 315; *Stone v. Livingston*, 6 John. 44; *Purves v. Moltz*, 5 Rob. 653.) So a request must be alleged in a complaint in a contract to deliver up a bond "on request," (3 Bulstr. 297,) or to pay money "on request," (3 Camp. 453,) or to pay an annuity on request, (Cro. Eliz. 548, 721,) or to perform any act on request, (1 Sand. 32; *Smith v. Tiffany*, 36 Barb. 23; *Payne v. Gardner*, 29 N. Y. 146;) or on a promise as surety, to pay rent on request, (6 M. and S. 9, 121, 125; 11 Price, 494,) or to abate a nuisance, (24 Barb. 404; 12 N. Y. 492.) But the rule requiring a demand does not apply to a commission merchant who is to sell and guaranty payment, unless he be a foreign factor, in which case a demand is necessary. (*Holden v. Craft*, 4 E. D. Smith, 490; *Cooley v. Betts*, 24 Wend. 203.) Nor does it apply to a surety for rent, after the tenant has left the premises. (*McKenzie v. Farrell*, 4 Bosw. 193,) nor to the case of a joint promissory note, given by the principal debtor, and another as his surety. (*Exparte Whitworth*, 2 Mon. D. and De G. 158,) nor to an action to recover of a stockholder on an illegal wager, (*O'Maley v. Reese*, 6 Barb. 653,) or to foreclose a mortgage, (*Harris v. Mulock*, 9 How. Pr. 402,) although expressed to be payable on demand. (*Gillett v. Balcom*, 6 Barb. 371.)

A demand of goods contracted to be sold, is not required when it would be useless to make one; as when the vendor has disabled himself from complying with the contract, or where a waiver of demand may be inferred from his declarations and conduct. (*Clark v. Crandall*, 3 Barb. 612.) Where a party covenants to convey land, he is not in default until the covenantee, being entitled to a conveyance, has demanded it, and having waited a reasonable time to have it drawn and executed, has made a second demand. But if, on the first demand being made, the covenantor absolutely refuses to convey, it seems a second demand is unnecessary. (*Lutweller v. Linnell*, 12 Barb. 512.)

When there is an executory contract for the sale of an article to be paid for upon delivery at any time within a certain period, in an action by the vendor for the price, it is not enough simply to show the default of the purchaser. The plaintiff must show that he was ready and offered to deliver the goods. (*Dunham v. Mann*, 8 N. Y. 508; *Kelly v. Upton*, 5 Duer. 336; *Cornwall v. Haight*, 8 Barb. 323; *Crandall v. Clark*, 7 id. 169; *Considerant v. Brisbane*, 14 How. Pr. 487; 2 Bosw. 471; *Dunham v. Pettie*, 4 E. D. Smith, 500, 21 N. Y. 397; and see *McKnight v. Dunlop*, 4 Barb. 36; *Fancher v. Goodman*, 29 id. 316.) If the plaintiff intends to rely upon a constructive delivery, he must not plead merely that the thing was delivered, but must allege the facts which he claims constitute a delivery. (*Smith v. Leland*, 2 Duer. 497.) In a complaint for the wrongful detention of personal property, an allegation of demand and refusal before suit, is not necessary; but an allegation of ownership in the plaintiff is necessary, and if omitted, the complaint is fatally defective. (*Scotfield v. Whitelegge*, 10 Ab., N. S. 104.) The fact that the plaintiff has not actual possession of the note sued upon, does not affect his right to sue upon it. (*Selden v. Pringle*, 17 Barb. 468; *Hastings v. McKinley*, 1 E. D. Smith, 273.)

In an action for the non-delivery of goods, pursuant to a contract for sale and for delivery at a particular place, the plaintiff need only allege that he was ready at the time and place appointed for the delivery to receive and pay for the goods. He need not allege payment nor an offer to pay. (*Bronson v. Wiman*, 8 N. Y. 183.)

Where it was agreed that the plaintiff, in consideration of the payment by the defendant of a specified sum on a day named, and on the delivery to him of certain notes, would make a certain assignment to the defendant, it was held that the money not being paid on the day named, the plaintiff might maintain his action therefor, without alleging that he had performed or offered to perform on his part. (*Smith v. Betts*, 16 How. Pr. 251.)

the defendant against whom the relief is sought, because a complain-

The general rule is that full performance of an entire contract to do any particular service, is essential to the payment of compensation, and that no recovery can be had for a part performance. (14 Wend. 257; 12 John. 165; 19 id. 337; 8 Cowen, 63; 11 N. Y. 25.) It is no excuse that the service which a party has undertaken to perform is impracticable in itself. (*Wolf v. Howes*, 24 Barb. 174, 666; 20 N. Y. 197.) Yet the sickness or death of the party contracting, is a legal excuse for the non-performance. (*Id*; *Fahy v. North*, 19 Barb. 341.) and so is the fact that complete performance is rendered impossible by the act of the law. (*Jones v. Judd*, 4 N. Y. 411.) Where such an excuse exists, a recovery may be had for the part of the work actually performed. (*Wolfe v. Howes*, 20 N. Y. 197.)

The meaning of the last clause of section 162 of the Code is, that instead of setting forth the instrument, according to its legal effect, it is sufficient to give a copy of it. (*Conklin v. Gandall*, 1 Keyes, 231.) In *Prindle v. Caruthers*, (15 N. Y. 220,) the complaint set out a copy of the instrument, whereby the defendant promised to pay a sum of money to C., and then alleged that the contract was the property of the plaintiff by purchase, and that the defendant was justly indebted to the plaintiff on said contract, \$200, which the plaintiff claimed. On demurrer to the complaint, it was held sufficient. So a complaint by indorsees, which stated only "there is due to the plaintiff from the defendant \$2,400, with interest from, &c., on a written instrument, of which the following is a copy: (Here followed a copy of a promissory note payable to the defendant's order, with copy of the signatures and of the indorsements.) That the plaintiffs have duly performed all the conditions in said contract on their part, and claim the said sum and interest," was held sufficient in the *Butchers' Bank v. Jacobson*, (15 Abb. 220, 24 How. Pr. 204.)

A party seeking the aid of a court of chancery must show distinctly and unambiguously, all the facts necessary to entitle him to that aid. (*Shepard v. Shepard*, 6 Conn. 37.) In *Wood v. Genet*, (4 Paige, 137,) the plaintiff stated in his bill, that he had purchased the estate in question, and taken a conveyance from the widow of the prior holder, and from the guardian of two of the infant heirs, and from one adult heir, but did not state that there were no other heirs, or that the guardian had any authority to sell the real estate of the infants. It was held that this was not a sufficient statement of title.

A bill for relief for an injury to the property of the plaintiff must show not only that he was owner of the property at the time of the injury, but also that he is owner at the time of filing the bill. (*Wiggin v. Mayor of New York*, 9 Paige, 16.) A bill by trustees, alleged that a former trustee had resigned, and that one of the plaintiffs had been "duly appointed" in his place. This was held on demurrer, to be a sufficient allegation of the removal and appointment; and it was held that the requisites to the validity of such appointment would be presumed. (*Cruger v. Halliday*, 3 Edw. 565.) In *Champlin v. Parish*, (3 Edw. 581,) a bill by trustees, under a will in relation to the estate, showed that the will was so framed as to pass the real estate to the trustees, and that they became seised and possessed of the estate. It was held that the bill showed sufficient title in them, although it did not allege the proving of the will.

The allegation as to the plaintiff's title should be positive and circumstantial, and not a mere conclusion of law. Hence, a bill alleging that the complainant has "a superior title both in law and equity," but not describing the nature of the claim or referring to any document of title, should be dismissed. (*Clark v. Bell*, 2 B. Monroe, 1.)

Where a bill is filed to enforce a deed of trust, which is opposed by a judgment creditor, and it appears on the face of the bill that the deed was not properly recorded, so as to give it priority over the judgment, the court will take notice of the defect, though the objection be not taken in the answer. (*Peacock v. Tompkins* 1 Humph. 35.) In an action to recover an interest in lands in Ohio, brought by one claiming under a will made and proved in another State, it must appear on the face of the bill, that the will has been proved and recorded in Ohio, according to the requisitions of the statutes of that State in such cases, in order to give the same validity and effect to the will as if made in Ohio. (*Kerr v. Moon*, 9 Wheat. 565.)

A complainant seeking equitable relief in a case in which the plaintiff by the rules of chancery, must pay the sum equitably due from him, should not be dismissed because it does not contain in terms an offer to pay such amount. The plaintiff, on establishing his case in other respects, may have a judgment that on paying a specified sum, he may have the relief appropriate. (*Beecher v. Ackerman*, 1 Rob. 30; 1 Abb. N. S. 141 S. C.)

ant cannot always be supposed to be cognizant of the nature of a defendant's interest. (r) And even where it is evident, from the nature of the case, that the complainant must be cognizant of the defendant's title, and sets out the same informally, yet if he alleges enough to show that the defendant has an interest, it will be sufficient. (s)

Prayer for relief.] The bill, as has been already stated, must also pray the court to grant the proper relief suited to the case as made by the bill; and if, for any reason founded on the substance of the case as stated in the bill, the complainant is not entitled to the relief he prays, either in whole or in part, the defendant may demur. (t) 10)

(r) *Baring v. Nash*, 1 Ves. & B. 551.

(s) *Roberts v. Clayton*, 3 Anst. 715.

(t) *Mitt. Eq. Pl.* 133.

(10) DEMAND FOR RELIEF.

The Code requires that the complaint shall contain, besides the matters already specified, a demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated. (Code, § 142.) The Code of *Minnesota* contains the same provision. (Public Statutes, ch. 60, sec. (63) LIX, sub. 3.) The Code of *California* has the same. (Cal. Prac. Act, § 147, sub. 3.) See also Codes of *Nevada*, *Idaho*, *Arizona*, &c.

The plaintiff may demand any kind of relief to which he supposes himself entitled, and he is not confined to one kind of relief. The defendant has nothing to do with the form of the relief demanded. (*Hall v. Hall*, 38 How. Pr. 97.) Where the facts stated may constitute one of two actions, which of the two is the proper one is to be determined on the trial. (*Ib.*)

The prayer for relief does not constitute any part of the "statement of facts." and a demurrer, therefore, will not lie to it. (*Averill v. Taylor*, 5 How. Pr. 478; *Beale v. Hayes*, 5 Sandf. 640.) It is no part of the cause of action, and does not determine the character of the action. That is shown by the facts stated in the complaint. (*Graves v. Spier*, 58 Barb. 349.) But the kind of relief sought should be explicitly demanded. (*Bankston v. Farris*, 26 Mo. 175; *Biddle v. Boyce*, 13 id. 532.)

In *chancery* the bill concludes with a prayer specifically for the relief which the plaintiff conceives himself entitled to, and also for general relief. (1 Dan. Ch. Pr. 3d Am. Ed. 382.) And it is said the latter can never be properly and safely omitted, because if the plaintiff should mistake the relief to which he is entitled in his special prayer, the court may afford him the relief to which he has a right, under the prayer for general relief; provided, it is such relief as is agreeable to the case made by the bill. (*Ib.*; note 3; *Mitt. Eq. Pl.* 38, 45; *Coop. Eq. Pl.* 13, 14; *Colton v. Ross*, 2 Paige, 396; *English v. Toxall*, 2 Peters, 595; *Peck v. Peck*, 9 Yerg. 301.) Relief not specifically prayed for may be claimed under the prayer for general relief. (*Beaumont v. Boulton*, 5 Ves. 435; *Story Eq. Pl.* § 41, note.) Though this rule is not universal, as where an injunction is wanted, a special prayer is necessary. (*Story Eq. Pl.* § 41: 2 *Story Eq. Jur.* § 862, 863; *Walker v. Devereaux*, 4 Paige, 248.)

Under the Code, the prayer for general relief in a complaint is proper, and will not be struck out on motion. (*Hemson v. Decker*, 29 How. Pr. 385.) A good cause of action, fully set out in a complaint, is not vitiated by an inappropriate prayer. Nor can a complaint be struck out for that reason, particularly when there is a prayer for general relief. The general prayer cures any defect in the specific prayer, and enables the court to give proper relief, and may be inserted for that purpose in every complaint, and is always proper and appropriate. (*Ib.*) The demand of relief is an important part of the complaint, especially where it is probable that there may be a judgment recovered by default, for in such case the relief cannot exceed that demanded in the complaint. (*Van Sant. Eq. Pr.* 107; *Code*, § 275; *Hurd v. Leavenworth*, 1 Code Rep., N. S. 278; *Simonson v. Blake*, 20 How. Pr. 484; S. C. 12 Abb. 331,) though in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. (*Code*, § 275.) Where the plaintiff in his complaint asked to have notes to the amount of \$5,000 delivered up and cancelled, and to have a judgment for \$2,000, it was held that a judgment for

Bill must be brought for the whole subject.] The bill must also be brought for the whole subject in dispute. The court will not permit a bill to be brought for part of a matter only, so as to expose a defend-

\$7,000 exceeded the relief sought in the complaint, and the judgment was reversed. (*Hurd v. Leavenworth, supra.*) It is not enough that the complaint states facts entitling the plaintiff to certain relief; he cannot in the absence of an answer, have any relief not demanded. (*Simonson v. Blake*, 12 Abb. 331; 20 How. Pr. 454; *Walton v. Walton*, 32 Barb. 203; S. C. 20 How. Pr. 347.) Thus, where in a foreclosure suit, the complaint only prays for a sale, the plaintiff cannot, in the absence of an answer, take a judgment for the payment of any deficiency. (*Ib.*)

The relief must follow the complaint. The rule that a party must recover according to the case made by the complaint, or not at all—*secundum allegata*, as well as *probata*—is not affected by the Code. No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some parts of the pleading and evidence. (*Rome Exchange Bank v. Eames*, 1 Keyes, 583.) Thus, in an action against a corporation, to recover compensation for a grant of property to them, the plaintiff on failing to recover, cannot have judgment for a restoration of the property, if he has not asked any such relief. (*Coleman v. Second Avenue Railroad Company*, 33 N. Y. 201; S. C. 48 Barb. 371.) So where the cause of action set forth in the complaint was a breach of a covenant for renewal contained in a lease, and the only relief demanded was judgment for a specified sum as damages, it was held that the only cause of action cognizable by the court, was that stated in the complaint, and that it was therefore immaterial whether or not the evidence made out a case for specific performance. (*Ryder v. Jenny*, 2 Rob. 56.)

A judgment giving the plaintiff relief not demanded in the complaint is not merely irregular, but voidable as unauthorized, and the right to move to vacate it is not limited to one year. (*Simonson v. Blake*, 12 Ab. 331.)

To entitle the plaintiff to a temporary injunction, it is not necessary to ask for it in the complaint. (See *Vincent v. King*, 13 How. Pr. 234.)

It is held in California that where a party asks for specific relief, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented. (*People v. Turner*, 1 Cal. 152.) And if specific relief cannot be granted, such relief as the case authorizes may be had under the prayer for general relief. (*Ib.*; *Truebody v. Jacobson*, 2 Cal. 269; *Rollins v. Forbes*, 10 id. 299.)

If the defendant appears and puts in an answer, it is said "it is of no consequence what is the demand for relief in the complaint, or whether there is any for specific relief. Whether the plaintiff has mistaken the kind of relief to which he is entitled is entirely immaterial." (*Marquat v. Marquat*, 7 How. Pr. 423; aff'd 12 N. Y. 336.) The court will in such case give such relief as the parties are entitled to, whether demanded in the complaint or not. (*Jones v. Butler*, 30 Barb. 641; S. C. 20 How. Pr. 159.) that is, such relief as is proper in reference to the parties before the court. (*Smith v. Howard*, 20 How. Pr. 151; *Eldridge v. Adams*, 54 Barb. 417,) and is consistent with the case made by the complaint and embraced within the issue. (*Covenhoven v. City of Brooklyn*, 38 Barb. 9,) provided an action is the proper remedy. Where the complaint asked for damages for keeping the plaintiff out of office, and to have the certificate of the defendant's election declared void, the complaint was dismissed because the plaintiff should have proceeded by *quo warranto*. (*Hart v. Harvey*, 21 How. Pr. 382.)

If the complaint alleges, and the evidence shows facts making an accounting necessary, it is not material that the complaint does not in terms ask for it, for it may be allowed under a general prayer for relief. (*Dyckman v. Valiente*, 42 N. Y. 549; aff'g. S. C. 43 Barb. 131; 28 How. Pr. 346; *Emery v. Pease*, 20 N. Y. 62.) In *Wood v. Brown*, (34 N. Y. 337,) where the complaint was inartificially framed, but contained a prayer for general relief, the facts showing that it was a case for an accounting, an accounting was adjudged under a prayer for general relief; but where the complaint alleges a partnership and asks for an accounting, if the plaintiff fails to establish the partnership, he cannot have an accounting. (*Salter v. Ham*, 31 N. Y. 321.) Where the complaint prayed that a deed of trust should be declared "void, null, and of no effect," and also for general relief, it was held that although the deed could not be declared to be void, null, and of no effect, yet that under the general prayer of the complaint, the court might allow it to be reformed; and it was reformed by inserting in it a power of revocation. (*Grafton v. Remsen*, 16 How. Pr. 32.)

The intent of the provision in subdivision 2 of section 275 of the Code, was to relieve a plaintiff from any technical objection that he has not prayed for the precise relief to

ant to be harassed by repeated litigations concerning the same thing. (u)
Nor for one of two claims upon the same defendant. (v)

(u) Id. 14.

(v) *Purefoy v. Purefoy*, 1 Vern. 29.

which, on the trial, it may seem he is entitled, but the relief to be granted must still be consistent with the case made by the complaint. (*Bradley v. Aldrich*, 40 N. Y. 510.)

In *Armitage v. Pulver*, (5 Trans. App. 183; 37 N. Y. 494,) it was held that it is not error to allow a plaintiff any judgment to which, upon the allegations and proof, he is entitled, either at law or in equity. The decisions which hold that if a party brings an equitable action, he must maintain it upon equitable grounds, or fail, even though he may on the trial prove a good cause of action, are not inconsistent with the rule laid down in the case last cited.

Where the complaint unites legal and equitable causes of action, if the evidence sustains either, judgment should be rendered accordingly, whether the action be tried at circuit or special term. (*New York Ice Company v. Northwestern Insurance Company*, 23 N. Y. 357; *Davis v. Morris*, 33 id. 519; *Getty v. Hudson River Railroad Company*, 6 How. Pr. 263; S. C. 10 Leg. Obs. 85.)

Thus, where the complaint prays for the reformation of a contract, and damages for its breach, and the court finds the plaintiff not entitled to have the contract reformed, but that he is entitled to damages for its breach, the plaintiff should have judgment for the damages proved. (*Ibid*; *Bidwell v. Astor Mutual Insurance Company*, 16 N. Y. 363.) Where a complaint claims the benefit of a trust deed, treating it as valid, relief cannot be given on the ground that the deed is void. (*Rome Exchange Bank v. James*, 1 Keyes, 583.) So a case for relief from a foreclosure on the ground of fraud, is not consistent with relief in damages for deceit. (*Bradley v. Aldrich*, 40 N. Y. 504.) But a case for specific performance, and in default thereof, compensation in damages is consistent with relief in damages merely. (*Scott v. Barlow*, 24 N. Y. 40; *Greason v. Keteltas*, 17 id. 491; and see *Marquat v. Marquat*, 12 id. 333.) Where the complaint alleges fraudulent representations on the part of the defendant, by which the plaintiff was induced to pay him money, and which is sought to be recovered, the plaintiff may recover as for money received to his use, without any proof of fraud. (*Byrbie v. Wood*, 24 N. Y. 607.) So on a complaint for forcible entry on the plaintiff's land and carrying away his goods, the plaintiff may have judgment for goods converted without force. (*Colton v. Jones*, 7 Rob. 164; and see *Eldridge v. Adams*, 54 Barb. 417.) In an action for relief from a usurious contract, the complaint will not be dismissed at the trial, because it does not contain an offer to pay what is equitably due; but the plaintiff may have judgment conditioned on his paying what is equitably due. (*Beecher v. Ackerman*, 1 Abb. N. S. 141; S. C. 1 Rob. 30; and see *Beach v. Cooke*, 28 N. Y. 508.)

Where an action is to obtain legal relief only, (the recovery of money,) and the plaintiff on the trial fails to establish a right to recover on legal grounds, he cannot have equitable relief. (*Towle v. Jones*, 19 Abb. 449.) So under a complaint framed to set aside an assignment on the ground of fraud, the plaintiff failing to obtain that relief, cannot have a judgment settling the construction of the instrument. (*Hotop v. Neidig*, 17 Abb. 332.)

In pleading, a party is now to state the facts on which he relies to sustain a recovery, and if issue be taken thereon, he will be entitled to just such a judgment as the facts established will by the rules of law warrant, without regard to the form or name of his action. (*Eldridge v. Adams*, 54 Barb. 417.) As the forms of pleading do not now control the court in an action for wrongfully taking and carrying away and converting property, must examine the evidence, and if the proof or facts found by the jury, entitle the plaintiff to a judgment, such judgment should be given, even though not asked for by the complaint. (*Ibid*.)

There is no reason against uniting in one action claims for both legal and equitable relief, (*Getty v. Hudson River Railroad Company*, 6 How. Pr. 263; *New York Ice Company v. Northwestern Insurance Company*, 21 id. 293; *Stevenson v. Buxton*, 15 Abb. 352; *Sheehan v. Hamilton*, 3 Abb. N. S. 197; *Davis v. Morris*, 36 N. Y. 563,) provided, they are not inconsistent with each other, (*Linden v. Fritz*, 3 Sandf. 633; *Young v. Edwards*, 11 How. Pr. 201; *Trull v. Granger*, 8 N. Y. 115.) and the matter arises out of the same transaction. (*Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 id. 224; *Weaver v. Conger*, id. 237; *Rollins v. Forbes*, id. 300; *Hill v. Taylor*, 22 id. 191; *Moses v. Walker*, 2 Hilt. 533; *Phalen v. Bushnell*, 46 Barb. 24.) But they should be separately stated in the complaint. (*Gates v. Kieff*, *supra*; *Getty v. Hud-*

Must state the whole case.] Care should be taken in framing the bill that every thing which is intended to be proved, be stated upon the face of it; otherwise evidence cannot be admitted to prove it. (w) Nor will even an inquiry be directed before the master, unless a foundation for such inquiry is laid in the pleadings. (x)

(w) *Gordon v. Gordon*, 3 Swans, 472. *Hall v. Maltby*, 6 Price, 240. 18 Ves. 302. 6 Sim. 565.
(x) *Holloway v. Millard*, 1 Mad. 414.

son River Railroad Company, 6 How. Pr. 239; *New York Ice Company v. Northwestern Insurance Company*, 23 N. Y. 357; *Young v. Edwards*, 11 How. Pr. 201.)

Although legal redress and equitable relief can be demanded in the same action, and either or both afforded by the court, yet to entitle the plaintiff to either, he must ask it in his complaint, (*Stevenson v. Buxton*, 15 Abb. 352,) and though the Code has abolished the distinction between legal and equitable remedies, it does not sanction demands for *inconsistent* relief. Thus, a forfeiture of a lease, and granting an injunction as though the lease was subsisting, cannot both be sought in the same action. (*Linden v. Hepburn*, 3 Sandf. 633; S. C. 9 N. Y. Leg. Obs. 80.) So a plaintiff cannot so frame his complaint as that if he fails to recover the possession of property, he can recover damages for the conversion. Hence, a complaint which alleges the taking, detention and conversion of personal property, and claims not only a redelivery to the plaintiff, but also damages for the conversion, is bad on demurrer. (*Maxwell v. Farnam*, 7 How. Pr. 235.) Where the relief demanded is a remedy at law only, as the recovery of money, it renders equitable relief so far inconsistent with the case made by the complaint, as to prevent the plaintiff's having equitable relief. (*Towle v. Jones*, 1 Rob. 87; *Ryder v. Jenny*, 2 id. 65.) A demand for the payment of an instalment of purchase money in arrear, and for a forfeiture of the contract, are also inconsistent. (*Young v. Edwards*, 11 How. Pr. 201.) And so are a demand of relief and of judgment for a specified sum. (*Durant v. Gardner*, 10 Abb. 445.)

But *alternative* relief can be obtained; and a complaint in an equitable action may be framed with a double aspect when the pleader doubts the particular relief to which the plaintiff is entitled, so that if the court should be against him, under one view of the case, it may nevertheless afford him assistance in another. Thus, in an action to recover property sold under a mortgage, the plaintiff may state both that the mortgage was usurious, and that the sale under the foreclosure was void for other reasons. (*Young v. Edwards*, 11 How. Pr. 201; *Linden v. Fritz*, 3 Code Rep. 165; S. C. 3 Sandf. 353; see also *Wood v. Seely*, 32 N. Y. 105; *Warwick v. Mayor, &c., of New York*, 23 Barb. 210; S. C. 7 Abb. 255; *People v. Mayor, &c., of New York*, 23 Barb. 240; S. C. 8 Abb. 7.) Yet in *Durant v. Gardner*, (10 Abb. 445; S. C. 19 How. Pr. 94,) it was held that a demand for judgment upon hypothetical or alternative conclusions of law, at which the court might arrive on the trial, was improper; also that a demand for general relief was inconsistent with a demand for judgment in a specified sum, in an action for a money demand on contract. And in *Warwick v. Mayor, &c., of New York*, (23 Barb. 210; S. C. 16 How. Pr. 357; 7 Abb. 265,) the complaint was held demurrable for demanding a judgment in the alternative, viz.: 1st, Relief to the plaintiff individually, and if that should be refused, then, 2d, Relief in reference to the same subject matter in favor of the plaintiff, in connection with other persons as tax payers.

It is improper to join in one complaint prayers for relief against the defendant individually, and in his capacity as executor. (*McMahon v. Allen*, 1 Hilt. 103.)

In *Maxwell v. Farnam*, 7 How. Pr. 236,) a complaint which alleged the taking and conversion of personal property, and claimed not only damages for the conversion, but also a redelivery to the plaintiff, was held to be demurrable on the ground that two causes of action were improperly joined. So a plaintiff cannot in the same complaint pray relief by a judgment for the amount claimed, and a judicial determination on the validity of an assignment of property made by the defendant. (*Reubens v. Joel*, 13 N. Y. 483.) In *Lamoreaux v. Atlantic Mutual Insurance Company*, (3 Duer. 630,) a demand of relief that "if necessary" the plaintiff should be relieved, was ordered to be amended by striking out the words "if necessary."

An *objection* to the relief demanded must be taken by motion. (*Durant v. Gardner*, 10 Ab. 445; S. C. 19 How. Pr. 94; *Ricard v. Townsend*, 6 id. 460, 462; *Moses v. Walker*, 2 Hilt. 533; *Walton v. Walton*, 32 Barb. 203; 20 How. 347; Anon. 11

Multifariousness.] As the bill should not omit any thing which it is material to state, it is equally important that it should not run into the opposite defect, and attempt to embrace too many objects; it being a rule in equity that two or more distinct subjects cannot be included in the same suit. The offence against this rule is termed *multifariousness*, and will render a bill liable to demurrer. (y) Joint and separate demands cannot be joined in a bill without rendering it multifarious. (z) (11) And as a bill by the same complainant against the same

(y) 1 Dan. 477.

(z) Harrison v. Hogg, 2 Ves. jun. 323. 2 Anst. 469.

Ab. 23. And see *People ex rel., Taylor v. Mayor, &c., of New York*, 8 Ab. 7; S. C. 28 Barb. 240; 17 How. Pr. 56; S. C. 10 Ab. 111; *Redmond v. Dana*, 3 Bosw. 615; *Andrews v. Shaffer*, 12 How. 441.)

(11) As respects the *joinder of several causes of action*, in the same complaint, or multifariousness, as it was formerly styled, the *Code* (sec. 167,) provides that a plaintiff may unite, in the same complaint, several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of

1. The same transaction or transactions connected with the same subject of action.

2. Contract, express or implied; or

3. Injuries, with or without force, to person and property, or either; or

7. Claims against a trustee, by virtue of a contract, or by operation of law. (See also Cal. Pr. Act, § 64, and Codes of Oregon, Nevada, Arizona, Idaho, Ohio. § 80; Wisconsin, § 73; Minnesota. § 87; Kansas, § 89.)

There are three other subdivisions of the section, relating to common law actions only.

It is further provided, by sec. 167, that the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial; and must be separately stated.

The causes of action must all belong to one of these classes. Thus, an action to enforce the specific execution of a contract, which belongs to the second class, cannot be joined with an action for an injunction to stay the commission of waste, which belongs to the third. But a claim for specific performance, may be united with a claim for the payment of a reasonable sum for the use and occupation thereof; both belonging to the first subdivision. (*Van Sant. Eq. Pr. 100; Spier v. Robinson*, 9 How. Pr. 326.) So a claim to reform an agreement, erroneous in form through the fraud of the defendant, may be united with a claim for damages for an alleged breach of it. (*Jeroliman v. Cohen*, 1 Duer. 629.) And where a creditor, suing in behalf of himself and other creditors, brought an action against an assignee, under an assignment for the benefit of creditors; the relief demanded being the reformation of the assignment in a matter not common to all the creditors, and an accounting by the assignee; it was held that such relief was not inconsistent, and that there was but one cause of action stated, arising out of one transaction. (*Garner v. Wright*, 28 How. Pr. 92.) But such claims, though they arise out of the same transaction, or transactions, cannot be joined, unless they are connected with the same subject of action. (*Hulce v. Thompson*, 9 How. Pr. 113; *Smith v. Halleck*, 8 id. 73.) For the plaintiff cannot, by the same bill, demand of several defendants, several distinct things having no connection with each other. (*Ingersoll v. Kirby*, Walk. Ch. 65.) Therefore, a bill to quiet title to lands is multifarious when parties are joined as defendants, between whom there is no connection in interest, as against the plaintiff. (*Huntton v. Platt*, 11 Mich. 234.) The joinder of causes of action arising out of the same transaction must be of such as are not contradictory, or inconsistent with each other. (*Sweet v. Ingerson*, 12 How. Pr. 331; *Linden v. Fritz*, 3 Sandf. 668; *Young v. Edwards*, 11 How. Pr. 201; *Trull v. Granger*, 8 N. Y. 115.) Nor can equitable causes of action, not falling under either of the subdivisions of section 167, such, for example, as a bill for partition, and a creditor's bill, be united. (*Van Sant. Eq. Pr. 101; Le Roy v. Shaw*, 2 Duer. 626; *Dewey v. Ward*, 12 How. Pr. 419.) Nor can a claim for equitable relief against a corporation, and one for damages against individual defendants, be joined. (*House v. Cooper*, 30 Barb. 177.)

defendant for different matters would be considered multifarious, so a

Several causes of action cannot be blended together in one count, in a complaint, but must be separately stated. (*Colwell v. N. Y. & Erie R. R. Co.* 9 How. Pr. 311; *Fan Namee v. Peoble*, id. 198; *Getty v. Hudson River R. R. Co.* 8 id. 177; *Whittier v. Bates*, 2 Ab. 477; *Latlin v. McCarty*, 17 How. Pr. 239; S. C. 8 Ab. 225; *Durkee v. Saratoga & Wash. R. R. Co.* 4 How. Pr. 226; S. C. 2 Code Rep. 145; *Acome v. American Mineral Co.* 11 How. Pr. 24.)

Where several causes of action are united in one complaint, they must belong to one class, as mentioned in section 137 of the Code, and be separately stated; and each count which assumes to set out a cause of action must do so in itself, and not depend upon other counts to supply the facts which are omitted therefrom. (*Landau v. Levy*, 1 Ab. 376.) Each different cause of action joined in the complaint, must be presented as a separate count, which must be good of itself, and stand by itself. (*Latlin v. McCarty*, 17 How. Pr. 239; S. C. 8 Ab. 225.) A rule of the Supreme Court directs that when there are several causes of action, they must be separately stated, and plainly numbered. (Rule 25 and note. See *Blanchard v. Strait*, 8 How. Pr. 83.) The causes of action should be distinguished by the phrase, "And for a further cause of action, the plaintiff complains," &c., or some other equivalent words. (*Benedict v. Seymour*, 6 How. Pr. 293; *Lippencott v. Goodwin*, 8 id. 242; *Goodwin v. McAlister*, 9 id. 123.)

The provision of the Code, requiring that the complaint shall contain a plain and concise statement of the facts which constitute the cause of action, applies to each count of the complaint; and a general allegation that the second cause of action arose out of transactions connected with the first, does not establish a case within the rule. (*Flynn v. Bailey*, 50 Barb. 73.) Different counts for the same cause of action, varying only in form and statement, are not allowed by the Code. (*Dickens v. New York Central R. R. Co.*, 13 How. Pr. 228; *Fern v. Vanderbilt*, 13 Ab. 72; *Dows v. Hotchkiss*, 10 N. Y. Leg. Obs. 281; *Nash v. McCauley*, 9 Ab. 159; *Whittier v. Bates*, 2 id. 477; *Simmons v. Fairchild*, 42 Barb. 404; *Ford v. Mattice*, 14 How. Pr. 91; *Lackey v. Vanderbilt*, 10 id. 155; *Churchill v. Churchill*, 9 id. 552; *Dunning v. Thomas*, 11 id. 231; *Stockbridge Iron Co. v. Mellen*, 15 id. 347.) An irregularity in this respect, however, is not a ground for setting aside the pleading, but must be reached by a motion to strike out the superfluous matter, specifying it in the notice of motion. (*Higgins v. Thomas*, 13 Ab. 72, note; *Lackey v. Vanderbilt*, 10 How. Pr. 155.) Where no necessity is shown for stating one cause of action in several counts, all but one will be struck out. (*Hepburn v. Babcock*, 9 Ab. 159, note.) The proper remedy for a violation of the above rule is by motion to compel the plaintiff to elect which count shall stand, and to strike out the others. (*Fern v. Vanderbilt*, 13 Ab. 72.) Where there are separate counts, in a complaint, each count must disclose a distinct right of action, complete in itself. (*Simmons v. Fairchild*, 42 Barb. 404.) All the facts necessary to constitute a cause of action must be alleged in each count. (*Ib.*) Where it appears from the face of the complaint that several counts therein are really for the same thing, no affidavit by the defendant is required, to show that there is really but one cause of action against him. (*Ford v. Mattice*, 14 How. Pr. 91. See *Lackey v. Vanderbilt*, 10 id. 155, contra.)

The Code, however, does not under all circumstances, prohibit the use of more than one count founded upon the same instrument or transaction; and where the complaint contains two counts founded upon the same instrument, which differ materially in substance, and are inserted for the purpose of sustaining two different and distinct claims, the court will neither compel the plaintiff to elect between such counts, nor strike out either of them as repetitions. (*Birdseye v. Smith*, 32 Barb. 217.) So a plaintiff may be allowed to set up one cause of action in two different counts, where there is a fair and reasonable doubt of his ability to safely plead them in one mode only. (*Jones v. Palmer*, 1 Ab. 442.)

In *Ohio*, the statement in the petition of one and the same cause of action in two different forms, one count narrating specially in detail the facts, and the second count containing a general allegation, is not allowable as a mode of pleading under the Code; but if no objection is taken, the general count may be regarded as mere surplusage. (*Ferguson v. Gilbert*, 16 Ohio St. 88.)

Different causes of complaint of the same nature, and between the same parties, may be united in one suit where the same relief is asked; but where the causes of complaint are dissimilar in their nature and would require different decrees, it would embarrass, rather than expedite the administration of justice, to allow them to be united in the same bill. (*Hart v. McKeen*, Walk. Ch. 417.) A bill framed with a double

fortiorari, would a bill by several complainants, demanding distinct

aspect must be consistent with itself. It should not set up different and distinct causes of complaint that destroy each other. (*Ib.*) A bill which unites objects entirely distinct, having no necessary or proper connection with each other, and which unites parties having no common interest in most of the subjects of controversy, is multifarious. (*Crane v. Fairchild*, 1 McCarter, (N. J.) 176; *Emans v. Emans*, 2 Beasley, (N. J.) 205.)

To determine whether a bill is multifarious, the court must look to the stating part, and not to the prayer alone; for if in his prayer for relief, the plaintiff asks several things, to some of which he may be entitled, and to others not, the bill is not on that account multifarious; but the plaintiff will, on the hearing, be entitled to that specific relief only which is consistent with the case made in the stating part of the bill. (*Hammond v. Michigan State Bank*, Walk. Ch. 214.)

A complaint may include causes of action to remove a trustee, and recover from a stranger property improperly sold by the trustee. (*Whitman v. Abernathy*, 33 Ala. 154,) and for legal and equitable relief, when consistent. (*Getty v. Hudson River Railroad Company*, 6 How. Pr. 269; *Young v. Edwards*, 11 id. 201; *Wardell v. Turney*, 5 Duer. 661; *Gridley v. Gridley*, 24 N. Y. 136; *Phillips v. Gorham*, 17 id. 284; *New York Ice Company v. Northwestern Insurance Company*, 21 How. Pr. 296; 12 Abb. 414; *Gooding v. McAllister*, 9 How. Pr. 123; *Davis v. Mairs*, 36 N. Y. 569; S. C. 3 Trans. App. 226; 35 Barb. 227.)

The causes of action to be joined must be in favor of all the plaintiffs and against all the defendants, and must belong to the same class, (*Enos v. Thomas*, 4 How. Pr. 48.) but the defendants need not be all equally affected. It is enough if the causes affect all, though in unequal degrees. (*Vermeule v. Beck*, 15 How. Pr. 333.)

A bill may be sustained against different persons relative to matters of the same nature, in which all of the defendants were more or less concerned, though not jointly in each act. (*Wheeler v. Clinton County Bank*, Harring. Ch. 449.) So a bill may be filed by several persons claiming under a common title, but in different shares and proportions. (*Shield v. Thomas*, 18 How., U. S. 253.) And two causes of complaint, growing out of the same transaction, may be joined in the bill when all the defendants are interested in the same claim of right, and similar relief is sought against each. (*Bowers v. Keescher*, 9 Iowa, (1 With.) 422.) But a complaint cannot contain distinct causes of action, in which some of the defendants are not interested. (*Alger v. Scoville*, 6 How. Pr. 131; S. C. 1 Code Rep., N. S. 303; *Lexington & Big Sandy Railroad Company v. Goodman*, 15 How. Pr. 85; S. C. 5 Ab. 493; 25 Barb. 469,) unless combination is charged. (*Wilson v. Wilson*, 23 Md. 162.) And parties having no community of interest cannot be joined in the same bill. (*Armstrong v. Athens County*, 10 Ohio, 235; *Ohio v. Ellis*, id. 456.)

The guarantor of a written instrument cannot be joined with the maker in a suit thereon, because the causes of action are distinct, and neither cause separately, affects "all the parties to the action." (*Le Roy v. Shaw*, 2 Duer. 626.) Nor can a cause of action against two defendants to recover the possession of real estate, be joined with a cause of action against one of them for moneys received by him for rents and profits. (*Tompkins v. White*, 8 How. Pr. 520;) or a cause of action for equitable relief against a corporation, with a claim for damages against individual defendants. (*House v. Cooper*, 16 How. Pr. 293.) So where one in whose hands securities have been deposited as collateral, has assigned them to several persons by different instruments, each of which are claimed to be void as against the plaintiff, he cannot embrace them all as defendants in one suit brought to compel the surrender of the securities and asking a temporary injunction in the meantime, to restrain their transfer. (*Lexington & Big Sandy Railroad Company v. Goodman*, 25 Barb. 469.) So where an infant, having conveyed different portions of land by separate deeds, to two persons, one of whom conveyed to five other persons, on coming of age, disavowed his deeds, and brought an action against all the grantees to recover possession, it was held that the several causes of action were improperly united. (*Voorhies v. Voorhies*, 24 Barb. 151.)

Not only must the causes of action affect all the parties to the action, but they must all exist in the same right. Thus, a plaintiff cannot include claims in his individual right, and claims due him in a representative capacity, as executor or administrator. (*Van Sant. Eq. Pr. 10*; *Lucas v. N. Y. Central R. R. Co.*, 21 Barb. 245; 4 Hill, 492; 1 Tenn. R. 489.) Nor can a cause of action against an executor, administrator or trustee, individually, be united with a cause of action against the testator or intestate, or *cestui que trust*. (*McMahon v. Allen*, 3 Abb. 89; *Davoue v. Fanning*, 4 John. Ch. 199; 12 How. Pr. 39; *Pugsley v. Aiken*, 14 Barb. 144; *Latting v. Latting*,

[*41] matters, against the same *defendants. (a) But a bill does not

(a) *Jones v. Garcia Del Rio*, 1 Turn. & Russ. 301.

4 Sandf. Ch. 31; *Landon v. Levy*, 1 Abb. 376; *Benjamin v. Taylor*, 12 Barb. 328; *Worth v. Radde*, 18 Abb. 396; 28 How. Pr. 230.) Nor a claim in favor of the plaintiff as an individual, with a claim in his favor in a representative character. (*Hall v. Fisher*, 20 Barb. 442; *Lucas v. N. Y. Central R. R. Co.* 21 id. 245; *Carter v. Treadwell*, 3 Story, C. C. 25, 51; *Robinson v. Guild*, 12 Metc. 323.) Nor a claim against the defendant individually, with one against him as executor. (*McMahon v. Allen*, 12 How. Pr. 39; S. C. 3 Ab. 89; 1 Hilt. 103.) Yet it has been held in North Carolina, that a bill is not multifarious because it alleges title to the same fund in two different rights, to wit, as administrator and as next of kin. (*Fairly v. Priest*, 3 Jones' Eq. 21.)

A cause of action against one defendant as trustee, and against another defendant individually, cannot be joined. (*Alger v. Scoville*, 1 Code R., N. S. 303; 6 How. Pr. 131.) Nor a cause of action against the defendant individually, with a cause of action against him as trustee. (*Landon v. Levy*, 1 Abb. 376); or a claim against the defendant in his individual character, and another claim against him as heir, for the debt of his ancestor. (*Bryan v. Blythe*, 4 Blackf. 249. See *Robinson v. Guild*, 12 Metc. 323.) Nor a claim in favor of the plaintiff as an individual, with a claim in favor of the public generally. (*Warwick v. The Mayor, &c., of New York*, 26 How. Pr. 358; 28 Barb. 212); nor a claim against all the defendants jointly, with a claim against one or some of the defendants severally. (*Barnes v. Smith*, 16 Abb. 420; *Wells v. Jewett*, 11 How. Pr. 242; *Le Roy v. Shaw*, 2 Duer. 626; *Rodgers v. Rodgers*, 11 Barb. 595; *Enos v. Showers*, 4 How. Pr. 48; *Viall v. Mott*, 37 Barb. 208; *Tompkins v. White*, 8 How. Pr. 520); nor a claim for a breach of warranty, and a claim for damages for fraudulent representations in regard to the same transaction. (*Sweet v. Ingerson*, 12 How. Pr. 331; *Springstead v. Lawson*, 14 Abb. 328; *Quintard v. Newton*, 5 Rol. 72); nor for a legacy, and for rent, not arising out of the same transaction. (*Gridley v. Gridley*, 33 Barb. 250); nor for a divorce on the ground of adultery, and for cruel and inhuman treatment. (*McIntosh v. McIntosh*, 12 How. Pr. 289; *Johnson v. Johnson*, 5 John. Ch. 163; *Henry v. Henry*, 17 Abb. 411); nor for a wrongful conversion of goods, and a claim for money received to the plaintiff's use. (*Cobb v. Dows*, 9 Barb. 230; and see *Morse v. Smith*, 10 How. Pr. 361; *Hunter v. Powell*, 15 id. 221; *Dorman v. Kellam*, 4 Abb. 202; 14 How. Pr. 184.

A bill is also multifarious where the plaintiff, as next of kin, calls upon the defendant, who is the personal representative of the intestate, to answer in that capacity, and also, as an heir at law, calls upon the defendant to account for rents and profits which have come to his hands. (*Van Mater v. Sickler*, 1 Stockt. (N. J.) 483.) But a plaintiff may unite a cause of action as executrix with one as devisee, where both accrued under a contract made by the testator with the defendant, growing out of the same matter. (*Armstrong v. Hall*, 17 How. Pr. 76.)

Several causes of action do not always form the subject of several separate statements or counts, but are sometimes thrown, for the sake of brevity and convenience, into one. (*Longworthy v. Knapp*, 4 Abb. 115; *Adams v. Holley*, 12 How. Pr. 329.) Stating several grounds of complaint is not necessarily several causes of action. (*Durant v. Gardner*, 10 Abb. 445.)

By multifariousness in a bill is meant the improperly joining, in one bill, distinct and independent matters, and thereby confounding them; as, for example, the uniting of several matters of a distinct and independent nature, against several defendants, in the same bill. (Story Eq. Pl. § 271; *Wert v. Randall*, 2 Mason, 201; *Fellows v. Fellows*, 4 Cowen, 682; *Brinkerhoff v. Brown*, 6 John. Ch. 139; *Boyd v. Hoyt*, 5 Paige, 65; *Jackson v. Forrest*, 2 Barb. Ch. 576; *Metcalf v. Cady*, 8 Allen, 587; *Richardson v. McKinson*, Litt. Sel. Ca. 320; *Hungerford v. Cushing*, 8 Wis. 332.) A joint claim against two or more defendants cannot be joined in the same bill (or complaint) with a separate claim against one of the defendants only, in which the other defendants have no interest, and which is wholly unconnected with the claim against them. (*Swift v. Eckford*, 6 Paige, 22; *Boyd v. Hoyt*, 5 id. 65.) Nor can an action be maintained by an administrator in conjunction with the heirs and distributees of the intestate, to recover personal property in the hands of the defendant, and to divide and distribute it. (*Thurman v. Shelton*, 10 Yerger, 383.) Unconnected demands against different estates cannot be united in the same bill or complaint, though the defendant is executor of both. (*Daniel v. Morrison*, 6 Dana, 186; *Kay v. Jones*, 7 J. J. Marsh, 37. See *McCartney v. Culhoun*, 11 Ala. 140.) So when heirs at law, or legatees, have an alleged right of action arising under the wills of

become multifarious because all the complainants are not interested to an equal extent. (b)

(b) *Kuye v. Moore*, 1 Sim. & Stu. 61.

two different persons, such claims cannot be united in the same complaint, even though two of the defendants are the executors under one will, and the third defendant is executor under the other will. (*Viall v. Mott*, 37 Barb. 208.) Nor will a complaint be good if it seeks redress against several defendants, for injuries arising out of transactions with them separately, at different times, and relating to different subjects. (*Coe v. Turner*, 5 Conn. 86; *Marcellis v. Morris Canal*, &c. 1 Saxton, (N. J.) 31; *Meachum v. Williams*, 9 Ala. 842; *Colburn v. Broughton*, id. 351; *Hungerford v. Cushing*, 8 Wis. 332.)

But a bill is not multifarious when one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights. (*Dinnock v. Birby*, 20 Pick. 368; *Seers v. Carrier*, 4 Allen, 341; *Tucker v. Tucker*, 29 Wis. (8 Jones,) 350; see *Watson v. Cox*, 1 Ired. Eq. 339; *Stuart v. Coalter*, 4 Rand. 74; *Newland v. Rogers*, 3 Barb. Ch. 432; *Robertson v. Stevens*, 1 Ired. Ch. 247; *Delafield v. Anderson*, 7 Sme. and Mar. 630; *Allen v. Montgomery Railroad Company*, 11 Ala. 437; *Scrimieger v. Buchannon*, 3 A. K. Marsh, 219; *Parish v. Sloan*, 3 Ired. Ch. 607; *Fann v. Hargett*, 2 Dev. and B. Ch. 31.) Nor when its allegations all relate to one transaction between the same parties, to one and the same subject matter and the same injury, although it may pray for two different methods of relief against that injury. (*Wells v. Bridgeport & C. Co.* 30 Conn. 316; — *v. Woods*, 2 Jones' Eq. (N. C.) 198.) Nor when it joins a good cause of complaint growing out of the same transaction, where the defendants are all interested in the same claim of right, and where the relief asked in relation to each, is of the same general character. (*Walkup v. Zehring*, 13 Iowa, (5 With.) 306.) Nor is a bill filed against separate and distinct holders of different tracts of land, aliened by the husband during coverture, without relinquishment of the wife, to recover dower in each tract, multifarious. The plaintiff may elect whether to convene all the purchasers in one suit, or to bring separate suits against each. (*Boyden v. Lancaster*, 2 P. and H. (Va.) 198. Unconnected parties having a common interest centering in the point in issue in the cause, may unite in the same bill. (*Comstock v. Rayford*, 1 Sm. and M. 423.) Thus, where two non-residents having distinct claims against another non-resident, filed their bill in Mississippi, to subject funds of the non-resident defendant in the hands of a resident of that State, who was also made a defendant; it was held on demurrer, that the bill was not multifarious. (*Ibid.*) And where an administrator has collusively sold separate lots to separate purchasers at the same sale, a bill against all the purchasers is not multifarious. (*Forniquet v. Forstall*, 34 Miss. (5 George,) 87.)

A bill is multifarious which seeks to redeem a mortgage of an entire estate, and a subsequent mortgage by one tenant in common of his share in a part of the estate. (*White v. Curtis*, 2 Gray, 437.) But a bill is not necessarily multifarious by reason of its seeking to redeem two distinct mortgages of different parcels of real estate, or by reason of its seeking specific performance of distinct contracts relating to different parcels of real estate. (*Robinson v. Guild*, 12 Metc. 323; see *Holman v. Bank of Norfolk*, 12 Ala. 369.) So a bill for a general account and settlement of a copartnership may embrace every object necessary to the complete adjustment of the concern, without being objectionable for multifariousness. (*Wells v. Strange*, 5 Georgia, 22. See *Kent v. Lee*, 2 Sandf. Ch. 105; *Tomlinson v. Claywell*, 4 Jones' Eq. (N. C.) 317.)

Where several persons claim under one general right, they may unite in a bill for the establishment of that right, without incurring the risk of a demurrer for multifariousness, although the title of each plaintiff may be distinct. (1 Dan. Ch. Pr. 351; Story Eq. Pl. § 279, a; *Shields v. Thomas*, 18 How. 253.) Where a bill in equity by several plaintiffs, to enjoin a nuisance, contained also a prayer for an account and compensation for the damage to each plaintiff, it was held that multifarious relief could not be granted as prayed for; but that the objection might be obviated by striking out the prayer for an account of the damage to the plaintiffs respectively. (*Murray v. Hay*, 1 Barb. Ch. 59; *Brady v. Weeks*, 3 Barb. 157.) So in other cases where all the plaintiffs are interested in the principal matter stated in the bill, but the bill states a distinct ground for the interference of equity, which concerns only one of the plaintiffs, if there is no prayer for relief touching this latter matter, the bill is not multifarious. (*Judson v. Toulmin*, 9 Ala. 662; *Davis v. Miller*, 4 Jones' Eq. (N. C.) 447.)

When the allegations of a complaint constitute but one cause of action, the fact that an allegation commences "and for a further cause of action," will not justify

Scandal and impertinence.] Another important matter to be at-

a demurrer. (*Hillman v. Hillman*, 14 How. Pr. 456.) And allegations of fraud in support of a cause of action, and not made as constituting a separate cause of action, do not make an improper joinder of causes of action. (*Campbell v. Wright*, 21 How. Pr. 1. See *Meyer v. Van Collem*, 7 Ab. 222; *Durant v. Gardner*, 10 id. 445; Code, § 167, 172.)

A complaint is not necessarily bad as constituting more than one cause of action, for the reason that it demands a multiplicity of relief, (*Geery v. New York & Liverpool Steamship Company*, 12 Ab. 263,) or assigns several grounds of relief. Thus, a complaint in an action against the directors of a corporation, seeking to charge them personally with a debt of the corporation, is not to be deemed as uniting several causes of action because it sets forth several grounds, on either of which the defendants would be liable. (*Durant v. Gardner*, 10 Ab. 445; S. C. 19 How. Pr. 94.) So where an assignor of a mortgage assigned as collateral security for the payment of his promissory notes, after the collection thereof, brings an action against the assignees for the surplus money in their hands, and the surrender of the notes paid, the claim is single and was one cognizable by a court of equity. It cannot be regarded as two distinct causes of action requiring distinct modes of trial, and incapable of being joined in a single suit. (*Cahoon v. The Bank of Utica*, 7 N. Y. 486.)

A court of chancery allows distinct and separate causes of complaint between the same parties to be joined in one suit, unless it is apparent that the defence will be seriously embarrassed by confounding different issues and proofs in the litigation. (*Nourse v. Allen*, 4 Blatch. 376.)

In *Kennebeck & C. R. R. Co. v. Portland, &c., R. R. Co.* (54 Maine, 173,) the rule is laid down that a bill is multifarious only when the different grounds of action are wholly distinct and each sufficient. But when not wholly distinct, but forming parts of one continuing transaction, all essential to a proper understanding of the case, the bill is not multifarious.

When the object of a bill is single, to establish and to obtain relief for one claim in which all the defendants may be interested, it is not multifarious, although the defendants may have different and separate interests. (*Bugbee v. Sargent*, 23 Maine, 269.) Where shares in a corporation were transferred by a debtor to his creditor, the latter agreeing "to account for the said shares, or reconvey them," it was held that the bill was multifarious, and that the debtor had no such interest as would enable him to maintain a bill in equity against a third person by reason thereof. (*Hervey v. Feezie*, 24 Maine R. 1.) So where a bill against several defendants sought redress for injuries arising out of transactions with them separately at different times, and relating to different subjects, it was held bad for multifariousness. (*Coe v. Turner*, 5 Conn. 86.) A bill is also bad for multifariousness where several plaintiffs demand relief as to several matters perfectly distinct and unconnected against one defendant, or where one plaintiff demands relief as to several distinct and unconnected matters against several defendants. But where one general right is claimed by the bill, though the defendants have separate and distinct interests, the bill is not multifarious. (*Mix v. Hotchkiss*, 14 Conn. 32.) If a claim against several defendants is joined with a claim in which one only of the defendants is interested, and which is wholly disconnected with the claim against all of the defendants, all or either of them may demur for multifariousness. (*Swift v. Eckford*, 6 Paige, 22.)

To render a bill multifarious, it must contain several good grounds of action which cannot properly be joined in one suit, (*Many v. Beekman Iron Company*, 9 Paige, 188,) and must contain not only separate and distinct matters, but such that each entitles the complaint to separate equitable relief. (*Pleasants v. Glasscock*, 1 Sm. and M. Ch. 17; *McCabe v. Bellows*, 1 Allen, 269.)

The several owners of different tracts of land through which a canal company have constructed their canal, cannot join in a bill against the company charging that the company have taken the plaintiffs' land without permission, and done great damage thereby, and that the company is insolvent and praying for an account and an injunction to restrain the company from using the land. Such a bill is multifarious. (*Marsellis v. Morris Canal & Banking Company*, Saxton, 31.) So a bill by one of several heirs for the partition of real estate, and for a distributive share of personal estate in the hands of the administrator, is bad for multifariousness in demanding several matters distinct in their nature. (*Carmichael v. Browder*, 3 How. Miss. 252.) But several judgment creditors of the same debtor, where separate executions have been returned *nulla bona*, may join in the same bill to subject and distribute the same common fund. (*Bullet v. Stewart*, 3 B. Monroe, 115.) And persons holding distinct interests under the same title, may join in a suit for investigating their equi-

tended to in framing a bill, is to see that it does not contain statements

ties. (*Tilford v. Henderson*, 1 A. K. Marsh, 219.) So a creditor asserting a claim in equity against the defendant, may combine with it a claim on account of fraudulent conveyances made by the defendant. (*Halbert v. Grant*, 4 Monroe, 580.) So it is not multifarious to join in a creditor's bill, as parties defendant with the debtor, several persons to whom he has conveyed distinct parcels of property out of which the plaintiff seeks satisfaction of his debt, although such persons may have no common interest in the several parcels so conveyed. (*Chase v. Searles*, 45 N. H. 511; *Williams v. Neel*, 10 Rich. Eq. (S. C.) 338; *Bastee v. Tompkins*, 4 Sneed, (Tenn.) 623.) So also where a debtor in order to defraud his creditors, purchased land, causing the deed to be made to his wife, who participated in the fraud to its whole extent, and conveyed land to another person with the same intent, who conveyed to a third, both grantees being cognizant of the fraud, it was held in an action by a creditor to set aside the conveyances, that both transactions being of the same nature, although different in form, could be joined in the same complaint. (*North v. Bradway*, 4 Minn. 183.) So where a judgment creditor alleged that the debtors combining with their assignees, had endeavored fraudulently to defeat his lien by one of them executing a mortgage to one of the assignees, and all of them assigned portions of their property to another, and prayed that the securities so given might be declared void, and that a receiver be appointed, it was held that separate causes of action were not united. (*Bank of British North America v. Suydam*, 6 How. Pr. 379; S. C. 1 Code Rep., N. S. 325.) But in an ordinary creditor's suit, the plaintiff cannot seek to set aside as fraudulent, various conveyances made by the debtor to different persons at different times. (*Reed v. Stryker*, 6 Abb. 109.)

It has been held in Wisconsin, that under Rev. Stat. C. 125, §§ 29, 30, a complaint in an action by two lot owners, to restrain the sale for non-payment of taxes, of lots owned by them severally, is liable to demurrer on the ground that it improperly unites several causes of action. (*Barnes v. Beloit*, 19 Wis. 93.) In *Fitch v. Creighton*, (24 How., U. S. 159) however, it was held that a bill is not multifarious because it seeks to enforce the liens for assessments upon several lots benefited by improvements on the street. A bill filed by one of the next of kin against the administrator, for administration of the estate, and also seeking as against other defendants, to set aside a deed whereby the plaintiff had assigned a part of his interest in the estate for their benefit, is multifarious. (*Bouck v. Bouck*, Law. Rep. 2 Eq. 19.)

And, under section 167 of the Code, a claim to recover from an agent on the ground of his selling land to his partners, for a price below its actual value, cannot be joined with a claim to recover the property, or the proceeds thereof, from the purchasers, upon allegations that the agent stood in such relations of confidence to the plaintiff that he would hold the property as trustee for him. (*Gardner v. Ogden*, 22 N. Y. 327.)

A bill filed against executors, denying their authority to act as such, and to recover property sold by them, as such, is not multifarious because the purchasers of such property are made co-defendants with them. But a devisee, claiming under a subsequent will of the same testator, cannot be joined as defendant, in such a bill. (*Gaines v. Chew*, 2 How. U. S. 619.) The objection of multifariousness does not apply when the parties have one common interest touching the matter of the bill, though they claim by distinct titles, and have independent interests; nor where the several matters are of the same nature, as to the defendants, and the same general right in the complainant. (*Butler v. Spann*, 27 Miss. (5 Cush.) 234.)

As to what constitutes multifariousness, it is said by the Supreme Court of the United States, in *Gaines v. Chew*, (2 How. U. S. 619,) "it is impossible to lay down a general rule; every case must be governed by its own circumstances, and the Court must exercise a sound discretion on the subject." (See also *Butler v. Spencer*, 27 Miss. (5 Cush.) 234; *Clegg v. Varniel*, 18 Texas, 294.) The rule is one of convenience; and though the matters are distinct, yet if justice can be administered between the parties without multiplicity of suits, the objection will not prevail. (*Bowers v. Keercher*, 9 Iowa, (1 With.) 422.)

A demurrer to a bill for multifariousness goes to the whole bill. (*Boyd v. Hoyt*, 5 Paige, 65; *McIntosh v. Alexander*, 16 Ala. 87; *White v. White*, 5 Gill. 359.)

The proper method of taking advantage of multifariousness when apparent upon the face of the bill, is by demurrer. (1 Dan. Ch. Pr. 352; *Ward v. Cooke*, 5 Mad. 152; *Wynne v. Callender*, 1 Russ. 293; *Story Eq. Pl. § 284, a*; *Bryan v. Blythe*, 4 Blackf. 249; *Grove v. Fresh*, 9 Gill. and John. 281; *Thurman v. Shelton*, 10 Yerg. 383; *Luckett v. White*, 10 Gill. and John. 480; *Abraham v. Plesoro*, 3 Wend. 538; *Bell v. Woodward*, 42 N. H. 181; *Abbot v. Johnson*, 32 id. 9; *Buffalow v. Buffalow*,

or charges which are scandalous or impertinent; for if it does, it may be excepted to by the defendant, and if, on a reference to a master, he reports that the bill contains scandalous or impertinent matter, the court will order such parts to be expunged with costs. (c) (12)

(c) 1 Dan. 451, 2.

2 Ired. Ch. 113; See *Avery v. Kellogg*, 11 Conn. 562; *Moreau v. Saffarans*, 3 Sneed. 595; *Redmond v. Dana*, 3 Bosw. 615.)

The Code of New York (*sec.* 144) specifies, among the cases in which the defendant may demur to the complaint, when it shall appear upon the face thereof "that several causes of action have been improperly united," (*sub.* 5.)

It has been held that a demurrer does not lie, under this subdivision, for the defect of not separately stating two causes of action, the causes of action being such as may, if properly stated, be united in one complaint. (*Bass v. Comstock*, 38 N. Y. 21; 36 How. Pr. 382; *Anderson v. Hill*, 53 Barb. 238.) An error of that kind is to be corrected by motion. (*Anderson v. Hill*, *supra*.) When the objection is not apparent upon the face of the bill, it is open to the defendant on his plea or answer. (*Bell v. Woodward*, 42 N. H. 181.) Where it does not appear on the bill, but is shown by the answer, it is available to the defendant on the hearing. (*Abbot v. Johnson*, 32 N. H. 9.)

In the United States courts, it is held that the objection of multifariousness cannot, as a matter of right, be taken by the parties, except on demurrer, plea or answer. If not so taken, it must be regarded as waived. (*Oliver v. Piatt*, 3 How., U. S. 333.)

The objection should be raised before answer. Filing an answer, and going into an examination of testimony as to the merits of the whole matter in controversy, is a waiver of the objection. (*Gibbs v. Clagett*, 2 Gill. and J. 14; *Bryan v. Blythe*, 4 Blackf. 249; *Oliver v. Piatt*, 3 How., U. S. 333; *Moreau v. Saffarans*, 3 Sneed. 595; See *Wilson v. Lynt*, 30 Barb. 124); so far as the defendants' rights are concerned. (*Hickman v. Cooke*, 3 Humph. 640); but the court may, nevertheless, *proprio jure*, insist upon the objection of its own motion, and dismiss the bill. (Ib.; *Ohio v. Ellis*, 10 Ohio, 456; *Oliver v. Piatt*, 3 How., U. S. 333; *Emans v. Emans*, 1 McCarter. (N. J.) 114.) It is said, however, in *Bean v. Bean*, (1 Ala., S. C. 265,) that it is rarely advisable that a Chancellor should *sua sponte*, dismiss a bill for multifariousness. Whether this will be done or not, must depend on the nature of the case, and the course of proceedings at the time of the hearing. (*Chew v. The Bank of Baltimore*, 14 Md. 299.) When the objection really exists, the Supreme Court will not reverse a decree of dismissal for that cause. (*Bean v. Bean*, *supra*.) The court should not interfere, and take the objection, *sua sponte*, where the trouble and expense by reason of multifariousness might have been saved by a demurrer. (*Chew v. Bank of Baltimore*, *supra*.) When the objection is raised at the hearing, it will be fatal only in the discretion of the court; which will not allow the objection when the reason for it fails. (*Hamilton v. Whitridge*, 11 Md. 128.) The court will notice the objection, at that stage, *sua sponte*, only when it is found impracticable, from multifariousness, to make a proper decree, doing justice between the parties; or perhaps when it satisfactorily appears that the defendant has been embarrassed, or otherwise prejudiced in his defence. (*Wales v. Newbould*, 9 Mich. 45.) But where the form of the bill embarrasses the court in the administration of justice, it will dismiss the bill, although the defendant has waived the objection of multifariousness. (*Swayze v. Swayze*, 1 Stockt. (N. J.) 273.)

Where a joint claim against several defendants is joined in a bill with a separate and distinct claim against one of the defendants only, either or all of the defendants may demur for multifariousness. (*Boyd v. Hoyt*, 5 Paige, 65.)

(12) SCANDAL AND IMPERTINENCE.

There are many cases, however, in which, though the words in the record are very scandalous, and highly reflecting upon the party, yet if they are material to the matter in dispute, and tend to a discovery of the point in question, they will not be considered as scandalous. (1 Dan. Ch. Pr. 353; Story Eq. Pl. § 269.) Thus, a statement in an answer, introduced to show the temper with which a bill is filed, and the oppressive course pursued by the plaintiff, is not scandalous or impertinent; inasmuch as it may have an effect on the costs. (*Desplaces v. Goris*, 1 Edw. 350.) So, an executor, who is called to account, is not subject to an exception for scandal and

Scandal consists in the allegation of any thing which is unbecoming the dignity of the court to hear, or is contrary to good manners, or

impertinence for saying, in his answer, that some of the property is withheld from him under a forged deed possessed by the plaintiff; for his silence might prejudice him, afterwards. (*Jolly v. Carter*, 2 Edw. 209; See *Somers v. Torrey*, 5 Paige, 54.) The court always judges whether, though matter be *prima facie* scandalous, it is or is not of absolute necessity to state it; and if it materially tends to the point in question, and is become a necessary part of the cause, and material to the defence of either party, the court never looks upon this to be scandalous. (1 Dan. Ch. Pr. 354.)

In a bill under the statute for dissolving an insurance company, an allegation that a person named not a party to the suit had, in conjunction with one of the directors, been guilty of a gross fraud in obtaining stock, but charging no privy to the fraud on the part of the other directors, was held to be irrelevant and scandalous. (*King v. Sea Insurance Company*, 26 Wend. 62.)

Although nothing relevant can be scandalous, matter in a bill may be impertinent without being scandalous. (1 Dan. Pr. 354; *Fenhoulet v. Passavant*, 2 Ves. 24; *Hood v. Inman*, 4 John. Ch. 437.) Impertinence is the introduction of any matters into a bill, answer, or other pleading, or proceeding in a suit, which are not properly before the court for decision at any particular stage of the suit. (Story Eq. Pl. § 266; *Wood v. Mann*, 1 Sumner, 506, 578.) The best test to ascertain whether matter be impertinent, is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties. (*Woods v. Morrell*, 1 John. Ch. 103.) The court will not, because there are here and there a few unnecessary words, treat them as impertinent. (Story Eq. Pl. § 267; *Hawley v. Wolverton*, 5 Paige, 522.) A bill may contain matter which is impertinent, without the matter being scandalous; but if in a technical sense it is scandalous, it must be impertinent. (Story Eq. Pl. § 270; *McIntyre v. Trustees of Union College*, 6 Paige, 253.)

The court may strike out scandalous or impertinent matter on motion. (*Bowman v. Sheldon*, 5 Sand. 660; *Carpenter v. West*, 4 How. Pr. 53; *Massina v. Clark*, 17 Abb. 183; *Opdyke v. Marble*, 18 id. 266, 375.) This rule applies in what would have been an equity case prior to the Code. It seems that any one affected thereby, may move to strike out scandalous matter whether a party or not. (*Carpenter v. West*, *supra*.)

The motion must be made before demurring to or answering the pleading objected to, and within twenty days from the service of such pleading. (*New York Ice Company v. Northwestern Insurance Company*, 12 Abb. 74; *Walker v. Granite Bank*, 1 Abb., N. S. 406,) and before noticing the issue for trial. (*Kellogg v. Baker*, 15 Abb. 287.) The motion papers should point out the precise parts objected to. (*Benedict v. Dake*, 6 How. Pr. 352; *Blake v. Eldred*, 18 id. 240; *Bryant v. Bryant*, 2 Rob. 612.)

Neither scandal nor impertinence, however gross, was ever a ground for demurrer, it being a maxim of pleading that *utile per inutile non vitiatur*. (1 Dan. Ch. Pr. 357; Story Eq. Pl. § 269.)

Any statement in a bill which may be material in establishing the general allegation therein, or in determining the nature or extent of the relief to which the plaintiff is entitled, consistent with the case made by the bill, is relevant and cannot be excepted to for impertinence. (*Hawley v. Wolverton*, 5 Paige, 522.) In a suit by the trustees under a will, for waste committed upon the trust property by a lessee for a short term of years, a statement of the will, the death of the testator, the probate of the will, by the plaintiffs, and their assumption of the trust, cannot be excepted to for impertinence. (*Ibid.*) A statement that the trees cut were appurtenant to a house erected by the testator for a country residence, as ornamental trees, and showing the situation of the home trees, is pertinent. (*Ib.*) And a statement of the estimation in which such trees were held by the testator is not impertinent; but a statement by the plaintiffs of their opinion as to the value of the trees, is impertinent. (*Ib.*) A statement that the injury was wilful, and committed by the defendant after notice of the importance of the trees, by the offer of a large reward for the detection of any person injuring them, cannot be excepted to for impertinence. (*Ib.*)

If a complaint states a good cause of action on a promise to pay absolutely, it will not be held bad merely because it contains superfluous allegations which would be appropriate were the action founded upon a promise to indemnify. (*Hay v. Hall*, 23 Barb. 378.) Where a complaint sets out a cause of action on contract, although there

which charges some person with a crime not necessary to be shown in the cause. (d) To which may be added that any unnecessary allega-

(d) Prac. Reg. 383.

are allegations of fraud therein, this will not render the cause of action non-assignable. (*Brady v. Bissell*, 1 Abb. 76.)

In an action calling upon the assignees of an insolvent debtor to account for and pay over the trust funds, the unnecessary and premature allegation in the complaint, that a prior judgment for distribution had been obtained against the assignees by collusion and fraud, does not change the character of the action so as to require that the plaintiff in such judgment of distribution be made a party to the action. (*Kerr v. Blodgett*, 25 How. 303; S. C. 16 Ab. 137.)

As to the present practice in *England*, respecting impertinence, it is enacted by section 17 of the 15 and 16 Vict. ch. 86, that "the practice of excepting to bills, answers, and other proceedings in the said court for impertinence, shall be, and the same is hereby abolished: provided always, that it shall be lawful for the court to direct the costs occasioned by any impertinent matter introduced into any proceeding in the said court, to be paid by the party introducing the same, upon application being made to the court for that purpose." And by the 30th order of August, 1852, it is directed that the application to be made for the costs of any impertinent matter introduced into any bill, answer, &c., is to be made at the time when the court disposes of the costs of the cause or matter, and not at any other time. (1 Dan. Ch. Pr. 357; *Dufaur v. Sigel*, 4 De Gex, M. and G. 520.)

In the *United States courts* it is required that "every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *haec verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master, by any judge of the court, for impertinence or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court, or a judge thereof, shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the defendant shall be entitled to all costs occasioned by the reference." (Equity Rule, 26.)

In *New Hampshire*, it is provided by rule of court, that "every bill and answer shall be expressed as concisely as may be, and no deed, will, agreement, or other writing shall be set forth at length, or annexed to any bill or answer; but so much of either as is material, and no more, shall be inserted." (Rule of Chancery, 4; 38 N. Hamp. 606.) "The idle repetitions 'your orator further complains,' 'your orator further sheweth to your honors,' and the like, in bills; and this 'defendant further answering, saith,' and the like, in answers, shall be omitted. Where the names of parties are omitted, they shall be referred to as plaintiffs or defendants." (*Ibid*; Rule 7.)

An exception for impertinence will be overruled if the expunging of the matter excepted to will leave the residue of the clause, which is not covered by the exception, either false or wholly unintelligible. (*McIntyre v. Trustees of Union College*, 6 Paige, 239.)

In the *United States courts*, Rule 27 in Equity, directs that "no order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day, after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on, or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination."

Disparaging or abusive words are not scandalous in an equity pleading, unless they are also impertinent. (*Henry v. Henry*, Phill. (N. C.) Eq. 334.)

The *Code* contains no authority for excepting to a complaint for scandal or impertinence; but section 160 provides that if *irrelevant* or *redundant* matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby. And when the allegations of a pleading are so *indefinite* or *uncertain* that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

tion bearing cruelly upon the moral character of an individual, is also scandalous. (*e*)

Impertinence is the same kind of fault in pleadings in equity which in those at common law is denominated *surplusage*. This at law, taken in its largest sense, includes the introduction of unnecessary matter of whatever description, and includes the admission of matter wholly foreign, as well as of matter, which though not wholly foreign, does not require to be stated, or which, if stated, should be stated with conciseness. (*f*)

It is not impertinent in a bill amended after answer, to adopt the language of the answer, and set forth its averments by way of pretence, with a charge to meet them. (*g*)

In a bill to remove a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, nor to impute to him corrupt or improper motives in the execution of his trust; nor to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation. But it is impertinent and may be scandalous to state any circumstances as evidence of general malice or personal hostility; because the fact of malice or hostility, if established, affords no necessary or legal inference that the conduct of the trustee results from such motives, and because such a course tends to render a bill in equity an instrument of inquisition into the private life of every trustee. (*h*)

Setting out deeds and documents.] The 17th rule of the court *authorizes certain deeds or instruments in writing to be read [*42] upon a hearing on bill and answer, provided they are stated or set out in the bill of complaint. It has been decided, under this rule, that in order to enable the complainant to read such documents at the hearing, the complainant must not only set out the deed or other instrument in his bill, but that he must also state therein that it has been duly acknowledged or proved, in such a manner as to entitle it to be read in evidence without further proof. (*hh*) (13) (14) (15)

(*e*) Coffin v. Cowper, 6 Ves. 514.

(*f*) Steph. on Pl. 422.

(*g*) Seeley v. Boehm, 2 Mad. 176.

(*h*) Earl of Portsmouth v. Fellows, 5 Mad. 450.

(*hh*) Latting v. Hall, 9 Paige, 383.

(13) IRRELEVANCY OR REDUNDANCY.

The Code (section 160) provides that if irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby.

Irrelevancy, in pleading, as used in the Code, like impertinence as used in Chancery Practice, comprehends both prolixity, or needless details of material matter, and matter out of which no cause of action or defence could arise between the parties in the particular suit. (*The Lee Bank v. Kilching*, 11 Abb. 435; S. C. 7 Bosw. 664.)

Matter is *irrelevant* which has no bearing on the subject matter of the controversy,

SECTION V.

BY WHOM, AND HOW, BILLS ARE DRAWN.

Unless the complainant intends to appear in person and conduct the proceedings himself, the first step to be taken by him, on instituting a

and cannot affect the decision of the court. (*Fabricotti v. Launitz*, 1 Code R., N. S. 121; *Stafford v. Mayor of Albany*, 6 John. 25; *Van Rensselaer v. Brice*, 4 Paige. 177; *Lee Bank v. Kitching*, 11 Abb. 425; *Cahill v. Palmer*, 17 id. 196; *Dovan v. Dinsmore*, 33 Barb. 86.) But it is not irrelevant if material only as affecting the damages. (*Root v. Foster*, 9 How. Pr. 37); or the costs. (*Van Rensselaer v. Brice*, 4 Paige, 177.) Hence, the true test of the materiality of averments sought to be struck out is, to inquire whether such averments tend to constitute a cause of action or defence; if they do, they are not irrelevant. (*Ingersoll v. Ingersoll*, 1 Code R. 102; *Averill v. Taylor*, 5 How. Pr. 476; *Minor v. Terry*, 6 id. 203; *Quintard v. Newton*, 5 Rob. 72; *Voorhies' Code*, 10 ed. 247.)

Where the plaintiff has an option either to sue on contract or tort, and he elects to sue on contract, in the form for money received to the plaintiff's use, all allegations as to fraud on the part of the defendant, in reference to the alleged cause of action, are redundant and irrelevant. (*Sellar v. Sage*, 12 How. Pr. 531; 13 id. 230; *Lee v. Elias*, 3 Sandf. 136; *Field v. Morse*, 8 How. Pr. 47; and see *Lamorceaux v. Atlantic Mu. Ins. Co.* 3 Duer. 681.)

Where a complaint, after stating the facts, proceeded: "Whereupon the plaintiff became entitled to the possession of the said note," the court said, "It was probably not necessary to state this conclusion upon the facts stated; but it can do no harm." (*Decker v. Matthews*, 12 N. Y. 321; *Gould v. Williams*, 9 How. Pr. 51; *St. John v. Griffith*, 1 Abb. 40; *Meyer v. Collen*, 28 Barb. 230); and see *Lee Bank v. Kitching*, (7 Bosw. 664, 11 Abb. 439); and *Bridge v. Payson*, (5 Sandf. 216); where such an allegation was held to be irrelevant.

Where a complaint avers that a second contract between the parties was executed "in lien" of the first, but fails to show that any important rights had intervened between the making of the two contracts, making it necessary to sue upon the first, all the allegations respecting the original agreement will be stricken out of the complaint, on motion, as being irrelevant and redundant. (*Chesebrough v. The N. Y. & Erie Railroad Co.* 26 Barb. 9.) So, if facts sufficient to constitute a cause of action for equitable relief, and a series of interrogatories like a creditor's bill of discovery are stated in a complaint, the latter matters are not demurrable, but can be stricken out as irrelevant. (*Bank of British North America v. Suydam*, 6 How. Pr. 379; S. C. 1 Code Rep., N. S. 325. And where a count in a complaint sets out no cause of action, but is argumentative as regards a previous count, it will be stricken out as irrelevant and hypothetical. (*Hunter v. Powell*, 15 How. Pr. 221.) If a complaint asks for relief not warranted by the facts set forth therein, the defendant may, on motion, have such irrelevant claims for relief struck out. (*Lord v. Vreeland*, 13 Ab. 195; S. C. aff'd. 15 id. 122; 24 How. Pr. 316.) In an action against a trustee of a manufacturing corporation, to charge him with a debt due from the company to the plaintiff, on the ground of the failure and neglect of the company to file their annual report as required by law, allegations in the complaint, that the plaintiff has recovered judgment against the company, for said debt, and issued execution thereon, which has been returned unsatisfied, will be stricken out as irrelevant. (*Weymouth v. Dimock*, 41 How. Pr. 92; *McHenry v. Eastman*, 35 id. 207.)

A needless repetition of material averments is *redundancy*; although the facts averred, so far from being irrelevant, may constitute the whole cause of action. (*Bowman v. Sheldon*, 5 Sandf. 660.) It is matter which might be proved under a general denial, and is not irrelevant. (*Hollenbeck v. Clow*, 9 How. Pr. 292.) In *Truscott v. Dole*, (7 How. Pr. 221.) the words "as the plaintiff is informed and believes," in a verified complaint, were stricken out as redundant.

Irrelevancy and redundancy are not equivalent terms. Although matter which is irrelevant is also redundant, yet the converse is not true. (*Voorhies' Code*, 10th ed. 246.)

suit in chancery, is to employ a solicitor and counsel to commence

When a pleading is irrelevant, or redundant, the remedy is by motion, to strike from it the irrelevant or redundant matter; and not by demurrer. (*Watson v. Husson*, 1 Duer. 242; *Spits v. Access. Transit Co.* 5 id. 663; *Roeder v. Ormsby*, 13 Abb. 34; *Smith v. Greenin*, 2 Sandf. 702; *Chesbrough v. The N. Y. & Erie Railroad Co.* 26 Barb. 9; *The Lee Bank v. Kitching*, 11 Abb. 435; *Meyer v. Van Collem*, 23 Barb. 230; *Ward v. Ward*, 5 Abb., N. S. 145.)

An entire pleading cannot be struck out as irrelevant or redundant. (*Benedict v. Duke*, 6 How. Pr. 352; *Nichols v. Jones*, id. 355; *Hull v. Smith*, 8 id. 150; *Howell v. Knickerbocker Life Insurance Company*, 24 How. Pr. 475; *Blake v. Eldred*, 18 id. 240; *Fasnacht v. Stahn*, 5 Abb., N. S. 333; 53 Barb. 650; *Collins v. Coggill*, 7 Rob. 81.) Omitting to move to strike out irrelevant or redundant matter is an admission that the defendant understands the nature of the charge, and is prepared to meet it (*Quintard v. Newton*, 5 Rob. 72.) A complaint will not be dismissed at the trial because it contains irrelevant or redundant matter. (*Simmonds v. Eldridge*, 19 Abb. 296; *Smith v. Countryman*, 30 N. Y. 655.)

Motions to strike out parts of a pleading as irrelevant or redundant, are substitutes for special demurrers, (*Kellogg v. Baker*, 15 Abb. 287; *Lee Bank v. Kitching*, 11 id. 439; 7 Bosw. 664.) or for exceptions for impertinence under the former practice in chancery. (*Benedict v. Duke*, 6 How. Pr. 352; *Carpenter v. West*, 5 id. 53; *Blake v. Eldred*, 18 id. 240; *Esmond v. Benschoten*, 5 id. 44.) They are not to be encouraged. (*Moloney v. Dows*, 15 How. Pr. 261.) Matter, though clearly redundant, if not tending seriously to prejudice the opposite party, or encumber the record, will not be stricken out. The opposite party is not in such a case aggrieved. (*Clark v. Harwood*, 8 How. Pr. 470; *White v. Kydd*, 4 id. 68; *Hynds v. Griswold*, 4 id. 69; *Harlow v. Hamilton*, 6 id. 476; *Brockelman v. Brandt*, 10 Abb. 141.) Yet it has been said that a party is aggrieved by every unnecessary allegation. (*Carpenter v. West*, 5 How. Pr. 53; *Isaac v. Velloman*, 3 Ab. 464.) And again, "If the matter cannot be made the subject of a material issue, or affect the question of an injunction, or costs, or other relief to be granted, and embarrasses the opposite party and the court, it has no business in the pleading." (*Martin v. Kanouse*, 2 Ab. 331; *Aubrey v. Fiske*, 1 Trans. App. 246. See also *Farmers' Bank of Long Island v. Sherman*, 6 Bosw. 181; 30 N. Y. 655; *Rensselaer Plank Road Company v. Wetzel*, 6 How. Pr. 68; *Stewart v. Boulton*, 6 id. 71.) And in *Isaac v. Velloman*, (3 Ab. 464,) it was held by the New York Common Pleas that irrelevant and redundant matter may be stricken from a pleading without its being shown that it aggrieves a party, otherwise than to compel him to answer the objectionable matter.

The motion to strike out parts of a complaint as irrelevant must be made before demurring to, or answering the complaint, and within twenty days from the service thereof, (*New York Ice Company v. Northwestern Insurance Company*, 12 Ab. 74,) and before noticing the issue for trial. (*Kellogg v. Baker*, 15 id. 287.) The party moving should specify clearly what portion of the complaint is objectionable, as under the old practice of exceptions for impertinence. (*Benedict v. Duke*, 6 How. Pr. 352; *Blake v. Eldred*, 18 id. 240; *Bryant v. Bryant*, 2 Rob. 612.) If a complaint is obnoxious to the objection of redundancy, the redundant matter should be so clearly pointed out by the defendant in his notice of motion, that the court may put its finger upon it. (*Bryant v. Bryant*, *supra*.) It is no objection to the motion that the moving party does not show affirmatively, that he noticed his motion in time. If the notice was not served in time, the plaintiff may show that fact in opposition to the motion. (*Barber v. Bennett*, 4 Sand. 705.)

A stipulation extending the time to answer, and to make such application as the defendant shall be advised, operates to extend the time for moving to strike out matter in the complaint as irrelevant or redundant. (*Lackey v. Vanderbilt*, 10 How. Pr. 155.) By noticing a cause for trial, a party waives the right of moving, subsequently to strike out redundant matter from his adversary's pleading. (*Esmond v. Van Benchoten*, 5 How. Pr. 44; *Marry v. James*, 34 id. 238.) So obtaining an order extending the time to answer, is a waiver of all objections to the complaint, and a bar to a motion to strike out irrelevant matter, unless the right to make the motion is expressly given. (*Bowman v. Sheldon*, 5 Sand. 657; see *Miln v. Vose*, 4 id. 660.) If, after notice of motion to strike out parts of the complaint, the defendant serves his answer, he thereby waives his motion. (*Goch v. Marsh*, 8 How. Pr. 439.)

Irrelevant and redundant matter will be stricken out of a complaint for a cause of action for the conversion of personal property. (*Moffatt v. Pratt*, 12 How. Pr. 48.) So a complaint containing six counts, similar to a declaration under the former prac-

tice, not being allowed by the Code, on motion, five of them will be stricken out, with costs of the motion. (*Stockbridge Iron Company v. Mellen*, 5 How. Pr. 439.)

The rule in regard to striking out redundant matter is, that unless it is clear that the facts alleged cannot properly be received in evidence, such matter will be retained until the trial. (*Follett v. Jewitt*, 10 N. Y. Leg. Obs. 193; S. C. 2 Liv. Law Mag. 189.) In an *anonymous* case in 2 Sandf. 682, the court said that on a motion to strike matter out of a pleading as irrelevant, redundant or frivolous, it would be governed by the consideration whether it was in any way questionable as to the matter being good in point of law. If there were any reasonable doubts as to the matter being pertinent, the party should be put to his demurrer. That in respect to matter palpably redundant or frivolous, the court would strike it out of course.

Where a complaint states a good cause of action, and then proceeds to state additional, redundant or improper matters, a motion to strike out such matters is a proper remedy. (*Meyer v. Van Collem*, 28 Barb. 230; S. C. 7 Abb. 222.) Redundancy in words will not justify the court in striking out a part of a pleading, unless the matter is redundant or irrelevant. (*Warren v. Struller*, 11 N. Y. Leg. Obs. 94.)

From an order denying a motion to compel a party to make his pleading more definite and certain, and to strike out irrelevant and redundant matter contained therein, an appeal does not lie. (*Field v. Masterton*, 41 How. Pr. 95.)

(14) INDEFINITENESS OR UNCERTAINTY.

Section 160 of the Code also provides that when the allegations of a pleading are so indefinite or uncertain that the precise nature of a charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

The motion, under this section, to make a pleading more definite and certain, is a substitute for a special demurrer. (*Kellogg v. Baker*, 15 Abb. 286.) A motion to make a pleading more definite and certain by setting forth the contents of a written instrument relied on by the pleader, should not prevail, where it appears that the instrument is lost, and the pleading apprises the adverse party of the nature and effect of the instrument. (*Kellogg v. Baker*, 15 Abb. 286.)

The omission to move that the complaint be made definite and certain is an admission that the defendant understands the nature of the charge, and is prepared to meet it. (*Quintard v. Newton*, 5 Rob. 72.) The indefiniteness and uncertainty to be relieved against on motion is only such as appears on the face of the pleading. (*Brown v. Southern Mich. R. R. Co.* 6 Abb. 237.)

The objection to a complaint on the ground that it is indefinite and uncertain, must be taken by motion, under the above clause of section 160 of the Code, and not by demurrer. (*Chesebrough v. The N. Y. & Erie R. R. Co.* 26 Barb. 9; *Seeley v. Engell*, 13 N. Y. 542; *Smith v. Greenin*, 2 Sandf. 702; *Richards v. Edick*, 17 Barb. 260; *Graham v. Cannan*, 5 Duer. 697; *Village of Warren v. Philips*, 30 Barb. 646.)

The indefiniteness and uncertainty to be relieved on motion is only such as appears on the face of the pleading. (*Brown v. Southern Mich. R. R. Co.* 6 Abb. 237.)

Wherever the pleader desires to show a conclusion different from that which the law would, *prima facie*, draw, he must state the facts which remove such *prima facie* conclusion; but if, instead of stating the facts, the pleader merely states the conclusion, the fault is uncertainty, not insufficiency, and the remedy of the opposite party is by motion, to have the pleading made certain, by amendment. (*Martin v. Kanouse*, 11 How. Pr. 563; 2 Abb. 327. See *Eno v. Woodworth*, 4 N. Y. 253)

The time stated in a pleading is often not material; that is, it may be departed from, in evidence; but allegations in respect to time, like all other allegations, are evidence against the party making them, as his admission. (*Andrews v. Chadbourne*, 19 Barb. 147.) But if the time when a fact happened is material to constitute the cause of action, it should undoubtedly be stated. The fact, without the time, would be insufficient to constitute the cause of action; but if the time is immaterial, a demurrer will not lie for omitting to state it. (*The People ex rel. Crane v. Ryder*, 12 N. Y. 439; *Barnes v. Matteson*, 5 Barb. 375.) Thus, where the complaint alleged that at an election legally held in the county of P., pursuant to the statute, for the election, among other officers, of a county judge for such county, for the term of four years from the 1st day of January, 1852, the relator received a majority of the votes given for the office of county judge, and was legally elected to such office, for such term, it was held, on demurrer, that the complaint stated facts sufficient to show that the relator was entitled to the office and properly made a party. And that if the time when the election was held was not sufficiently stated, by this allegation, the remedy was by motion to have it made more definite, and the objection was not available on demurrer. (*Ib.*) Where it is important to show that a particular fact,

alleged in a pleading, occurred after the happening of some other event, it is, in most cases, sufficient to allege that such fact occurred *after* such other event. (*Martin v. Kanouse*, 2 Ab. 331; *Kellogg v. Baker*, 15 id. 237. See *Brown v. Harmon*, 21 Barb. 510; *Beesley v. Dolby*, 6 Bing. N. C. 37; Voorhies' Code, 10th ed. 248.) But an allegation that the plaintiff was not advised of fraud *until long after*, is uncertain. (*Johnson v. Johnson*, 5 Ala., N. S. 101. And see *Bertine v. Varian*, 1 Edw. 343.)

An allegation, in a complaint, that the plaintiff "afterwards, to wit," on a day specified, paid certain moneys, does not preclude him from showing that the payment was made at an earlier day, for the purpose of claiming interest. (*Lyon v. Clark*, 8 N. Y. 418. See *Dubois v. Beaver*, 25 N. Y. 123.)

An omission to allege the time and place at which an act stated in a pleading was done, does not render the pleading insufficient, or demurrable. (*Carpenter v. Brown*, 6 Barb. 147. See *Beach v. Bay State Co.* 10 Abb. 71; *Ryalls v. Bramall*, 1 Ex. 734.)

Although when one agrees to sell and deliver at a particular place, and the other agrees to receive and pay, an averment by the purchaser of a readiness and willingness to receive and pay *at that place*, in case he sues for a non-delivery, is indispensable to a good complaint, (*Clark v. Dales*, 20 Barb. 65), yet, if in such a case, the complaint alleges a *general* readiness and willingness on the part of the plaintiff to perform his part of the contract, this would imply a readiness and willingness to perform at the particular place. (Voorhies' Code, 10th ed. 248.)

The omission of the first names of persons in pleadings, (unless excused by averment,) makes the pleading indefinite and uncertain. (*Applemans v. Blanche*, 14 M. and W. 154; *Esdale v. McLane*, 15 id. 277.)

The following allegations have, in the cases mentioned, been held not sufficiently certain: That the plaintiff was *duly* appointed administrator, (*Beech v. King*, 17 Wend. 17;) or receiver, (*Gillet v. Fairchild*, 4 Denio, 83; *White v. Joy*, 13 N. Y. 86;) that referees *duly* made their award, (*Everand v. Patterson*, 6 Taunt. 645, 2 Marsh. 304;) that an act was done "in due course of law," (*Currie v. Henry*, 2 Johns. 437;) or in a "suspicious manner," (*Muir v. Kaye*, 4 Taunt. 34;) or "according to statute," (*Walker v. Maxwell*, 1 Mass. 104;) or "contrary to statute," (*Smith v. Lockwood*, 13 Barb. 209;) that the defendant had made "repeated acknowledgments," (*Bloodgood v. Bowen*, 8 N. Y. 365;) that "by virtue of a certain writ or other warrant," (1 Saund. 298, note 1;) that the plaintiff was "compelled to pay," (*Packard v. Hill*, 7 Cow. 442, 1 Wend. 209;) that S. "failed to fulfil his obligations by virtue of said instrument," (*Van Schaack v. Winne*, 16 Barb. 95;) that each plaintiff is a creditor "in the sum of \$100 and upwards," (*Gray v. Kendall*, 5 Bosw. 666;) that A. is a creditor on "several promissory notes of said firm," (id.); that services and materials were done and supplied "at the times and about the matters, and at the prices specified in an account already delivered," (*Farcey v. Lee*, 10 Ab. 143;) that a judgment obtained in the name of another "belongs to the plaintiff," (*Martin v. Kanouse*, 2 Ab. 327;) that "the plaintiff, at the defendant's request, rendered to the defendants other services as agent, for which he is entitled to have, as a fair reward, \$50; also for work, labor and services furnished by plaintiffs for defendants," (*Chesebrough v. New York & Erie Railroad Company*, 13 How. Pr. 557;) facts anticipating and avoiding the defence of the statute of limitations. (*Butler v. Mason*, 5 Ab. 40.)

Less definiteness and certainty is required when the facts lie more in the knowledge of the opposite party than the pleader. This was the rule previous to the Code. (Steph. Pl. 370.) If the pleader alleges that he is heir, he must show his pedigree, and how he became heir; but if he alleges that his opponent is heir, that is sufficient without more. (2 Saund. 7, c. note. See *St. John v. Northrup*, 23 Barb. 26; *Richards v. Edick*, 17 id. 270.) In alleging the opposite party to be an assignee, it is not necessary to state how he became assignee. (*Norton v. Vultee*, 1 Hall, 384.) In *Nellis v. De Forest*, (16 Barb. 67,) a policy of insurance in possession of the opposite party was held to be described with sufficient certainty where it stated the names of the insurer and the insured, that it was on furniture in the defendant's tavern in N., and that it was for \$1,000. So where the complaint stated the circumstances under which the defendant made an assignment for the benefit of creditors, and set forth the whole assignment, and then alleged that the assignment was fraudulent and void on its face, and was made to hinder, delay, and defraud creditors, it was held sufficiently definite and certain, and that it was not necessary to state why it was fraudulent and void on its face. (*Hastings v. Thurston*, 18 How. Pr. 530; 1 Ab. 418.) In *Slowman v. Schmidt*, (8 Ab. 5,) the complaint stated that at a specific time, the defendants received, as agents of the plaintiff, from a person named, cer-

and conduct it on his behalf. (16) Though the complainant has a right to appear in person, and manage his cause without the assistance of a solicitor or counsel, yet it is not *usual* for a party to appear in person, unless he is himself a solicitor, at least, of the court. Nor would it be quite safe, indeed, for a complainant, not familiar with the practice

tain sums of money, amounting to a specified sum, and then stated a demand of payment and refusal. This was held neither indefinite nor uncertain.

Allegations in respect to *quantity* are rarely necessary, unless the subject of the averment is a record, a written instrument, or an express contract. (*Van Rensselaer v. Jones*, 2 Barb. 643.)

A party cannot on the trial object to a pleading as indefinite or uncertain. (*Farmers' Bank of Long Island v. Sherman*, 6 Bosw. 181; 30 N. Y. 655. See *Martin v. Kanouse*, 2 Ab. 331.)

From an order to make a pleading definite and certain an appeal lies. (*Arrieta v. Morrissey*, 1 Ab., N. S. 439.) The operation of the order may be suspended during the appeal by a stay of proceedings. (*Culver v. Hollister*, 17 Ab. 405.) In *Field v. Stewart*, (41 How. Pr. 95,) however, it was decided by the Superior Court of New York that an appeal does not lie from an order *denying* a motion to compel a party to make his pleading more definite and certain, and to strike out irrelevant and redundant matter contained therein.

(15) SUPPLEMENTAL COMPLAINT.

See note to Supplemental Bill, Post, vol. 2, p. 59.

(16) In New York, since the abolition of the court of chancery, there are no longer any *solicitors*. Business in the courts, in equity cases, as well as those at law, is now conducted by *attorneys*. Their examination and admission are regulated by rule of court. (See Rules 1, 2.)

As to the rights, duties, and responsibilities of attorneys, see Townsend's and Wait's notes to rules of Supreme Court, 1 and 2 Voorhies' Code, 10th ed., 694, 695; Wait's Code, 822, 823, 824.

Rule 10 of the Supreme Court requires that on process or papers to be served, the attorney, besides subscribing or indorsing his name, shall add thereto his place of business; and if he shall neglect to do so, papers may be served on him at his place of residence, through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence. This rule applies to a party prosecuting or defending in person, whether he be an attorney or not.

An attorney may be changed by consent or upon cause shown, and upon such terms as shall be just, upon the application of the client, by the order of a Justice of the Supreme Court, and not otherwise. (Rule 15.)

It has been decided that a client has a right to change his attorney at pleasure, on payment of his fees. (*Hazlett v. Gill*, 5 Rob. 111; *Wolf v. Trochelman*, 1b.) The change, however, should only be by order of the court. (*Ibid.*) The court, in the absence of any agreement as to the amount of costs, will not order a substitution of an attorney on payment of the taxed costs only, but will allow the attorney such further compensation as under the circumstances is proper. (*Cregier v. Cheesbrough*, 25 How. Pr. 200.) On the substitution of an attorney, where the attorney alleges that, subsequent to the judgment, his client assigned it with a view to defeat the attorney's lien, the attorney may have a reference to ascertain his lien on the judgment for taxed costs, without prejudice to his rights as against the assignee. (*Richardson v. Brooklyn Railroad Company*, 24 How. Pr. 321; id. 480; 15 Ab. 342, n.) Rule 17 of the Superior Court of New York, provides that no *ex parte* order for the substitution of an attorney for either party shall be granted, unless upon the consent in writing, signed by the party and his attorney, duly acknowledged or proven by affidavit. Upon the substitution of an attorney, it is sufficient to serve notice thereof. The order of substitution need not be served. (*Bogardus v. Richtmeyer*, 3 Ab. 179; *Dorton v. Lewis*, 7 How. Pr. 132.) Until an order of substitution is entered, and notice thereof served, the opposite party may treat with the original attorney. (*Parker v. City of Williamsburgh*, 13 How. Pr. 250.)

If a party has an attorney in the action, service of papers must be made upon the attorney instead of the party. (Code, § 417,) excepting the service of a summons or other process, or of any paper to bring the party into contempt. (Code, § 418.)

of the court, to hazard his rights by attempting to draw his bill and carry on the suit without professional assistance.

If a solicitor is employed, it is not necessary that his retainer should be in writing. *(i)* Though, as a matter of evidence and convenience, it would doubtless be better for solicitors, before commencing suits, to require written authority to do so. But whether the authority is in writing or by parol, it should be *special*: as it has been held that a *general* authority to act as solicitor for a party is not sufficient to warrant the solicitor in commencing a suit on his behalf; *(k)* though the rule is otherwise as to *defending* suits. *(l)* The rule requiring a special authority in the solicitor to commence a suit, applies not only to cases where the party is to sue alone, but where he is to sue as a co-complainant, with others, and even to cases where his name is merely made use of *pro forma*. *(m)*

If a party sole complainant in a bill swear that he did not authorize the *attorney to file it, the proceedings, on application, will be [*43] stayed, and the attorney made liable for the costs, unless he produce a written authority for commencing the suit. *(n)* And where a suit is commenced in the names of several persons by their solicitor, the court will not inquire whether such suit was authorized by all; unless some of them object to the proceedings, or the adverse party shows affirmatively that the suit is commenced and carried on in the names of some of the parties without authority. *(o)* If a bill be exhibited in the name of a married woman, against her husband, it may, upon affidavit that she knew nothing of it or had not consented to it, be dismissed. *(p)*

The solicitor being duly authorized to commence a suit, the next step is to draw the bill, from the facts stated by the complainant, or otherwise. In ordinary suits, it is usual for the solicitor to draw the bill, afterwards submitting it to counsel for his approval and signature. In cases of great importance or difficulty, however, it is safer to have the bill drawn by counsel; as the success of the suit may depend, in a great measure, upon the manner in which the bill is framed.

(i) Lord v. Kellett, 2 My. & Keen, 1.

(j) Wright v. Castle, 3 Meriv. 12.

(n) Wheeler v. Bulwer and wife, 1 Glasc. Rep. 263.

(o) Bank Commissioners v. Bank of Buffalo, 6 Paige, 497.

(k) Wilson v. Wilson, 1 Jac. & Walk. 457.

(m) 1 Jac. & Walk. 457.

(p) Prac. Reg. 60.

SECTION VI.

ENGROSSING, SIGNING, AND SWEARING TO.

Engrossing.] The bill having been drawn, submitted to the complainant or person who is to swear to it, and found to be correct in its statement of the facts and in the charges therein contained, is, in the next place, to be engrossed, in order that it may be signed, sworn to, filed and served. The draft being preserved in the office of the solicitor.

A rule of the court requires that all bills, answers, and other proceedings, and copies thereof shall be fairly and legibly written; and if not so written, the register, assistant register and clerks shall not file such as may be offered to them for that purpose. (*g*) (17)

Signing.] Except in cases where an injunction is asked for, or a discovery, or an answer on oath is required from the defendant, bills are usually signed by the solicitor and counsel alone, and not by the party. (*r*) (18) If the complainant sue in person, however, it must be

(*g*) Rule 95.

(*r*) *Hatch v. Eustaphieve*, 1 *Clarke*, 63.

(17) A statute requires that pleadings shall be in the English language. (2 *Rev. St.* 275, § 9.)

Rule 20 of the Supreme Court requires all the pleadings and other proceedings and copies thereof, to be fairly and legibly written; and if not so written, &c., the clerks shall not file such as may be offered to them for that purpose; nor will the court hear any application or motion founded thereon. But if the party upon whom such paper shall have been served shall not return the same within twenty-four hours, to the party serving it, with a statement of the particular objection to its receipt, he will be deemed to have waived the objection.

When a party returns a paper as irregular, he must state his objections to it explicitly. A mere statement that the service is irregular, and not in compliance with certain specified sections of the Code, is not sufficient. (*Chemung Canal Bank v. Judson*, 10 *How. Pr.* 133; *Broadway Bank v. Danforth*, 7 *id.* 264.) Where papers are to be returned for irregularity, if there is no attorney's name on them, they are to be returned to the party. If the party is a municipal corporation, having a counsel chosen under a statute, the papers should be returned to such counsel. (*Taylor v. Mayor, &c. of New York*, 11 *Ab.* 255.)

In *Henry v. Bow*, (20 *How. Pr.* 215,) the fact of the motion papers being badly defaced with interlineations and erasures, was held a sufficient reason for denying a motion. And in *Bame v. Jones*, (8 *D. and R.* 114,) costs of a motion were refused because the motion papers were badly written. In *Johnson v. Carey*, (3 *Rob.* 710,) an injunction was dissolved on the ground, among others, that the affidavit and papers on which it was granted were illegible.

(18) The Code requires that every pleading, in a court of record, shall be subscribed by the party, or his attorney. (Sec. 156.)

A similar provision is contained in the Codes of *Wisconsin*, (§ 62); *Kansas*, (§ 115); *Ohio*, (§ 105); *Minnesota*, (§ 77, LXXIII.); *Indiana*, (Bick. *Civ. Prac.* 64); and *California*, (*Prac. Act.*, § 51.)

If an infant is a party suing or defending by guardian, the attorney who conducts the suit may subscribe the pleadings. (*Hill v. Thacter*, 3 *How. Pr.* 409. See *Anable v. Anable*, 24 *id.* 92.) The signature to a verification of a pleading, without more, is a sufficient subscription to the pleading. (*Hubbell v. Livingston*, 1 *Code Rep.* 63.) If a pleading is served which does not appear to have been subscribed, it should be

signed by him. *And in that case, it seems that the bill need [*44] not be signed by counsel. (s) The general rule, however, is that the bill must be signed by counsel. (19) And if it is not so signed, it will be ordered to be taken off the files; or it may be demurred to for that cause. (t.)

In a suit by a corporation, the bill, if it is not a sworn one, is signed by the solicitor and counsel of the corporation. In case the bill is to be sworn to, it should be signed by the officer making the oath.

Swearing to bill.] Bills in which the answers of the defendants on oath is not waived, must be verified by the oath of the complainant, or in case of his absence from the state, or other sufficient cause shown, by the oath of his agent, attorney, or solicitor. (20) And all bills for discovery merely must be verified in the same manner. (u)

(s) See 1 Hoff. Ch. Pr. 97.

(t) *Dillon v. Francis*, Dick. 68. *French v. Dear*, 5 Ves. 547. *Kirkley v. Burton*, 5 Mad. 378. *Carey v. Hatch*, 2 Edw. 190. *Partridge v. Jackson*, id. 520.

(u) Rule 17.

returned, with notice of the defect. (*Ehle v. Haller*, 10 Ab. 287; 6 Bosw. 661); or the defect will be waived. (Id.)

A complaint, defective for want of a signature, may be amended; and if not amended in the court below, will be regarded in the Supreme Court as so amended. (13 Ind. Rep. 445.) If a pleading be not properly signed, and no objection be made thereto until the trial, the defect will be regarded as waived. (20 Ind. Rep. 62.)

Rule 13 of the Supreme Court directs that on process or papers to be served, the attorney, besides subscribing or indorsing his name, shall add thereto his *place of business*; and if he shall neglect to do so, papers may be served on him at his place of residence, through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence, and paying postage thereon. If neither place of business nor residence can be found, service may be made by filing the papers with the clerk.

This rule applies to a party who prosecutes or defends in person, whether he be an attorney or not.

Papers lacking the attorney's signature should be returned to the party. Where such party is a municipal corporation, having a counsel chosen under a statute, the papers should be returned to him. (*Taylor v. Mayor, &c., of New York*, 11 Ab. 255.)

An attorney in fact, who is not an attorney at law, cannot sign his name to a complaint for his principal, as "plaintiff's attorney." (*Dixey v. Pollock*, 8 Cal. 570.)

(19) 1 Dan. Ch. Pr. 312; Mitf. Eq. Pl. 48; *French v. Dear*, 5 Ves. 547; *Kirkley v. Burton*, 5 Mad. 378; *Hatch v. Eustaphie*, 1 Clarke, 63.)

This was the rule prior to the Code; and is doubtless the rule still, in all the states having a separate court of chancery.

By a rule of the court of chancery in New Jersey, every bill must be signed by counsel before it is filed. (Chancery rule 1.) And the omission of the signature of counsel is a defect which requires an amendment. (*Wright v. Wright*, 1 Halst. Ch. 153.)

It is also the rule in the United States courts. The 24th Equity rule of the Supreme Court of the United States requires that "every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation, on his part, that upon the instructions given to him, and the case laid before him, there is good ground for the suit, in the manner in which it is framed."

(20) VERIFYING COMPLAINT.

The Code, although it does not require the plaintiff to verify his complaint, unless he chooses to do so, provides that when any pleading is verified, the subsequent pleading, except a demurrer, must be verified, also. (Sec. 156.) (See also Cal. Prac. Act, § 51.)

The oath administered to the party must be in substance, that he

If the complaint be not verified, or, though verified, if the copy served do not contain a copy of the verification, including the jurat and the name of the officer before whom it is sworn, the defendant may serve an unverified answer. (*Hughes v. Wood*, 5 Duer. 603, note; *Graham v. McCoun*, 5 How. Pr. 353; *Trowbridge v. Didier*, 4 Duer. 450.)

The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters, he believes it to be true; and must be by the affidavit of the party; or, if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county, where the attorney resides, and capable of making the affidavit.

The affidavit may also be made by the *agent* or *attorney*, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney.

When the pleading is verified by *any other person than the party*, he shall set forth, in the affidavit, his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party.

When a *corporation* is a party, the verification may be made by any officer thereof.

And when the *state*, or *any officer thereof*, in its behalf, is a party, the verification may be made by any person acquainted with the facts.

The verification may be *omitted* when an admission of the truth of the allegation might subject the party to prosecution for felony.

And no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading. (Code of N. Y. § 157.)

The Codes of *Ohio*, *Wisconsin*, *Kansas*, *Minnesota*, and probably other states, contain similar provisions. (Code of Ohio, § 106; Code of Wisconsin, § 63; Code of Kansas, §§ 116 to 123; Code of Minnesota, § 77. LXXIII.)

In *Indiana*, in general, the complaint need not be sworn to; and when sworn to, it has no other effect, as a general rule, than if without oath. (Laws of 1853, p. 101; Bicknell's Civ. Prac. 64.) There are a few cases in which, by statute, the complaint is required to be sworn to; for example, complaints for an injunction, and some complaints in proceedings supplementary to execution. In such cases, if the defendant answers to the merits, without objecting to the complaint for want of an oath, the objection is thereby waived. (Bicknell's Civ. Prac. 64, 65.)

The form prescribed in section 157 of the Code, need not be literally followed. (*Radway v. Mather*, 5 Sandf. 655; *Harris v. Trip*, 4 Ab. 232.) A substantial compliance is sufficient. (*Waggoner v. Brown*, 1 How. Pr. 212.) The substitution of "facts" for "matters" will not render a verification defective. (*Whelpley v. Van Epps*, 9 Paige, 333.) The verification need not state that the deponent has read the pleading. (*Patterson v. Ely*, 19 Cal. Rep. 28.)

Where, in a pleading, all the allegations are positive, and are none of them stated to be on information and belief, the verification that it is true to the affiant's knowledge, without adding the words "except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true," is a sufficient verification. (*Kinkaid v. Kip*, 1 Duer. 692. And see *Ross v. Longmuir*, 24 How. Pr. 49; 15 Ab. 326.)

In *chancery* practice, where it is necessary that a bill should be sworn to, for the purpose of calling for an answer on oath, it is not necessary that the allegations of a bill, verified by oath merely for that purpose, should be sworn to positively. It is sufficient that the person verifying the bill swears to his belief of the charges contained in it. (*Veeder v. Moritz*, 9 Paige, 371; *Triebert v. Burgess*, 11 Md. R. 452.)

Independent of any statutory provision, and where no preliminary order is required, it is not generally necessary that bills should be sworn to, although an answer on oath is not waived. (1 Dan. Ch. Pr., Am. Ed. 395, note 4; *Atwater v. Kinman*, Harring. Ch. 243; *Jerome v. Jerome*, 5 Conn. R. 352.)

In *Maine*, a bill in equity to redeem mortgaged premises need not be verified by affidavit. (*Hilton v. Lothrop*, 46 Maine, 297.) But bills of discovery, and those praying for an injunction, must be verified by oath. (Chan. rule 1; 37 Maine R. 581.)

A bill need not be sworn to in *Massachusetts* (*Burns v. Lynde*, 6 Allen, 306); nor in *Illinois* (see Chancery Code, § 2); nor in *Indiana*, except in a few cases specified by statute, as in complaints for an injunction, or in proceedings supplementary to execution (2 R. S. 60, § 138; id. 152, § 518; Bick. Civ. Prac. 64); nor in *Wisconsin*

has read the bill, or has heard it read, and knows the contents thereof;

or *Minnesota*, though when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (Code of Wisc. § 62; Pub. Stat. of Minn. ch. 60, § (77) LXXIII.)

And there is no rule in the United States Circuit Court for Massachusetts, requiring an oath to be filed with the bill. (*Woodworth v. Edwards*, 3 Wood. and Minot, 120.)

In *North Carolina*, "an affidavit of the truth of the matters contained in his bill" is necessary to give jurisdiction to the court of equity, under the statute (Rev. Code, ch. 7); and the want of such an affidavit is a good ground for a general demurrer. (*Barringer v. Andrews*, 5 Jones' Eq. 348.)

In *Delaware*, a creditors' bill must contain the averments required by the 109th Rule, and those averments must be sworn to, in the *jurat*. (*Clark v. Davis*, Harring. Ch. 227.)

The verification should be subscribed by the deponent. (*Lainbeer v. Allen*, 2 Sandf. 648.)

When the verification is by the party himself, all statements contained in it will be evidence, on the trial, against the deponent. (*Morrell v. Cawley*, 17 Ab. 76); but when it is by one not a party to the suit, his statements therein are not evidence against a party to the suit. (*Bowen v. Powell*, 1 Lans. 1.) It is irregular for a complaint to be sworn to before the plaintiff's attorney. (*Gilmore v. Hempstead*, 4 How. Pr. 153; *Anon.* id. 290.) But such a verification cannot be treated as a nullity. The defendant's remedy is by motion to set it aside. (*Ib.*) Or he may serve an unverified answer. (*Ib.*) Where one swears that a complaint is true, it is in law swearing that it is "true to the knowledge of the plaintiff," as required by the above section of the Code. (*Southworth v. Curtis*, 6 How. Pr. 271.) But a verification that the deponent "has read the foregoing complaint, and knows the contents thereof, and that the same is true," is defective. (*Williams v. Riel*, 5 Duer. 601.) So of a verification that "the above complaint is substantially true, of his own knowledge." (*Waggoner v. Brown*, 8 How. Pr. 212.) So a verification that the deponent has "read the complaint, and that the same is true according to the best of his knowledge and belief," is insufficient if made by the plaintiff, and certainly so if made by his attorney or agent. (*Van Horne v. Montgomery*, 5 How. Pr. 238. See *Fitch v. Bigelow*, id. 237; S. C. 3 Code R. 216.) The form of verification required by the Code does not necessarily imply that it appears in the pleading what matters are stated on personal knowledge, and what on information and belief. (*Truscott v. Dole*, 7 How. Pr. 221.) Hence, the words "as the plaintiff is informed and believes," where they occurred in the sworn complaint, were stricken out as redundant. (*Ib.*) In *Harnes v. Tripp*, (4 Ab. 232,) where all the allegations in a pleading were made on information and belief, a verification in which it was stated that the affiant "believes it to be true, all the allegations therein being on information and belief," was held to be sufficient.

The verification of a complaint should be united in by every party united in the pleading, where their interests are several. (*Gray v. Kendall*, 10 Ab. 66; S. C. 5 Bosw. 666.) Where one of several parties united in interest makes the verification, he should state that he is acquainted with the facts. (*Kelly v. Bowman*, N. Y. Transcript, July 18, 1861; *Boston Locomotive Works v. Wright*, 15 How. Pr. 253.) Where a plaintiff says, in his verification, that "he knows the contents of the foregoing complaint, and that the same is true, except," &c., it is insufficient. He should state that the same is true to his knowledge. (*Tibballs v. Selfridge*, 12 How. Pr. 64.) When the action is prosecuted or defended for the immediate benefit of one not a party to the record, but who is the party in interest, the pleading may be verified by him. (*Taber v. Gardner*, 6 Ab., N. S. 147.) If the plaintiff is an *infant*, the complaint may be verified by his guardian, or attorney. (*Hill v. Thacker*, 3 How. Pr. 407; *Anable v. Anable*, 24 id. 92.)

The verification is no part of a pleading. (*George v. McAvoy*, 6 How. Pr. 200.) Hence, if a complaint be actually served without a verification, the plaintiff cannot amend, of course, by serving the same pleading with a verification. If he does so, such subsequent service is a nullity, and may be disregarded. (*Ib.*) Omitting to verify, or defectively verifying, the complaint, does not render the pleading irregular. (*Quin v. Tilton*, 2 Duer. 648.)

Although the complaint be not verified, yet the defendant may verify his answer; and if he does so, the reply, if any, must be verified. (*Lin v. Jacquays*, 2 Code Rep. 29; *Levi v. Jacquays*, 4 How. Pr. 126.)

Absence of the plaintiff from the county is a sufficient reason for a verification by the attorney. (*Roscoe v. Morison*, 7 How. Pr. 121; *Lutson v. Lefever*, 5 Sandf.

and that the same is true of his own knowledge, except as to the mat-

650); and this, though the pleading is not founded on a written instrument in the possession of the attorney, nor all the allegations within his personal knowledge. (*Stannard v. Matice*, 7 How. Pr. 4.) If the agent or attorney has a knowledge of the facts, the verification by him need not state the absence of the party. (*Gourney v. Wersuland*, 3 Duer. 613; *Ross v. Longmuir*, 15 Ab. 326.) Where the verification of a pleading is made by the agent or attorney of the party, it must state his knowledge on the subject; and if it is done upon information and belief, it must state the grounds of his belief, and state what knowledge he has, and the reason why it was not made by the party. A mere statement that he has possession of the note sued on is insufficient. (*Treadwell v. Farrett*, 10 How. Pr. 184; *Hubbard v. National Protection Ins. Co.* 11 id. 149; *Stannard v. Matice*, 7 id. 4; *Fitch v. Bigelow*, 5 id. 237; *Bank of Maine v. Bull*, 14 id. 311; *Soutter v. Mather*, 14 Ab. 440; *Boston Locomotive Works v. Wright*, 15 How. Pr. 253; *Meads v. Gleason*, 13 id. 309.)

A pleading may be verified by an attorney, when his client is a non-resident, although the attorney's information is obtained through a resident agent of the client. It is not necessary that the agent knowing most about the matter should verify the pleading. (*Drevert v. Appert*, 2 Ab. 165.) Where the action is founded on a written instrument in the possession of the attorney, it can be verified by him; and he need not show personal knowledge of the allegations in the complaint. (*Mason v. Brown*, 6 How. Pr. 481; *Smith v. Rosenthal*, 11 id. 442.) In such a case, the possession of the instrument, alone, is enough to authorize an agent or attorney to verify the complaint. (*Myers v. Gerrits*, 13 Ab. 103; *Wheeler v. Chesley*, 14 id. 441.) The agent or attorney may verify the pleading by stating that he has possession of the instrument, and giving the reason why the party cannot verify it, and stating what knowledge he has, if any, or grounds to believe that the instrument is genuine; as that he knows the signature of the party, or has admission thereof, or any appropriate fact relating to the subject. (*Boston Locomotive Works v. Wright*, 15 How. Pr. 253.) In other actions, a general or special agent may verify if he has actual personal knowledge of the matter stated in the pleading. But he must state his character as agent, and the nature of the agency, so as to show that his knowledge grew out of, or pertained to, his business or trust; and state his knowledge, or the grounds of his belief, in respect to the allegations of the pleading; and also why it is not made by the party. (*Ib.*) In such cases, a party may verify upon information and belief; but an agent cannot do so although the party is in a different county. (*Ib.*) An attorney having possession of the written instrument for the payment of money only, on which the action is brought, may verify the complaint, whether he and the plaintiff be in the same county, or not. The fact that the action is brought on such an instrument, which is in the attorney's possession, is, of itself, a sufficient excuse, or reason, for the attorney verifying the pleading. (*Wheeler v. Chesley*, 14 Ab. 441.) In an action upon two notes, the complaint was verified by another than the plaintiff; the verification stating that the notes were in the deponent's possession, and that the reason why the plaintiff did not verify was because he was absent from the state. This was held a sufficient allegation that the deponent was the agent of the plaintiff, to put the defendant to the proof of the contrary, he having set up no defence to the action. (*Myers v. Gerrits*, 13 Ab. 103.) Where an agent or attorney verifies a pleading, he must state what knowledge he has on the subject, and the grounds on which his belief is founded, and why he makes the affidavit instead of the party. That the action is an instrument for the payment of money, which instrument is in the affiant's hands, is no exception to the rule. (*Meads v. Gleason*, 13 How. Pr. 309.) It is sufficient, for an attorney verifying a pleading, to swear that he believes the same to be true, on information derived from his client. (*Dixwell v. Wordsworth*, 2 Code R. 1.)

Under the former *chancery* practice, when a bill was to be verified by the oath of an agent or attorney of the plaintiff, it should be drawn in the same manner as a bill which was to be sworn to by the plaintiff himself, stating those matters which were within the personal knowledge of such agent or attorney positively, and those which he had derived from the information of others, should be stated or charged upon the information and belief of the plaintiff. And the oath of the agent or attorney verifying the bill, should state that he had read the bill, or heard it read, and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters therein stated to be on the information and belief of the plaintiff, and that as to those matters, the deponent believed it to be true. (*Bank of Orleans v. Skinner*, 9 Paige, 305.)

Where one verifies a pleading who is *not a party*, he must state his knowledge of

ters which are therein stated to be on his information or belief, and

each material fact stated therein, or the grounds of his belief of the truth of the same. So far as he speaks of his knowledge, he must state what knowledge he has; when he speaks of belief, he must state the sources of his information and the grounds of his belief. The allegation that the pleading is true, &c., is insufficient. (*People ex rel. Smith v. Allen*, 14 How. Pr. 334.)

When the verification is by an officer of a corporation, it is in fact the verification of the corporation, and the form of it may be the same as that of a party, viz.: not stating his grounds of belief or sources of information or knowledge. (*Glabenslee v. Hamburg & American Packet Company*, 9 Ab. 104.)

The verification may be omitted where it would criminate the party pleading. (*Thomas v. Harrop*, 7 How. Pr. 57.) It is also provided by statute that the verification may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness, to the truth of any matter denied by such pleading. (Laws of N. Y. 1854, p. 153.) That is where the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge. (*Clapper v. Fitzpatrick*, 3 How. Pr. 314.) If the fact to which he is interrogated forms but one link in the claim of testimony which is to convict him, he is privileged; and the witness need not explain how he might be criminated by the answer. If the prosecution to which he might be exposed is barred by lapse of time, the privilege ceases, and the witness must answer. (*Henry v. Bank of Salina*, 1 N. Y. 86.) So if the prosecution be under a foreign law. (*King of the Two Sicilies v. Wilcox*, 15 Jurist, 214.) Or if the witness has been protected by statute against the use of his testimony on a trial against himself. (*The People v. Kelly*, 24 How. Pr. 369; *Matter of Hackley*, 24 N. Y. 74; *Byars v. Smith*, 4 Bosw. 679.)

A complaint imperfectly verified, need not be returned by the defendant as defective. He may serve his answer without verification. (*Lane v. Morse*, 6 How. Pr. 394.)

A demurrer is not the proper remedy for an irregularity in the verification of a pleading. The proper course is to move to set aside the pleading for irregularity. (*Webb v. Clark*, 2 Code R. 16; S. C. 2 Sandf. 647; *Gilmore v. Hempstead*, 4 How. Pr. 153.) But see *Struss v. Parker*. (9 How. Pr. 342, *contra*.) In *Wilkin v. Gilman*, (13 How. Pr. 225,) it is said the practice of moving to set aside a pleading for want of a sufficient verification is not to be commended.

The affidavit to the verification may be taken before any officer authorized to administer an oath, if taken within the jurisdiction of such officer. In case it is taken out of the State, it may be taken by commissioners of deeds specially appointed for that purpose. (Van Sant. Eq. Pr. 111.) See act of 1856, (Laws of N. Y. ch. 270,) to authorize the appointment of commissioners to take proof and acknowledgment of deeds, &c., and to administer oaths in other states and territories. As to the form of a verification out of the State, see 2 Rev. St. 396, § 25; 12 Wend. 225; 3 Hill, 463; *Lahens v. Fielden*, (1 Barb. 22;) Laws of 1863, p. 449; *City of Brooklyn v. Lumley*, (28 How. Pr. 401.)

The affidavit of verification must have a venue in the margin, to show where it is taken. Where the verification was without a venue, and the residence of the commissioner was not stated, and there was nothing to show where it was sworn, it was held that the verification was a nullity. (*Lane v. Morse*, 6 How. Pr. 394.) The same effect would also follow from omitting the signature of the party or of the officer taking the affidavit. (*Laimbeer v. Allen*, 2 Sandf. 648; *Graham v. McCoun*, 5 How. Pr. 353.) But it has been held that the mere omission of the date of the jurat is not a fatal objection to it. (*Schoolcraft v. Thompson*, 7 How. Pr. 446.)

Although, as above stated, a defective verification does not vitiate the complaint itself, yet the verification being a nullity, the complaint will be regarded as an unverified pleading. And even though the verification be in all respects correct, yet if the copy served be defective, either in omitting the name, or the signature of the party, the officer, &c., the defendant may treat the verification as a nullity; for he has a right to consider the complaint served on him as the one he is required to answer. (*Trowbridge v. Didier*, 3 Duer. 448.)

The object of a verification is to secure good faith in the averments of the party. (*Patterson v. Ely*, 19 Cal. 28.)

In California, there is nothing in the statute absolutely requiring a complaint to be verified, with the exception of complaints in actions for an injunction (Pr. Act, § 113; 1 Estee, Pr. 188;) or in actions brought against steamers, boats and vessels, (Pr. Act, § 319;) or in actions for divorce; and such other actions as are specially provided for. (1 Estee, Pr. 188.)

that as to those matters he believes it to be true. And the substance of the oath administered must be stated in the jurat. (*v*)

The following is the form of a jurat to a bill under the above rule of court:

STATE OF NEW YORK, }
Saratoga county, } ss:

On this day of, 18.., before me personally appeared the above named A. B. and made oath that he has read the above bill subscribed by him, (or, has heard it read,) and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters he believes it to be true.

C. D.,¹ master in chancery.

Where a corporation aggregate is complainant, the bill, from the necessity of the case, must be verified by some officer or agent of the corporation. (*w*.)

Bills which are to be verified by the oath of an agent or attorney for a complainant, should be drawn in the same manner as bills which are to be sworn to by the complainant himself; stating those matters which are within the personal knowledge of such agent or attorney [*45] positively; *and those which he has derived from the information of others should be stated or charged upon the information and belief of the complainant. And the oath of the agent or attorney verifying the bill, should state that the agent has read the bill, or heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on the information and belief of *the complainant*, and that as to those matters the deponent believes it to be true. (*x*)

The jurat should not be drawn in the form of a separate affidavit. (*y*)

In verifying a bill, under the 17th rule, for the mere purpose of calling for an answer on oath, it is not necessary that the allegations in the bill should be sworn to positively. It is sufficient if the person verifying the bill swears to his belief of the charges contained in it. (*z*)

(*v*) Rule 18.

(*w*) Bank of Orleans v. Skinner, 9 Paige, 305.

(*x*) Bank of Orleans v. Skinner, 9 Paige, 305.

(*y*) Stafford v. Bryan, 2 Paige, 46.

(*z*) Veeder v. Moritz, 9 Paige, 371. See further as to jurats, post, Chap. VI, Sec. 5, (BOOK I.)—jurats to answers.

SECTION VII.

NUMBERING AND MARKING FOLIOS, ENDORSING, AND FILING.

Numbering and marking folios.] The solicitor or counsel who draws a bill must distinctly number and mark each folio (of 100 words) in the margin thereof; (21) and all copies, either for the parties or the court, must be numbered or marked in the margin so as to conform to the original draft, and to each other. No allowance will be made on taxation of costs for copies not thus numbered and marked. (a) It is not necessary to number the pages of the bill, in addition to numbering the folios. The word folio was formerly used to denote a page, and it may be conveniently employed for that purpose still.

Endorsing.] The register and assistant register are required, by rule, to keep the papers filed before the chancellor separate from those filed before a vice chancellor. And to enable them to do so, the solicitor filing a bill or other paper must designate, on the back thereof, whether it is filed "before the chancellor" or "before the vice chancellor." (b) As bills and petitions are addressed to the chancellor, in all cases, the marking of the paper in conformity with this rule is the only mode of determining whether it was the intention of the [*46] party to institute his proceedings before the chancellor or before the

(a) Rule 95.

(b) Rule 7.

(21) Rule 26 of the Supreme Court requires that any pleading, &c., exceeding two folios in length, shall be distinctly numbered and marked at each folio in the margin thereof; and all copies, either for the parties or the court, shall be numbered or marked in the margin, so as to conform to the original draft or entry, and to each other. If not so folioed, &c., the clerks shall not file the same; nor will the court hear any motion or application founded thereon. But the party on whom any paper is served will be deemed to have waived any objection, unless he returns the same within twenty-four hours to the party serving the same, with a statement of the particular objection to its receipt.

The omitting to folio a pleading, is to be remedied by a motion to set aside the pleading, not by demurrer. (*Dorman v. Kellam*, 14 How. Pr. 184; S. C. 4 Ab. 202; *Bass v. Comstock*, 38 N. Y. 21.) The proper course to pursue when the party objects to a pleading on this ground, is to return the pleading, and at the same time to point out the defect. If this is not done within a reasonable time, it will be held that the irregularity has been waived. (*Strauss v. Parker*, 9 How. Pr. 342.) A complaint will not be set aside, although neither that nor the copy served is folioed as required by the rule, if retained twelve days without objecting to the defect. Such acceptance and delaying to object, waive the effects. (*Chatham Bank v. Van Veghten*, 5 Duer. 628.) A motion to set aside the complaint on this ground will be denied, when the moving papers are obnoxious to the same objection, viz.: that the folios are not marked and numbered. (*Sawyer v. Schoonmaker*, 8 How. Pr. 198.)

When a party returns a paper as irregular, he must state his objections to it explicitly. A mere statement that the service is irregular, and not in compliance with certain specified sections of the Code, is not sufficient. (*Chemung Canal Bank v. Judson*, 10 How. Pr. 133; *Broadway Bank v. Danforth*, 7 id. 264.)

vice chancellor, when the bill is filed in the first or third circuits. And the court has decided that in case of dispute as to the person before whom the suit is instituted, the marking of the bill or petition must determine the question. (c) (22)

In the entitling and endorsement of papers by either party, the complainant's name must be placed first. (d)

The endorsement upon the back of a bill is in this form :

In chancery
Before the chancellor,
(or, Before the vice chancellor of the circuit.)

John Rodgers
v.
Timothy Jackson.

Bill,
J. E.
Sol. for comp't.

Filing.] The next step is to cause the engrossed copy of the bill to be filed in the proper office. (23) If the suit is commenced before the

(c) In the matter of the Receivers of the Globe Ins. Co. 6 Paige, 102.

(d) Rule 95.

(22) Rule 26 of the Supreme Court requires that all pleadings shall be indorsed with the title of the cause. If not so indorsed, the clerks are forbidden to file the same ; and the court will not hear any motion or application founded thereon. But an objection that the pleading is not indorsed will be waived, unless the pleading is returned within twenty-four hours.

Rule 13 directs that on process or papers to be served, the attorney, besides subscribing or *indorsing* his name, shall add thereto his *place of business* ; otherwise papers may be served on him at his place of residence, as near as can be ascertained, through the mail. If neither place of business nor residence can be found, service may be made by filing the papers with the clerk.

This rule applies to a party who prosecutes or defends in person, whether he be an attorney or not.

An attorney or a party having fixed his place of residence for the purposes of the action, in the manner prescribed by the rule, service by mail can only be made by him at the place thus indicated, and the opposite party can only make service upon him by mail, by addressing him at that place. (*Hurd v. Davis*, 13 How. Pr. 57.)

(23) The Code (§ 416) requires that the summons and the several pleadings in an action shall be filed with the clerk within ten days after the service thereof respectively ; or the adverse party on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

When a party files a pleading in obedience to an order under this section, requiring him to do so, he is not bound to notify the other party that the pleading has been filed. (*Donoy v. Hoyt*, 1 Code Rep., N. S. 286.)

The court will permit a party to file a pleading after the time limited therefor in an order to file it, if the omission be explained—as if a copy was inadvertently filed instead of the original. (*Short v. May*, 2 Sand. 639.)

The clerks of the several counties of the State are clerks of the Supreme Court, (Const. of 1867-8, Art. VI, § 20,) and with them all the pleadings and proceedings

chancellor, the bill is to be filed in the office of the register or assistant register. If before a vice chancellor, it must be filed in the office of the clerk of that circuit. If the bill is filed with the register or assistant register, all subsequent pleadings and proceedings must be filed with one of them, unless the cause is referred to a vice chancellor. If so referred, all papers filed therein while it remains before the vice chancellor may be filed with the clerk of his circuit. (e) (24)

(e) Rule 8.

in an action are to be filed. Rule 3 of the Supreme Court requires that papers shall be filed in the county specified in the complaint as the *place of trial*. In case the place of trial is changed, the papers then on file, and those afterwards filed, shall be filed in the clerk's office specified in the order, and all other papers in the cause shall be filed in the county so specified.

In all cases where publication is made, the complaint *must* be first filed, and the summons, as published, must state the time and place of such filing. (Code, § 135, *sub. 5*.) It has been held that service by publication is insufficient, unless the complaint be filed *before* publication; and that the summons as published must state the time and place of filing. A judgment entered upon a service thus defective is a nullity. (*Kendall v. Washburn*, 14 How. Pr. 380; *Titus v. Relyea*, 16 id. 371; 8 Ab. 177.) But in *Waffle v. Goble*, (53 Barb. 517,) it was held that filing the complaint was not necessary to the regularity of the judgment, where, after the order for publication, the summons was personally served out of the state.

The complaint *must* also be filed in cases where a notice of *lis pendens* is filed; as that notice is to be filed at the time of filing the complaint, or at any time afterwards, and is not properly filed before. (Code, § 132.) If notice of *lis pendens* is filed without a complaint, even though the action have been commenced by the service of a summons, it is of no validity; but it becomes operative the moment the complaint is placed on file. (*Benson v. Sayre*, 7 Ab. 472.)

Where the complaint was filed on the 22d of September, and the summons, dated and published on the 23d of September, stated—the “complaint has *this day* been filed”—it was held to be a sufficient compliance with the statute. (*Jacquerson v. Van Erben*, 2 Abb. 315.)

In *Johnson v. Carey*, (3 Rob. 710,) an injunction was dissolved, upon the ground, (among others,) that the papers had not been filed, as required by the rules of the court.

The circuit courts of the United States, as courts of equity, shall be deemed always open, for the purpose of filing bills, answers and other pleadings, and for issuing and returning mesne and final process. (Equity rule 1.) And it is provided, by Equity rule 11, that no process of subpoena shall issue from the clerk's office, in any suit in Equity, until the bill is filed in the office.

In *Massachusetts*, the plaintiff must file his bill before, or at the time of taking out the subpoena; and no injunction or other proceeding shall be ordered until the bill is filed, unless for good cause shown. (Rule 3 of the rules for practice in chancery.)

In *New Jersey*, the clerk of the court of chancery is required to keep in his office a docket, in which he shall enter the titles of all suits brought into the court, and a memorandum of every paper filed in the same, under the title of the suit, with the time of filing, and the name of the solicitor of each party, and also an alphabetical index to the same; and the said docket shall be, at all proper hours, accessible to the bar. (Chancery rule 2, § 8. See also rule 11 Supreme Court, New York.)

In *North Carolina*, it seems a suit in equity is commenced when the bill is filed. (*McLin v. McNamara*, 2 Dev. and Bat. Ch. 82; *Aston v. Galloway*, 3 Ired. Ch. 125.)

In *New York*, the attachment is commenced by the service of a summons. (Code, § 93); or, in case of attachment against foreign corporations, when the summons is issued. (Id. § 227.)

(24) SERVICE OF COMPLAINT.

A copy of the complaint need not be served with the summons. In such case, the summons must state where the complaint is, or will be, filed; and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and, in person or by attorney, demands in writing a copy of the complaint, specifying a place within

*SECTION VIII.

WHEN BILL TO BE ACCOMPANIED BY AN AFFIDAVIT.

In bills of particular descriptions, it is necessary that an affidavit

the state where it may be served, a copy thereof must, within twenty days thereafter, be served accordingly, and after such service, the defendant has twenty days to answer; but only one copy need be served on the same attorney. (Code, § 130.)

If the summons states that a copy of the complaint has been filed, instead of stating that the *complaint* has been filed, it is not such an irregularity as will vitiate a judgment entered for default of answer. (*Hart v. Kramer*, 2 Code Rep. 50.) If the complaint is filed, and no copy is served, with the summons, and the summons, instead of stating where the complaint is filed, states that a copy of the complaint is "annexed," the summons will be irregular. (*Keeler v. Belts*, 3 Code R. 183.) Where the summons is in the form appropriate for serving the copy complaint, together with the copy summons, the omission to serve a copy of the complaint, or to state, in the summons, the place of filing the complaint, although irregular, will not affect the validity of the judgment. (*Foster v. Wood*, 1 Ab., N. S. 156; 30 How. Pr. 234.) A summons served without any copy of the complaint is irregular, unless it states that the complaint was, or will be, filed. (*Pignolet v. Daveau*, 2 Hilt. 584.)

The only case in which the defendant can demand a copy of the complaint is where there has been personal service of the summons, but no copy of the complaint has been served with it. Where a defendant has been served by publication, and a copy of the summons and complaint has been mailed to him, he is not entitled, as of course, to demand a copy of the complaint to be served on him. (*Mackay v. Laidlaw*, 13 How. Pr. 129.)

Several persons may be named in the summons, and the plaintiff may deliver a complaint against only the one upon whom the process is served, omitting the names of the other defendants mentioned in the summons. (*Travis v. Tobias*, 7 How. Pr. 90.) And where one or more, but not all, of several defendants have appeared and demanded a copy of the complaint, it need be served upon such only as have appeared; and when several appear by one attorney, only one copy of the complaint need be served. (Van Sant. Eq. Pr. 118.)

A notice of appearance, to which was added, "and I require all papers to be served on me at my office, 11 Wall St.," was held a sufficient demand of the complaint in *Ferris v. Soley*, (23 How. Pr. 422,) and *Walsh v. Kursheedt*, (8 Ab. 418.) Where a demand of a copy of the complaint was served for one defendant on the 1st of November, and by the same attorney, for another defendant on the 9th of November, it was held that the plaintiff was bound to serve a copy of the complaint within twenty days of the first demand, and that the defendant might move on proof of service of the first notice and demand, without waiting for the expiration of twenty days from the last service. (*Luce v. Trampert*, 9 How. Pr. 212.) After demand of a copy of the complaint duly made, the plaintiff may, on showing ground therefor, obtain further time to furnish a copy of the complaint. (*Littlefield v. Merwin*, 2 Code R. 128; S. C. 4 How. Pr. 303.) But such order cannot be granted *ex parte*, after the time for serving the complaint has expired. (*Stephens v. Moore*, 4 Sandf. 674.) And the affidavit upon which the application to extend is founded, or a copy, must be served with a copy of the order; if not, the order may be disregarded. (Code, § 405.)

In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice setting forth the general object of the action, a brief description of the property affected by it, if it affects specific, real, or personal property, and that no personal claim is made against such defendant; in which case no copy of the complaint need be served on such defendant, unless within the time for answering, he shall in writing, demand the same. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff. (Code, § 131.)

The omission of the plaintiff to serve the notice prescribed by this section, does not deprive the court of the power in equity cases, to award costs against a defendant upon whom a copy of the complaint has been served, for unreasonably defending the action. (*O'Hara v. Brophy*, 24 How. Pr. 379.)

should be annexed to them, on their being filed. Thus, on a bill of interpleader, there must be an affidavit that the complainant does not collude with any of the defendants. (f) (25) In a bill by a party in a suit at law to examine witnesses *de bene esse*, there must be an affidavit that the witness proposed to be examined is of the age of seventy—that the matter to be proved is material, and lies within the knowledge of one person only—that the witness is going out of the jurisdiction, and not likely to return in time to be examined—or the other special circumstances on which it is proposed to apply to the court for leave to examine him *de bene esse*. (g) (26) In a bill to obtain the benefit of an instrument on which an action at law would lie, alleging that it is lost, or if the bill is filed for the discovery of an instrument, suggesting that it is in the power or custody of the defendant, and praying

(f) Mitf. Eq. Pl. 49.

(g) Atk. Ch. Pr. 4.

When the service of the summons is made by publication, a copy of the complaint must be mailed, pursuant to the order of publication. The defendant has twenty days to answer after the expiration of the time required for publication. But the plaintiff may expedite the proceedings by making personal service out of the State; in which case an order for publication must be first obtained, though actual publication need not be made; and the defendant will have only twenty days to answer after such personal service. (Van Sant. Eq. Pr. 116; *Dykens v. Woodward*, 7 How. Pr. 313.)

If the complaint has not been served with the summons, the plaintiff may apply for his judgment at the proper time, without serving any notice or copy of the complaint upon the defendant, (*Engs v. Overing*, 2 Code R. 79; *Bennett v. Delicker*, 3 id. 117; *Van Pelt v. Boyer*, 7 How. Pr. 325,) unless the defendant demands a copy of the complaint, as authorized by section 130 of the Code. (Van Sant. Eq. Pr. 116.) If such notice and demand have been personally served on the plaintiff's attorney, a copy of the complaint must be served within twenty days thereafter. (*Ib.*) If, however, the notice has been served by mail, the plaintiff's attorney will have forty days. (Code, § 412.)

The mode of making service of the complaint is governed by the general provisions of the Code relative to the service of papers. (Sections 403 to 413.)

The copy must be served personally, or in the manner prescribed in section 409 of the Code, unless the person making the service, and the person to be served, reside in different places, between which there is a regular communication by mail; in which case it may be by mail. (Code, § 410.) By the "person making such service," is meant the party (if he appear in person,) or his attorney, and not an intermediate agent employed by the attorney. And a service by such agent in a different town from that in which the attorney resides, is not regular, or any service at all, except from the time the paper is actually received. The Code requires that there shall be *regular communication by mail* between the two places, to make such service available. (*Schenck v. McKie*, 4 How. Pr. 246; *Peebles v. Rogers*, 5 id. 208.)

(25) See Story Eq. Pl. §§ 304, 309; *Phillips v. Carew*, 1 P. Wms. 117; *Laight v. Morgan*, 1 Cal. C. in Br. 344; S. C. 1 John. ch. 429; *Ld. Ray*, 150. The reason given for requiring the affidavit is that the proceeding has a tendency to change the jurisdiction of the subject matter from a court of law to a court of equity. (Mitf. Eq. Pl. 150, 151; Story Eq. Pl. 309.) Justice Story says: "This reason is perhaps, not quite satisfactory. A better ground would seem to be, that the bill has a tendency to create delays, and may be used as an instrument unduly to retard the trial; and therefore, an affidavit that the bill is well founded is required. The affidavit should be positive as to the material facts." (Story Eq. Pl. § 309.)

(26) *Bignold v. Andland*, 11 Sim. 23. The affidavit of his solicitor is not sufficient. (*Wood v. Lyme*, 4 De G. and Sim. 16. See *Eden on Inj.* 2d Am. ed. 401, 402; *Shaw v. Coster*, 8 Paige, 339; *Tobin v. Wilson*, 3 J. J. Marsh. 67; *Marks v. Holroyd*, 1 Cowen, 691; Mitf. Eq. Pl. by Jeremy, 143.) Such an affidavit is not necessary in Connecticut. (*Nash v. Smith*, 6 Conn. 421.) See *Jerome v. Jerome*, (5 id. 352.)

relief that might be had at law if the instrument were in the hands of the complainant, there must be an affidavit annexed to the bill, in the former case, that the instrument is lost; and in the latter instance, that it is not in the custody or power of the complainant, and that he knows not where it is, unless it is in the hands of the defendant. (27) In any of these instances, the want of the requisite affidavit makes the bill demurrable. But if the relief sought extends merely to the delivery of the instrument, or is otherwise such as can only be given in a court of equity, such an affidavit is not necessary. (h)

Affidavits are also frequently annexed to the bill for another object. Thus, where a bill is filed for any purpose other than a discovery, the complainant may, if he thinks proper, waive the necessity of the answer being made on oath of the defendant, to avoid the necessity of disproving it when responsive to the bill. (i) But as the defendant may, by the 36th rule, still answer on oath, notwithstanding an oath is waived by the bill, for the purpose of moving to dissolve an injunction or discharge a *ne exeat*, it is provided by rule 37, that if, in addition to the usual oath of the complainant, the material facts in the bill, on which the injunction or *ne exeat* rests, are duly verified by the [*48] oath of a *credible and disinterested witness, annexed to, and filed with the bill, it shall not be a matter of course to dissolve the injunction, or discharge the *ne exeat* on the oath of the defendant; but the court may, in its discretion, retain it till the hearing.

Where the whole equity of the bill is denied by the sworn answer of the defendant, and no affidavit of a disinterested witness is annexed to the bill, the injunction will be dissolved on bill and answer, although

(h) Id. 5. 1 Newl. 70.

(i) 2 R. S. 175, § 49, (orig. § 44.)

(27.) 1 Dan. Ch. Pr., Am. ed. 1865, p. 395, and note 5. But if the objection, in case of a *lost instrument*, is not taken by demurrer, but the cause proceeds to a hearing, and the answer of the defendant admits the loss or destruction of the instrument, the court has jurisdiction, and the objection for want of the affidavit will be overruled. (*Ib*; *Crosse v. Bedingfield*, 12 Sim. 40.)

So in suits for the *discovery of deeds and writings*, and for relief founded upon such instruments, if the relief prayed be such as might be obtained at law, on the production of deeds or writings, the plaintiff must annex to his bill an affidavit that they are not in his custody or power, or that he knows not where they are unless they are in the hands of the defendant. But a bill for a discovery merely, or which only prays the delivery of deeds or writings, or equitable relief grounded upon them, does not require such an affidavit. (1 Dan. Ch. Pr. 396; *McElwel v. Sutton*, 1 Hill. Ch. 33; Story Eq. Pl. §§ 288, 313; *Findley v. Hinde*, 1 Peters, 244; *Livingston v. Livingston*, 4 John. Ch. 294; *Campbell v. Sheldon*, 13 Pick. 8, 18, 19, 20; Mitf. Eq. Pl. 54, 55; Anon. 1 Ves. 380; *Whitechurch v. Golding*, 3 P. Wins. 641; Anon. 3 Atk. 17; *Dormer v. Fortescue*, id. 132.)

When the subject matter of the writing is properly cognizable in equity, an affidavit of the loss is not necessary. (*Peart v. Taylor*, 2 Bibb. 566; Mitf. Eq. Pl. 124; *Laight v. Morgan*, 1 Cal. Ca. in Er. 345; S. C. 1 John. Ch. 9; *Campbell v. Sheldon*, 13 Pick. 18, 19, 20.)

security for the debt and costs in the suit at law has been given, under the provisions of the revised statutes on that subject. (*k*)

So where it is intended to apply for an injunction or *ne exeat* upon a bill sworn to by an agent or attorney of the complainant, if any material allegation or charge that is necessary to be sworn to positively, to authorize the issuing of the injunction or *ne exeat*, is not within the personal knowledge of the agent or attorney, he should, in addition to his own verification, annex the affidavit of the person from whom he derived his information; swearing that he knows such allegation or charge to be true. (*l*) (28)

(*k*) *Manchester v. Dey*, 6 Paige, 295.

(*l*) *Bank of Orleans v. Skinner*, 9 Paige, 305.

(28) A plaintiff is not entitled to an injunction, *ex parte*, upon a bill verified by his own oath only, where the facts upon which the injunction rests are not within his own knowledge. In such a case he should state the facts, in his bill, as upon his information and belief, and annex the affidavit of the person from whom he obtained the information, or of some other person who can swear positively to the truth of the material allegations in the bill. (*Campbell v. Morrison*, 7 Paige, 157; *Bank of Orleans v. Skinner*, 9 id. 305.) This is the general rule. (Eden on Inj. 2d Am. ed. 380, 381; 1 Hoff. Ch. Pr. 78, 425; *Hatch v. Eustaphie*, 1 Clarke, 63; *Hammersley v. Wyckoff*, 8 Paige, 72.) But the case of a *creditor's bill*, where an injunction is sought for against the judgment debtor alone, is an exception. (Post, 617, 618.)

In *New Jersey*, the affidavits of the plaintiff, made after filing the bill, are not competent to be read upon a motion for an injunction and a receiver. Such affidavits should be subjoined to the bill, and filed with it. (*Brandred v. Paterson Machine Shop*, 3 Green Ch. 294, 309.)

Upon an application for a *ne exeat*, also, an affidavit is necessary, as a foundation for obtaining it. (1 Hoff. Ch. Pr. 96; *Porter v. Spencer*, 2 John. Ch. 169; *Seymour v. Hazard*, 1 id. 1; *Thorne v. Halsey*, 7 id. 191; *Mattocks v. Tremaine*, 3 id. 75; *Gilbert v. Colt*, 1 Hopk. 500; *Gernoe v. Boccaline*, 2 Wash. C. C. 130.)

As to the form and requisites of the affidavit, and by whom it may be made, see Post, 649.

Advantage can be taken of the omission of an affidavit only by demurrer. (1 Dan. Ch. Pr. 399.) Where a plaintiff, instead of demurring on this ground, in the first instance, put in a plea to the whole bill, which was overruled, he was not allowed to demur *ore tenus* on the ground that the necessary affidavit was not annexed. (*Hook v. Dorman*, 1 S. and S. 227; *Crosse v. Beddingfield*, 12 Sim. 35; *Allen v. State Bank*, 1 Dev. and Bat. Eq. 6; *Findley v. Hind*, 1 Peters, 241; *Woodworth v. Edwards*, 3 Wood. and Minot, 120.)

The affidavit annexed to a bill may be amended, by leave of the court. (*Hamilton v. Marks*, 5 DeG. and Sm. 638.)

CHAPTER II.

PROCESS FOR APPEARANCE.

Sect. 1. SUBPENA.

2. ATTACHMENT.

3. ATTACHMENT WITH PROCLAMATIONS.

4. COMMISSION OF REBELLION.

5. SERGEANT AT ARMS.

6. SEQUESTRATION.

7. PROCESS AGAINST CORPORATIONS.

SECTION I.

SUBPENA TO APPEAR.

THE complainant's solicitor having filed the bill, in the next place proceeds to apprise the defendant thereof, in order to compel his ap-
[*49] *pearance and to procure from him an answer if it is desired, or at least to give him an opportunity to defend the suit if he wishes to do so. For this purpose, in pursuance of the prayer of the bill, he sues out a *subpœna* ; which is a writ issuing out of, and under the seal of the court, commanding the defendant personally to appear in court, before the chancellor or the proper vice chancellor, on a certain day, to answer to such bill of complaint. (1)

(1) SUMMONS.

In *England* all personal actions are brought by one universal *writ of summons*, which is issued out of the court where the action is brought, and directed to the defendant, commanding him to cause an appearance to be entered within a certain number of days after the writ is served, formerly 8. (3 Steph. Com. 566.)

In *New York* all civil actions in the courts of record are commenced, as to each defendant, since the Code, by the service of a *summons* on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him (Code, §§ 99, 127), or by a voluntary appearance of the defendant, which is equivalent to personal service of the summons upon him. (Code, § 139.) An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of the Code, when the summons is delivered with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided ; or, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. (Code, § 99.)

The *delivery* of a summons to the sheriff to be served, with an intent to have it served, is the commencement of an action (*Davis v. Duffie*, 18 Ab. 360), but only for the purpose of defeating the statute of limitations. (*Knight v. Beach*, 7 Ab., N. S. 241.) An action is commenced by the *service* of a summons. (*O'Hara v. Brophy*,

This writ now issues of course, upon filing the bill, without entering any order for that purpose; though the practice was formerly otherwise. (2)

24 How. Pr. 379.) The mere *issuing* of a summons is not the commencement of an action for general purposes. (*Kerr v. Mount*, 28 N. Y. 659.) When the service of the summons is by publication the action is not commenced until the expiration of the time prescribed for publication. (*Moore v. Thayer*, 10 Barb. 258; 6 How. Pr. 47. See *Buckhart v. Sanford*, 7 How. Pr. 329; *Matter of Griswold*, 13 Barb. 412; *Nosser v. Corwin*, 36 How. Pr. 540; *McCarthy v. Peake*, 18 id. 138.)

When the plaintiff files with his judgment roll proof of the service of the summons, he is concluded by such proof as to the time of such service. (*Burroughs v. Reiger*, 12 How. Pr. 170.) The endorsement by the officer of the time of the receipt of a summons is not of itself evidence of the fact, so as to show the time of the commencement of the action. (*Wardwell v. Patrick*, 1 Bosw. 406.)

The only mode of commencing an action under the Code is by summons or the obtaining a provisional remedy. (*Ex parte Rennour*, 3 Code Rep. 148; *Moore v. Thayer*, id. 176; *Treadwell v. Lawlor*, 15 How. Pr. 8.) And there is no other mode of bringing a party into court against his will than by the service of a summons. (*Akin v. Albany Northern R. R. Co.* 14 How. Pr. 337. And see *O'Hara v. Brophy*, 24 id. 383.)

The action should not be commenced until the cause of action has accrued. (*Smith v. Holmes*, 19 N. Y. 271; *McCullough v. Colby*, 4 Bosw. 603; *Wiggins v. Orser*, 5 Duer. 118; *Oothout v. Ballard*, 41 Barb. 33; *Smith v. Aylesworth*, 40 id. 104.)

Although the action may not be technically commenced until service of the summons, or voluntary appearance, yet from the time of such service, or the allowance of a provisional remedy, the court will be deemed to have control of all the subsequent proceedings. (Code, § 139; *Moore v. Thayer*, 6 How. Pr. 137; *McEuen's Ex'r v. Public Adm'r*, 3 Code Rep. 139.) And in *Gregory v. Weiner*, (1 Code Rep., N. S. 210,) it was held that, for the purpose of issuing a warrant under the non-imprisonment act, the action was sufficiently commenced, by lodging the summons with the sheriff, with the intent to have it served.

The office of a summons is to give the defendant a certain, authentic and fair notice that an action has been commenced, and to notify him of that reasonable time which the statute has afforded as an opportunity for the preparation of his defence, and, in proper cases, to apply to the court for any additional time that may be necessary to make preparation for the defence. (*Bulkley v. Bulkley*, 6 Ab. 307.)

In *Kentucky* a civil action is commenced by filing in the office of the clerk of the proper court a petition, and leaving a summons to be issued thereon. (Code of Prac. § 65.)

In *California* actions are commenced by filing the complaint and issuing of the summons thereon, which may be done at any time within the year after filing the complaint. (Cal. Prac. Act, § 23.) The clerk is not authorized to issue a summons after the expiration of a year from the time of filing the complaint, without an order of the court; and if the court is authorized to order the issuing of a summons after that period, the exercise of the power rests in its discretion. (*Dupuy v. Sheers*, 29 Cal. 258.) In the case last cited, where no service was had on the defendant until nine years had elapsed, it was held that an order of the court striking out the complaint, was not an abuse of discretion.

In *Reynolds v. Page*, (35 Cal. 296) it was held, that unless the summons and a certified copy of the complaint, duly attested, and in a condition to serve, are placed at the disposal of the plaintiff for service within one year from the filing of the complaint, the action should be dismissed. Unless this be done the summons is not issued, within the meaning of section 23 of the Practice Act. (*Ibid.*)

(2) A summons also issues, of course, in New York. (Code, §§ 127, 128.)

In *Ohio* the action is commenced by filing in the office of the clerk of the court a petition, and causing a summons to be issued thereon. (Code, § 55.) The plaintiff must also file with the clerk a *præcipe*, stating the names of the parties to the action, and demanding that a summons issue thereon. (*Ib.* § 56.) The summons must be issued and signed by the clerk, and be under the seal of the court. (*Ib.* § 57.)

In *Indiana* the summons is issued by the clerk of the court after the complaint is filed. It cannot be issued upon a *præcipe*. (*Bicknell's Civ. Prac.* 45; 12 Ind. Rep. 257.)

In *Wisconsin* actions are commenced by the service of a summons, with or without

The register, assistant register and clerks, are to furnish to any solicitor when required, and upon payment of the fees allowed by law, blank process to appear and answer to bills, with the seal of the court impressed thereon, and with the name of the process *printed* on the body of the seal. (a) But it is provided by another section of the statute that process for appearance shall not issue from the court until the bill praying the same shall have been filed. (b) By the words "issue from the court," as used in the statute, must be meant, not the sealing and delivering of the process out of the office of the register or clerk, but the filling it up, and serving, or putting it in a way to be served. As at law a writ is only considered as *issued* when it is delivered to the sheriff, or put in a regular course to reach him. (c) And in point of fact it is the constant practice in the register's, assistant register's and clerks' offices to deliver out sealed writs of subpoena to appear, whenever applied for, without waiting for a bill to be filed.

Form of.] The subpoena is required, by the 19th rule, to be in the same form substantially, expressive of the intent, as that heretofore used in this court. (d) And a form is given, at length, in rule 20. It must be in the name of the people. (e) It must contain the names of all the defendants; and it is advisable, if not necessary, to name all the complainants. (3) .

(a) 2 R. S. 179, § 75, (orig. § 69. See also 5 Paige, 80. (b) 2 R. S. 179, § 76, (orig. § 70.)
(c) See 1 Hoff. Ch. Pr. 160, note (5.) (d) See 2 R. S. 278, § 9. (e) Id. 275, § 8.

seal, subscribed by the plaintiff or his attorney, and directed to the defendant. (Code, §§ 32, 33; Rev. Stat. p. 717, §§ 1, 2.) The summons, or a copy thereof, must be filed with the clerk before the same is issued, or within ten days thereafter, and the State tax paid. (Rev. Stat. 718, sec. 4.)

In *Minnesota* the summons must be subscribed by the plaintiff or his attorney, and directed to the defendant. (Public Stat. p. 537, sec. 45.) (49.)

In *Kentucky* the summons may be issued at any time, to any county, against any one or more of the defendants, at the plaintiff's request. (Civil Code, § 67.) With every summons the clerk must issue as many copies as there are defendants named therein, unless otherwise ordered by the plaintiff. (Id. § 68.) The summons and copies are to be delivered to the sheriff or other officer authorized to execute it. (Id. § 71.) It is the duty of the sheriff, or one of his deputies, to attend at the clerk's office daily (Sundays excepted) to receive any process that may be issued; and the clerk must deliver to him any process remaining in his office. (Id. § 72.)

In *Kansas* actions are commenced by filing in the office of the clerk a petition, and causing a summons to be issued. The plaintiff must also file with the clerk a *præcipe*, stating the names of the parties to the action, and demanding that a summons issue thereon. The summons must be issued by the clerk, signed by him, and be under the seal of the court. (Code, §§ 62, 64, 65.)

In *California* the summons must be signed by the clerk, and directed to the defendant, and be issued under the seal of the court. (Cal. Pr. Act, § 23.) The clerk is required to indorse on the summons the names of the plaintiff's attorneys. (Id. § 24.)

(3) FORM OF SUMMONS.

The summons must be subscribed by an attorney, and directed to the defendant, and must require him to answer the complaint, and serve a copy of his answer on the attorney, at a place within the state, to be therein specified, in which there is a post office, within twenty days after service of the summons, exclusive of the day of service. (Code, § 128.)

Where the complainant wishes to make an unbaptized infant a party

It has been held that in *all cases*, the summons must state the name of the court in which the action is brought. (*Dix v. Palmer*, 5 How. Pr. 233; *James v. Kirkpatrick*, id. 241.) *Yates v. Blodgett*, 8 id. 278; *Webb v. Mott*, 6 id. 439; *Hewitt v. Howell*, 8 id. 346; *Tallman v. Hinman*, 10 id. 89; *Walker v. Hubbard*, 4 id. 154; *Ward v. Stringham*, 1 Code R. 75.) In *Walker v. Hubbard*, (4 How. Pr. 154.) the summons was served without a copy of the complaint, and without the name of any court appearing thereon. The defendant demanded a copy of the complaint, and one was served, entitled "Supreme Court." On motion to set aside the proceedings, it was held that the name of the court sufficiently appeared; and the plaintiff was allowed to amend by entitling the summons and complaint in the "Supreme Court." In another case, where a summons was served which did not mention the name of any court, (and without any copy of the complaint,) the defendant disregarded it, and the plaintiff took judgment for want of an answer, the court set the judgment aside. (*James v. Kirkpatrick*, 5 How. Pr. 241; *Croden v. Drew*, 3 Duer. 654.) But a summons which does not name the court is not void. (*Tallman v. Hinman*, 10 How. Pr. 89); as a defendant on whom both summons and complaint have been served cannot object that the summons does not name the court, if the complaint does. (*Yates v. Blodgett*, 8 How. Pr. 278; *Webb v. Mott*, 6 id. 439; *Hewitt v. Howell*, 8 id. 346.) If a summons is served without any copy of the complaint, and without naming any court, the defendant, by giving a general notice of appearance, will thereby waive the defect in the summons. (*Dix v. Palmer*, 5 How. Pr. 233; *Webb v. Mott*, 6 id. 439); and by such an appearance, all other irregularities on the face of the summons will be waived. (*Voorhies v. Schofield*, 7 How. Pr. 51. See *Baxter v. Arnold*, 9 id. 445.) But an appearance, although it admits the regularity of the summons, and its service, does not admit the identity of the cause of action indicated by the summons with that set out in the complaint, though both are served together. (*Tuttle v. Smith*, 14 How. Pr. 395.)

The court may allow the summons to be amended, by inserting a notice to the defendant of the nature of the demand, and that, unless he appear and answer within the time specified, judgment by default will be taken against him. (*Pollock v. Hunt*, 2 Cal. 194.)

Thus where it appears that the statute of limitations will run against a demand before another action can be brought, a defective summons may be amended, on motion to set it aside. (*Weir v. Slocum*, 3 How. Pr. 397.) But amendments can only be made by order of the court, upon motion. (*McCrane v. Moulton*, 3 Sandf. 736; *Allen v. Allen*, 14 How. Pr. 248; *Weare v. Slocum*, 1 Code Rep. 105; 3 How. Pr. 379.) A sheriff has no right, after making a return, to amend it, so as to affect rights which have already vested in third parties. (*Newhall v. Provost*, 6 Cal. 57; *Webster v. Haworth*, 8 id. 25.) But courts should exercise great liberality in allowing sheriffs to amend so as to make their returns conform to the facts, and to correct errors and mistakes. (*Gavitt v. Doub*, 23 Cal. 78.)

The summons must state the names of the parties to the action. (*Gardner v. Clark*, 8 How. Pr. 443; *Elliott v. Hart*, 7 id. 25; *Blanchard v. Strait*, 8 id. 83); or the name by which the party is known. (*Cooper v. Burr*, 45 Barb. 9; *Miller v. Stettiner*, 7 id. 692.) When one sues, or is sued, in a representative character, the character should be stated after his name, in the summons. (1 Arch. Pl. 81); and where, in the title of the action, the plaintiff describes himself as administrator, a reference, in the body of the summons, to "the above named plaintiff," will be intended and held to refer to him in his special character as therein described. (*Blanchard v. Strait*, 8 How. Pr. 84.) Where the summons described the plaintiff as administrator, and in the complaint he was represented as suing in his individual capacity, and for a demand in his own right, it was held a fatal variance. (*Ibid.*)

It seems that if there is a *misnomer* of the defendant, (except in cases coming within section 175 of the Code,) in the summons, a motion to set the summons aside for that reason cannot be entertained. (*Miller v. Stettiner*, 7 Bosw. 692; 22 How. Pr. 518; *Traver v. Eighth Av. R. R. Co.* 3 Trans. Ap. 203; 6 Ab. N. S. 46. See *Moulton v. De McCarty*, 6 Rob. 470; *Cooper v. Burr*, 45 Barb. 10; *Bank of Havana v. McGee*, 20 N. Y. 362.)

A mistake in the form of a summons is not amendable, of course, under section 172 of the Code. (*Diblee v. Mason*, 1 Code R. 37.) Although the court may have the power to amend, it can only be done on motion. (*McCrane v. Moulton*, 3 Sandf. 736; *Allen v. Allen*, 14 How. Pr. 248.)

A voluntary and general appearance, by the defendant, besides being equivalent to

defendant, it seems the subpoena should describe him as the last born child of A. B. and C. D.—his father and mother. (f)

(f) *Eley v. Broughton*, 2 Sim. & Sta. 188.

a personal service of the summons, is a waiver of all defects in the summons or previous proceedings. (*Webb v. Mott*, 6 How. Pr. 440; *Dix v. Palmer*, 5 id. 233; *Dole v. Manley*, 11 id. 138; *Hyde v. Patterson*, 1 Ab. 248; *Bierce v. Smith*, 2 id. 411.) But it will not authorize a judgment for want of an answer, without proof of due service. (*Macomber v. The Mayor, &c., of New York*, 17 Ab. 36.) An appearance by putting in an answer protesting against the jurisdiction, is not such an appearance as will waive the objection to the jurisdiction. (*Sullivan v. Frazee*, 4 Rob. 616; *Mahoney v. Penman*, 1 Ab. 34; 4 Duer. 603; *Hewitt v. Howell*, 8 How. Pr. 347.) Where the defects in the summons or proceedings prior to appearance are not made apparent until after the notice of appearance is served, the appearance is no waiver. (*Voorhies v. Schofield*, 7 How. Pr. 51; *Shafer v. Humphrey*, 15 id. 564.) Where one of several persons named as defendants in the summons, but on whom no copy had been served, gave a notice of appearance and demanded a copy of the complaint, and no copy being served, he moved to dismiss the action; it was held he had no right to appear, or move for a dismissal of the action. (*Tracy v. Reynolds*, 7 How. Pr. 327.) But in *Higgins v. Rockwell*, (2 Duer. 650), it was decided by the Superior Court of New York that one named as a defendant, and against whom a judgment was prayed, had a right to appear and answer, although no summons had been served on him. In an action on contract, against two defendants, as partners, if the complaint is served on one only, the other may appear voluntarily. (*Wellington v. Classon*, 9 Ab. 175; 18 How. Pr. 10. See *Waterbury Leather Co. v. Krause*, 9 Ab. 175, n.)

A copy of the complaint need not be served with the summons; and in that case, the summons must state where the complaint is, or will be filed. (Code, § 130.) A summons which, at the time of service, is unaccompanied by a complaint, and does not state where the complaint is, or will be filed, is irregular. (*Pignolet v. Daveau*, 2 Hilton, 584.)

Where there has been service by publication, the name of the state should certainly appear in the summons, and probably in the complaint. This statement, below the signature of the attorney, will not suffice. "The complaint in this action was filed in the clerk's office of the county of Montgomery, on the first day of October, 1857." (*Titus v. Relyea*, 16 How. Pr. 371; S. C. 8 Ab. 177.)

If the summons states that a copy of the complaint has been filed, instead of stating that the complaint has been filed, it is not such an irregularity as will vitiate a judgment entered for default of an answer. (*Hart v. Kremer*, 2 Code Rep. 50.) So where the summons is in the form appropriate for serving the copy complaint, together with the copy summons, the omission to serve a copy of the complaint, or to state in the summons the place of filing the complaint, this, though irregular, will not affect the validity of the judgment. (*Foster v. Wood*, 1 Ab., N. S. 150; 30 How. Pr. 284.) If the complaint is filed, and no copy is served with the summons, and the summons, instead of stating where the complaint is filed, states that a copy of the complaint "is annexed," the summons will be irregular. (*Keeler v. Belts*, 3 Code Rep. 183.)

As respects the subscription to a summons, it has been held that a printed subscription of the attorney's name is sufficient. (*Mutual Life Ins. Co. v. Ross*, 10 Abb. Pr. 260, note; *Brainerd v. Heydrick*, 32 How. Pr. 97.)

The plaintiff must insert, in the summons, a notice in substance, as follows:

"1. In an action arising on contract, for the recovery of money, only, that he will take judgment for the sum specified therein, if the defendant fails to answer the complaint in twenty days after the service of the summons.

2. In other actions, that if the defendant shall fail to answer the complaint within twenty days after service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint." (Code, § 129.) Similar provisions are contained in the *California Practice Act*, (§ 26,) and in the *Code of Wisconsin*, (§ 34.)

Of the 1st subdivision, it is unnecessary to say anything, in this place, as it relates solely to actions at law. (*West v. Brewster*, 1 Duer. 647.) The summons, in the form prescribed by it, is proper only where the action is upon contract, for the recovery of a sum of money as such, without calling upon the court to ascertain or adjudge anything but the existence and terms of the contract by which it is due. (*Norton v. Cary*, 14 Ab. 364; S. C. 23 How. 469; *Tuttle v. Smith*, 14 How. Pr. 395.) The 2d subdivision prescribes the form of the notice which is to be used in equitable actions.

The summons must follow one or the other of the forms prescribed by the above

A subpoena must be in the English language, and in a fair, legible character. (*g*)

(*g*) 2 R. S. 275, § 9.

section. (*Ridder v. Whitlock*, 12 How. Pr. 208.) A plaintiff cannot use both forms of notice, in the same summons; but must elect under which he will proceed. (*Van Sant. Eq. Pr. 35*; *Baxter v. Arnold*, 9 How. Pr. 445.) Thus, it has been held that a notice, in the summons, containing a money demand against two, and a demand for relief against all the defendants, is irregular. (*Baxter v. Arnold*, 9 How. Pr. 455. See also *Home v. Cooper*, 16 How. Pr. 93.) So in *Douglass v. Wiswall*, (cited *Van Sant. Eq. Pr. 35*.) a notice in the alternative, that the plaintiff would take judgment for a certain sum, or apply to the court for the relief demanded, was held irregular.

If the plaintiff intends to unite in the same action a cause of action for a simple money demand on contract, with a proper cause of action for equitable relief, which he may do under section 167 of the Code, he should not insert, in the summons, a notice that he will take judgment for a specified sum and also for the relief demanded; but for the relief demanded, only. The action, in such a case, though a legal cause is joined, is an equitable action, triable by the court and not by a jury; and the summons should be in the proper form of all equitable actions, viz.: that "the plaintiff will apply to the court for the relief demanded in the complaint." (*Van Sant. Eq. Pr. 36*.)

In all cases where the action is not upon a money demand, or obligation for the payment of money, when the damages can be ascertained by a simple computation of interest, the notice should be under subdivision 2 of section 129. (*Hanson v. Decker*, 29 How. Pr. 385. See *McDougall v. Cooper*, 31 N. Y. 498; *Goff v. Edgerton*, 18 Ab. 381; *Willett v. Stewart*, 43 Barb. 93.) When it is so, and the complaint sets out a cause of action in equity, but demands judgment for a specific sum of money, containing also a prayer for general relief, the complaint cannot be set aside as a departure from the summons. The court can give a proper judgment upon it under the prayer for general relief. (*Ib.*)

So, in an action to recover unliquidated damages, for breach of a contract, the summons should follow subdivision 2. (*Salters v. Ralph*, 15 Ab. 273.) So, also, in actions to recover damages for fraud and deceit. (*Hartshorn v. Newman*, id. 63.) And to recover both liquidated and unliquidated damages, for breaches of contract. (*Norton v. Cary*, 14 Ab. 364; S. C. 23 How. Pr. 469.)

The Revised statutes require that upon every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any *penalty* or *forfeiture*, shall be endorsed a general reference to the statute by which such action is given, in the following form: "According to the provisions of the statute regulating the rate of interest on money," or "according to the provisions of the statute concerning sheriffs," as the case may require, or in some other general terms referring to such statute. (2 R. S. 481, § 7.) The object of this provision was to inform the defendant of the nature and cause of the action against him.

The object and purpose of the statutory requirement are fully and completely answered and fulfilled, without the indorsement, when the complaint is annexed to the summons and served with it, and contains the very reference which should, strictly, be indorsed upon the summons. (*Cox v. New York Central & Hudson River R. R. Co.* 61 Barb. 615.)

Where the plaintiff elected, as he was authorized by statute to do, to serve his complaint with the summons, putting both on the same piece of paper, and making the necessary reference to the statute, in the body of the complaint, instead of indorsing it upon the summons; *Held*, that this was a sufficient compliance with the statute; and an order setting aside the summons for want of an indorsement thereon was reversed. (*Ib.*)

As the summons is the first proceeding in the action, and all subsequent proceedings are supposed to be based upon it, if the complaint does not conform to the summons, it is the complaint, and not the summons, which is irregular. (*Boington v. Lapham*, 14 How. Pr. 360; *Tuttle v. Smith*, id. 395; 6 Ab. 329; *Shafer v. Humphrey*, 15 id. 564; *Ridder v. Whitlock*, 12 id. 208; *Davis v. Bates*, 6 Ab. 15. See *Tuttle v. Smith*, 14 How. Pr. 395.)

In *Wisconsin*, the summons is to be in the same form as it is required to be in this state (by section 128 of our Code), except that it must be subscribed by the *plaintiff* or his attorney, and require the answer to be served on the person whose name is subscribed to the summons. (Rev. Stat. 717, § 2; Code, § 33.) The like form of summons is required in *Minnesota*. (Public Stat. 537, § 45.) In *Ohio* the summons

[*50] **When to be tested and made returnable.*] The subpœna must be tested in the name of the chancellor, on the day it is issued, and be made returnable according to the fact, either before the chancellor or before the vice chancellor having jurisdiction, in the court of chancery, wheresoever the court shall then be; and, unless otherwise directed, it may be made returnable on any day except Sunday, either in vacation

is issued by the clerk, under the seal of the court, and signed by him. Its style is "The State of Ohio, — county," and must be dated the day it is issued. It must be directed to the sheriff of the county, and command him to notify the defendant that he has been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true, and judgment rendered accordingly. Where the action is for the recovery of money only, there must be indorsed on the writ the amount for which, with interest, judgment will be taken if the defendant fails to appear: and in case of non-appearance judgment cannot be rendered for a larger sum. (Seney's Code, § 57, p. 77.) The same form is adopted in *Kansas*. (Code, § 65.)

It has been held, in Ohio, that a summons signed by the deputy clerk, alone is good, although it would be more regular to sign the name of the clerk by his deputy. (*Walk v. Bank of Circleville*, 15 Ohio Rep. 288. See also *Chapin v. Allison*, id. 566.) And it has been decided that it is only in cases where the action is for the recovery of money only that the summons must show, in any manner, for what the action is brought. (*Williams v. Hamlin*, 1 Handy, 95.) And where a summons is indorsed "for the recovery of money only," and the petition claims a further and different relief, the court will not enter up a judgment by default, against a defendant, for other relief than that indorsed on the summons. (*Ibid.*)

In *Indiana*, the form of a summons is given in 2 Rev. Stat. 350. It must correspond with the complaint. (5 Bld. 175.) In case of variance, the court will permit an amendment, to make them agree, even after a motion to quash for the variance. (8 Ind. Rep. 354.)

In *Illinois*, upon the filing of the bill, the clerk of the court must issue a summons, directed to the sheriff of the county in which the defendant resides, if he be a resident of the state, requiring him to appear, and answer the bill, on the return day of the summons. Where there are several defendants, residing in different counties, a separate summons must be issued to each county, including all the defendants residing therein. (Chancery Code, § 5; Statutes of 1858, vol. 1, p. 139.) Every summons must be tested in the name of the clerk of the court out of which it issues, signed with his name, bear the seal of the court, be dated on the day it issues, and be made returnable at the next term of the court after the date; unless the suit be brought within ten days immediately preceding any term; in which case the summons must be returnable at the next term thereafter. (*Ibid.* § 6.)

In *California*, the summons must state the general nature of the action, and the time in which the defendant must appear and plead; in other words, when it is returnable; and it must be made returnable at the time fixed by statute. (*People v. Woodlief*, 2 Cal. 241; *Porter v. Herman*, 8 id. 625.) And that in case of his failure to appear, default will be taken. (*Porter v. Herman, supra.*) If radically defective in stating the amount for which judgment will be demanded, it will not support a judgment by default. (*Ibid.*; *People v. Woodlief, supra.*)

In *Kentucky*, the summons is required to be directed to the sheriff of the county, or, at the request of the plaintiff, to the jailer, coroner or constable, and command him to summon the defendant or defendants named therein, to answer the petition filed by the plaintiff, giving his name, at the time stated therein, under the penalty of the petition being taken for confessed, or of the defendant being proceeded against for contempt of court, on his failure to do so. The summons must be dated on the day it is issued, and signed by the clerk. (Civil Code, § 66.) The summons is to be made returnable on the first day of the next term of the court, unless that term begins within ten days from the date of the summons, when it is to be returnable on the first day of the term following. (Id. § 70.)

or in term. If the chancellor is a party, or interested in the suit, the subpoena must be tested in the name of the vice chancellor before whom the suit is pending. (*h*)

Where the complainant made his subpoena returnable on Sunday, and afterwards took out an attachment thereon, against the defendant, for not appearing, the court set aside the attachment as irregular. (*i*)

Sealing and signing.] The subpoena must be sealed with one of the seals of the court; (*k*) signed with the name of the register, assistant register, or clerk, from whose office it issues, and subscribed or endorsed with the name of the solicitor, (*l*) or of the complainant, in case he prosecutes in person. (*l*)

It is not necessary the register or clerk should personally sign the subpoena. His name is usually signed by the complainant's solicitor.

Service of.] The subpoena may be served by delivering a copy thereof subscribed by the complainant or his solicitor, and inscribed "copy;" and by showing the original, under the seal of the court, at the time of such delivery, to the defendant, or in case of his absence, to his wife or servant, or some member of his family, at his dwelling house or place of abode. (*m*) (*5*)

(*h*) Rule 19.
(*k*); 2 R. S. 179, § 72, (orig. § 66.)

(*i*) Gould v. Spencer, 5 Paige, 541.
(*l*) Id. 278, § 9.

(*m*) Rule 21.

(4) SIGNATURE OF ATTORNEY.

It has been already stated that the summons must be subscribed by an attorney. (Code, § 128.) The attorney mentioned in this section means an attorney at law. (*Weare v. Slocum*, 3 How. Pr. 397.) Where the summons is signed by the firm-name of two attorneys who are in partnership, and the complaint and subsequent proceedings are signed with the individual name of one of them only, the court may, after judgment, amend the summons by substituting the individual name of such attorney for the firm-name. (*Sluyter v. Smith*, 2 Bosw. 673.) If the name of the attorney is printed on the summons, that is a sufficient subscription. (*Mutual Life Ins. Co. v. Ross*, 10 Abb. 260, n.; *Saunderson v. Jackson*, 2 Esp. 180; 2 B. & P. 238; *Barnard v. Heydrick*, 2 Ab., N. S. 47; *Schneider v. Norris*, 2 M. & S. 286. See *Bank of Cooperstown v. Woods*, 28 N. Y. 546.)

In *Minnesota*, the summons must be signed by the plaintiff, or his attorney. (Public Stat. 537, § 44.) So, also, in *Wisconsin*. (Code, § 33; Rev. Stat. 717, § 2.)

In *Indiana*, the summons is issued by the clerk of the court, under the seal of the court. Before its delivery to the officer, to be executed, it must have the name of the attorney or other person at whose instance the same was issued, indorsed thereon, by the clerk of the court. (R. S. 1843, p. 224, § 14; 224, § 802; Bick. Civ. Pr. 48.)

In *Wisconsin*, the summons must be subscribed by the plaintiff or his attorney. (Code, § 33.)

(5) SERVICE OF SUMMONS; INSUFFICIENT SERVICE; MODE OF OBJECTING TO.

The practice in the *court of chancery* is thus laid down by *Daniell*: Service of the subpoena is effected either by delivering a copy of the writ to the person to be served, and at the same time producing the original writ, or else by leaving such copy at the dwelling-house of the person to be served, and at the same time producing the original writ to the person with whom such copy is left. (1 Dan. Ch. Pr. 432.) When the copy is left at a dwelling-house, it is necessary that it should be the place where

On married women. In a suit against husband and wife, the service

the defendant actually resides. The mere leaving the writ, or the copy, at the defendant's ordinary place of business, if he does not reside there, will not be good service. (Id. 433. See *Johnston v. Maccornell*, 3 Bibb. 1.) Where the defendant has no family, but boards, or makes it his home in the family of another, the subpoena to appear and answer may, in his absence from home, be served upon either of the heads of the family, at such place of his abode, although he has no wife or servant. But, to make such service regular, the place of service must be his actual place of residence at the time, and his absence therefrom must be merely temporary. (*People v. Craft*, 7 Paige, 325. See *Bickford v. Skewes*, 9 Sim. 428.) In *South Carolina*, a copy of the subpoena, left at the residence of a party domiciled in the state, and temporarily absent therefrom, is sufficient; unless it is made to appear that he has been surprised. (*Southern Steam Packet Co. v. Roger*, 1 Cheeves, 48.) In *Illinois*, where a summons in chancery is served by leaving it at the residence of the defendant, the return must show that it was left with some person who was a member of the defendant's family. (*Townsend v. Griggs*, 2 Scam. 365.) In *Massachusetts*, "if a party is not found, a copy of the subpoena may be left at his usual place of abode; and the truth of the case being returned by the officer, if it shall be made to appear to the court that the party has actual notice of the suit, no other notice shall be required; but the clerk shall issue other similar process, if the same shall be required by the party at whose instance the first was sued out; and if upon such second process, the party be not found, a copy shall be again left, in like manner, as herein before directed; and upon a second return that the party is not found, and that a copy has been left, as is herein directed, the same proceedings may be had as if the process had been served on the defendant." (Rule 6 of the Rules of Practice in Chancery.)

In *Indiana*, it has been held that where the defendant, understanding the nature and object of the writ, waives the reading of it, that is equivalent to personal service, and the writ may be returned as personally served. (13 Ind. Rep. 536.)

In the *United States courts*, the service of all subpoenas must be by a delivery of a copy thereof, by the officers serving the same, to the defendant personally, or, in the case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling-house, or usual place of abode of each defendant, with some free white person, who is a member or resident in the family. (13th Equity Rule.)

Under the *Code of Procedure*, the practice is somewhat different from the above.

The Code, (sec. 134,) after directing as to the manner in which the summons shall be served upon corporations, infants, persons *non compos mentis*, &c., directs that in all other cases it shall be served by delivering a copy thereof to the defendant personally. (See also Cal. Pr. Act, § 29.)

The summons must be served legally, otherwise the court will acquire no jurisdiction of the defendant, and all subsequent proceedings will be void. (*Bulkley v. Bulkley*, 6 Ab. 307.) "Service" means serving the defendant with a copy of the process, and showing him the original, if he desires it. (*Goggs v. Huntingtower*, 12 M. & W. 502; *Williams v. Van Valkenburgh*, 16 How. Pr. 152.) A mere manual delivery of the summons is not good service, unless the summons be left with the defendant. (*Beekman v. Cutter*, 2 Code Rep. 51. See *Niles v. Vanderzee*, 14 How. Pr. 547.) The summons must be delivered to, and left with, him. (Rule 23, Supreme Court.) If the defendant refuses to accept the summons, service may be made on him by informing him of the nature thereof, and of a purpose to make service, and laying it down at any appropriate place in his presence. Effecting a service by forcibly thrusting the paper upon the person of the defendant is improper, and when service is so effected the court will set it, and all subsequent proceedings, aside. (*Davison v. Baker*, 24 How. 39.) Where, however, a defendant refused to receive a process, it was held that laying it on his shoulder was good service. (*Bell v. Vincent*, 7 D. & R. 233.) In *Niles v. Vanderzee*, (14 How. Pr. 547,) the defendant was proceeded against as an absconding debtor by attachment, and after the publication had commenced he returned, and calling upon the plaintiff's attorney he inquired as to the amount of the plaintiff's claim. The attorney, handing him a copy of the summons and complaint, said: "There is a copy of the summons and complaint for you, in which is contained the whole amount of the claim." The defendant took the papers and read them, and laid them down on a desk and started to go away, when the attorney requested him to take the papers with him. The defendant replied that he did not want them, and went away without them. Held not a sufficient personal service.

The service of a summons and complaint by an agent of the plaintiff not an officer of the court, upon the father of the defendant instead of the defendant, by mistake,

of the subpoena on the husband alone is good service on both, unless

although the papers are subsequently handed to the latter by the former, is not service upon the defendant, and a judgment obtained by default in such a case will be set aside. (*Williamson v. Van Valkenburgh*, 16 How. Pr. 144.)

In all legal proceedings against a board of supervisors, the first process, and all other proceedings requiring to be served, must be served on the chairman or clerk of the board. (1 R. S. 384, § 3.) In California, in counties where there is a board of supervisors having an acting chairman or president, the summons must be served on him, in the same manner as upon private persons. When there is no such chairman or president, it must in like manner be served upon the county judge of the county. (Gen. Laws of Cal. ¶ 1210.)

Any trick or device which deprives the defendant of an authentic and fair notice that an action has been commenced, is a fraud upon the spirit and intent of the statute, and upon the rights of the party. Thus, placing in the defendant's possession a summons, disguised in such a manner as to conceal from her the knowledge which it was the intent of the law should be communicated, is not good service, and the subsequent discovery by the defendant of the contents of the summons, after she is beyond the limits of the State, is not good service. (*Bulkley v. Bulkley*, 6 Ab. 307.)

The courts will not sanction any attempt by fraud or misrepresentation to bring a party within the jurisdiction. (*Carpenter v. Spooner*, 2 Sandf. 717; *Goupil v. Simonson*, 3 Ab. 474.) Thus, where, by a false statement made for the purpose, a defendant was induced to come to the city of New York, and was there served with process, it was held to be irregular. (*Ib.*) So where a defendant residing in Canada was inveigled into this State by a trick, for the purpose of effecting a service of the summons upon him, the service of the summons, and all subsequent proceedings dependent thereon, were set aside. (*Metcalf v. Clark*, 41 Barb. 45.) So also where service is accomplished by means of an improper arrest and detention on criminal process. (*Benninghoff v. Oswald*, 37 How. Pr. 235.)

If a copy of the summons and a certified copy of the complaint are personally delivered to the defendant, and issued from a court of general jurisdiction, the court thereby acquires jurisdiction of the person of the defendant. (*Peck v. Strauss*, 33 Cal. 678.)

A non-resident, attending as a witness in an action to be tried in this state, in good faith, and for no other purpose, is exempt from the service of a summons upon him; and if service is made, in such a case, it will be absolutely set aside and discharged. (*Searer v. Robinson*, 3 Duer. 622; S. C. 12 Leg. Obs. 120.) A non-resident party to an action in this state, attending the court as a witness, is likewise privileged, while here and returning home, not only from arrest, but from any action brought against him. (*Merrill v. George*, 23 How. Pr. 331.) In *Pollard v. Union Pacific Railroad Co.* (7 Ab., N. S. 70), however, it was decided, at special term, that the mere service of a summons upon the defendant while he was attending court as a party or witness in another action, should not be set aside on the ground that he was privileged from such service. It is otherwise, where such witness or party is arrested.

In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to him, with the summons, a notice subscribed by the plaintiff, or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific, real or personal property; and that no personal claim is made against such defendant; in which case no copy of the complaint need be served on such defendant, unless, within the time for answering, he shall, in writing, demand the same. If a defendant on whom such a notice is served shall unreasonably defend the action, he shall pay costs to the plaintiff. (Code, § 131.)

The omission of the plaintiff to serve the notice mentioned in this section will not deprive the court of the power, in equity cases, to award costs against a defendant upon whom a copy of the complaint has been served, for unreasonably defending the action. (*O'Hara v. Brophy*, 24 How. Pr. 379.) For the service of this notice, the law provides no fee, and the sheriff stands, as to that, precisely as any other person. The certificate of service should be embodied in the return to the summons; but whether it be or not, no fee for it can be allowed. (*Benedict v. Warriner*, 14 How. Pr. 570.)

The remedy for a defective service of a summons is by motion to set the proceedings aside, and not by answer or demurrer. (*Nones v. Hope Mutual Life Ins. Co.* 8 Barb. 541; S. C. 5 How. Pr. 96; 3 Code R. 161.) On such motion a pretended service of the summons on a defendant may be disproved, by affidavit. (*Wallis v. Lott*, 15 How. Pr. 567; *Van Rensselaer v. Chadwick*, 7 id. 297.) An irregularity in the

the complainant seeks relief against the estate of the wife; in which

mode of delivery, is merely a ground of application to the court to set aside the summons. (*Peck v. Strauss*, 33 Cal. 678.) Where, on a motion to set aside a judgment taken for want of an answer, on the ground of a defect in the service of the summons, it appears that the defendant had improperly endeavored to avoid service of the summons, the judgment will not be set aside, unless upon satisfactory evidence that the summons had not come to the defendant's knowledge. (*Southwell v. Marryatt*, 1 Ab. 218.) Nor will the court set aside a judgment, for non-service of the summons, when it appears that although the defendant knew that the service had been erroneously made on his foreman for him, and that the plaintiff was proceeding on such service, as a regular service, yet did not make his motion to set aside until supplementary proceedings were resorted to. (*Hilton v. Thurston*, 1 Ab. 318.)

In *Ohio*, the Code requires that the service of a summons shall be by delivering a copy to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day. (Seney's Code, p. 82, § 62.) In *Walk v. Bank of Circleville*, 15 Ohio, R. 288,) a summons returned served by leaving a true copy at the residence of the party named, was held sufficient; at the "residence," and at the "usual place of residence," being equivalent terms. Where a summons, issued against three defendants, was returned "served by leaving a copy of this writ at the residence of the within named defendant;" it was held that it was not a good service as to all, or either of the defendants. (*Gamble v. Warner*, 16 Ohio Rep. 371.) The words "usual place of residence," mean the place of abode at the time of the service. (Nash's Plead. and Prac. 21.) Where the defendant is a single man, to justify the leaving a copy of the summons at his boarding-house, he must be actually boarding at the place at the time. If he has left the place, the service is not good. (*Id.*)

In *Wisconsin*, the Code, after prescribing the mode of service upon infants and lunatics, directs that in *all other cases*, the summons shall be served by delivering a copy thereof to the defendant personally; or, if not found, by leaving a copy thereof at his usual place of abode, in presence of some one of the family of suitable age and discretion, who shall be informed of the contents thereof. (Code, § 39, sub. 3; Rev. Stat. 719, sec. 9.) In *Minnesota*, the Code, after providing for service upon corporations, infants, and guardians, directs that the summons shall, in *all other cases*, be delivered to the defendant personally, or by leaving a copy at his last place of abode. (Public Stat. 538, § (53.) XLIX.) In *Kansas*, the service is by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day. (Code, § 70.) An acknowledgment of service, on the back of the summons, or the voluntary appearance of a defendant, is equivalent to service. (*Id.* § 73.) The statute of *Indiana* contains a similar provision. (2 Rev. Stat. 35, sec. 35.) Such acknowledgment, however, must be proved in open court to have been signed by the defendant; and regularly, such acknowledgment ought to state the time and place of the service. (2 Rev. Stat. 95, sec. 292, sub. 4.) The Code of *Ohio* also makes an acknowledgment of service, on the back of the summons, or a voluntary appearance, by the defendant, equivalent to service. (Seney's Code, p. 83, sec. 65.) And it has been decided there, that a defendant, pleading to the action, thereby, by implication of law, enters his appearance in the action, and is estopped from denying the service of process. (*Evans v. Iles*, 7 Ohio State Rep. 233.)

In *Illinois*, service of the summons is to be made by delivering a copy to the defendant, or leaving such copy at his usual place of abode, with some white person of the family, of the age of ten years, or upwards, and informing such person of the contents thereof, which service shall be at least ten days before the return day of the summons. (Chancery Code, sec. 7; Stat. of 1858, vol. 1, p. 139.) It has been decided, in that state, that when a summons in chancery is served by leaving it at the residence of the defendant, the return must show that it was left with some person who was a member of the defendant's family. (*Townsend v. Griggs*, 2 Scam. 365.)

In *California*, under the Practice Act, personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statutes, the mode would be by showing the original, under the seal of the court, and delivering a copy. (3 Estee Pr. 10; Prac. Act, § 29; *Edmondson v. Mason*, 16 Cal. 386; *Beckman v. Cutler*, 2 Code Rep. 51.)

In *Kentucky*, a summons is to be served by delivering a copy to the defendant. If he refuses to receive it, the offer of it to him will be a sufficient service. (Civil Code, § 74.) When a defendant is *out of the state*, the plaintiff may take a copy of the petition, certified by the clerk, with a summons annexed thereto, warning such defendant to appear and answer the petition within sixty days after the same shall

case the service must be on her, as well as on the husband, and she may put in a separate answer. (n) (6)

Where defendant is absent from home. When a defendant is absent from home, and no person can be found at his place of abode, the subpoena may be served on his clerk or servant, at his store or place of business. (o)

On a prisoner. It is not irregular to serve a subpoena personally upon *a defendant who is imprisoned in the state prison for a term of [*51] years, on a conviction for a crime. (p) (7) And service upon the keep-

(n) *Ferguson v. Smith*, 2 John. Ch. Rep. 139. *Leavitt v. Cruger and wife*, 1 Paige, 421. *Jones v. Harris*, 9 Ves. 488.

(o) *Smith v. Parke*, 2 Paige, 298. *Dyett and wife v. North Am. Coal Co.* 20 Wend. 570.

(p) *Phelps v. Phelps*, 7 Paige, 150.

have been served on him; and cause a copy thereof to be delivered to the defendant, any where in the United States, by some person to whom he is personally known. Proof of the delivery is to be made by the affidavit of the person making it, indorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant, shall be stated. The officer before whom the affidavit is made, must certify that the affiant is personally known to him to be worthy of credit. (Civ. Code, § 86.) The certified copy and summons, with the affidavit and certificate, as provided in section 86, being returned and filed, shall be deemed an actual service of the summons, in due time for trial at the first term commencing not less than sixty days after such service. (*Id.* § 87.) The Code also directs as to the mode of service upon *Shakers*, (§ 334) and *owners of steamboats* (§ 85.)

As to service of summons by publication, see Post chap. V, section 2, and note 2.

(6) SERVICE ON HUSBAND AND WIFE.

Where the action is against *husband and wife*, service on the husband alone will be good service on both, unless relief be asked out of the separate estate of the wife, in which case she must be served. (*Eckerson v. Volmer*, 11 How. Pr. 42; *Ferguson v. Smith*, 2 John. Ch. 139; *Foot v. Lathrop*, 53 Barb. 183; *Leavitt v. Cruger*, 1 Paige, 422; Rule 13 in Equity, U. S. courts.) And she may put in a separate answer, the husband in such case being considered only a nominal party. (*Leavitt v. Cruger*, *supra*; *Ferguson v. Smith*, *supra*.)

In *New Jersey*, in cases where husband and wife are made defendants, and the husband only is served with process of subpoena, the wife being out of the State, an order for publication must be taken against her, unless an appearance be entered for her. (Chancery, rule 6, § 2.)

If an action is brought against husband and wife to foreclose a mortgage executed by them jointly, and an attorney appears in the action for both, on the retainer of the husband, and judgment of foreclosure is entered, the wife cannot, after her husband's death, avoid the judgment on the ground that she was not served with process in the action, and did not appear therein. (*Foot v. Lathrop*, 53 Barb. 183.)

In the *United States* courts the service of a subpoena, in the case of husband and wife, must be by a delivery of a copy thereof to the husband personally, or leaving it at the dwelling-house or usual place of abode of the defendants, with some free white person who is a member or resident in the family. (13th Equity Rule.)

(7) Process for the commencement of an action against a convict in the State prison, may be served upon him in the prison. Although his right to sue is suspended, he may still be sued, and the suit prosecuted to judgment. (*Davis v. Duffie*, 8 Bosw. 617; S. C. 3 Keyes, 606; 4 Ab., N. S. 478; 3 Trans. App. 54; *Phelps v. Phelps*, 7 Paige, 500.) In *Johnson v. Johnson*, (Walker Ch. 309,) it was held that a service of the subpoena upon the keeper of the State prison in such a case was valid.

In *Kentucky*, where the defendant is a prisoner in the penitentiary, a copy of the petition must accompany the summons, and the service must be upon the keeper of the penitentiary, who shall deliver the copies of the petition and summons to the defendant, and a copy of the summons must also be delivered to the wife of the prisoner, or, if he has no wife, left at the place where he resided, or claimed to reside, prior to his confinement, with some white person of the age of sixteen years. (Civ. Code, § 83.)

er of a prison will be ordered to be good service upon a prisoner in his custody. (q)

Where defendant has no family. Where the defendant has no family, but boards or makes it his home in the family of another, a subpoena may, in his absence from home, be served upon either of the heads of the family at such place. But to make such service regular, the place of service must be his actual place of residence at the time of service; and his absence therefrom must be merely temporary. (r)

Service out of the state. The service of a subpoena upon a defendant out of the state is irregular. (s) (8)

When to be served. The service may be on or before the day of appearance mentioned in the subpoena. (t) And it may be made at any hour of the night. It seems a service on the return day, before 12 o'clock at night, is valid; as the legal day does not close until that hour. (9)

(q) 1 Dan. 566. *Hinde*, 85. *Joyce v. Joyce*, 1 Hogan, 121.

(r) *People v. Craft*, 7 Paige, 325.

(s) *Dunn v. Dunn*, 4 Paige, 425. *Creed v. Byrne*, 1 Hogan, 79. 1 Moll. 243. 1 Dan. 432.

(t) Rule 21.

(8) SERVICE, WHERE TO BE MADE.

In the former court of chancery, although the rule was as stated in the text, yet it was held that where the court had jurisdiction of the subject matter of the suit, if a defendant, who was beyond the limits of the State when served, consented to waive the irregularity of the service by a voluntary appearance, or by an agreement in writing to accept the service of a subpoena upon him as regular, he could not afterwards object to the regularity of proceedings against him, founded upon such service. (*Dunn v. Dunn*, 4 Paige, 425; *Picquet v. Swan*, 5 Mason, 561. See *Henderson v. Hoffer*, Halst. Dig. 170.)

Under the Code it has been held that the service of a summons must, except in the cases provided for in section 135 of the Code, be within the territorial jurisdiction of the court. (*Litchfield v. Bunnell*, 5 How. Pr. 341; *Fiske v. Anderson*, 33 Barb. 75; *Morrell v. Kimball*, 4 Ab. 352.) And that an admission of service by parties residing out of the State is ineffectual as the basis of any judicial proceeding *in personam* in this State. (*Ibid*; *Hulburt v. Hope Mutual Ins. Co.* 4 How. Pr. 275, 415.)

But in all actions in which the superior court of the city of New York has jurisdiction by subd. 1 of § 33 of the Code, and in an action against several persons jointly liable on contract, when one of them resides in that city the summons may be served in any county of the State. And it is only in those actions of which jurisdiction is acquired by the fact of personal service of the summons on all the defendants within the city of New York, that service of the summons out of that city is unauthorized and invalid. (*Porter v. Lord*, 4 Ab. 43; 4 Duer. 632.)

It is lawful to serve either civil or criminal process upon a person on board a British man-of-war lying within the jurisdiction of the court. (1 Opin. Att'y Gen. 87.)

(9) SERVICE, WHEN TO BE MADE.

In *Pollard v. Union Pacific R. R. Co.* (7 Ab., N. S. 70) the court refused to set aside the service of a summons made upon a resident of New Jersey, at a time when he was attending as a witness and party in a suit in which he was a defendant. (But see *Seaver v. Robinson*, 3 Duer. 622; *Merrill v. George*, 23 How. 331 *contra*.)

Service may be made at any hour of the day or night. In this respect there is a distinction between services of notices and of process. Unless the latter could be served at any hour there might be no means of catching the defendant. (*Prindle v. Cooper*, 1 Bing. 61; *Upton v. McKenzie*, 1 D. & R. 172; *Weyburn v. Neale*, 2 Bur. 813.) A party has the whole of the last day fixed for service in which to serve a

A subpoena cannot regularly be served on Sunday. (*u*) (10)

If the copy served is not filled up with the return day, the service will be irregular, and the proceedings will be set aside, although the original shown to the party was properly filled up. (*v*)

Where a *ne exeat* is issued at the same time with the subpoena, it is not necessary that the subpoena should be served first. Thus, where the complainants took out a subpoena when the *ne exeat* was issued, and made a *bona fide* attempt to serve the same, but were unable to do so previous to the service of the *ne exeat*, the court held there was no irregularity which could entitle the defendants to have the latter writ set aside. (*w*)

On infants. If an infant is made a defendant, the subpoena must be served upon him personally, in the same manner as upon adults. (*x*) (11) But it is recommended, in such cases, to accompany such service with a notice to the parent or guardian of the infant, or some

(*u*) 1 R. S. 675, § 58, (orig. § 69.)

(*v*) *Arden v. Walden*, 1 Edw. 631.

(*w*) *The Georgia Lumber Co. v. Bissell*, 9 Paige, 225.

(*x*) 1 Dan. 229, 563.

paper; and an affidavit that it was not served made on that day even after nine o'clock at night, is irregular. (*Hoxie v. Scott*, Clarke Ch. 457.)

The service of a summons upon an elector on election day is void, and all proceedings thereunder are void also. (*Meeks v. Noxon*, 1 Ab. 280; S. C. 11 How. Pr. 189; *sub. nom. Weeks v. Noxon*; *Pierce v. Smith*, 2 Ab. 411; *Hastings v. Farmer*, 4 N. Y. 296; *Wheeler v. Bartlett*, 1 Edw. 323; *Matter of the Election Law*, 7 Hill, 194; *Laws of 1842*, ch. 130 § 4.) So as to a service on the day of any town meeting. (1 *Rev. Stat.* 341. § 10.)

In *Wheeler v. Bartlett* (1 Edw. 323) it was held that the provision of the statute prohibiting the service of civil process on the day of special or general election did not apply to charter elections; and that the charter of the city of New York prohibiting the service of civil process upon electors on the day of a charter election did not apply to writs of subpoena, but had reference to process which causes duress. (See also *Matter of the Election Law*, 7 Hill, 194.)

The attorney subscribing a summons, may at his option, by an indorsement on the summons, fix a time for the service thereof, and the service must then be made accordingly. (*Code*, § 133.) When no time is thus fixed the same section directs that the service shall be made and the summons returned with proof of the service to the person whose name is subscribed thereto, with all reasonable diligence.

(10) *Field v. Park*, 20 Johns. 140; *Taylor v. Phillips*, 3 East, 155; *Vanderpool v. Wright*, 1 Cowen, 209, 210, *note a*. Procuring the service on Saturday of any process issued from a justice's court in a civil suit upon any person whose religious faith and practice is to keep that day as the Sabbath, is declared a misdemeanor. (*Laws of N. Y.* 1847, ch. 349.) In such a case the service being prohibited by statute is void. (*Hastings v. Farmer*, 4 N. Y. 296.) But a service on Saturday upon a person of the Jewish persuasion and religion will not render the judgment void. (*Marks v. Wilson*, 11 Ab. 87.)

(11) (*Massie v. Donalson*, 8 Ohio, 377; *Jones v. Mason*, N. C. Term R. 125.) But service of a subpoena on the father of a minor defendant if within the jurisdiction, has been held sufficient if the minor resided out of the jurisdiction. (*Kirwan v. Kirwan*, 1 Hogan, 264.) So as to a service on the surviving parent, whether the infant is more or less than fourteen years of age. (*Sanders v. Godley*, 23 Alabama, 473.) But when the parent and child are both parties a service on the parent alone is not sufficient to bring the infant before the court. The subpoena should be served on the parent for the infant, and this should appear by the officer's return. (*Hodges v. Wise*, 16 Alabama, 509.)

The Code provides that if the action is against a minor under the age of fourteen years, the summons shall be served by delivering a copy thereof to him personally and also to his father, mother or guardian; or if there be none within the State, then to any person having the care and control of such minor or with whom he shall reside,

competent person of the family, of the nature of the writ, and of the necessity for the infant's having a guardian appointed to appear and defend his interests. (y) Where the infant cannot be found, so as to [*52] be served, or is *absent from the state, the complainant must proceed by advertisement under the statute relative to non-resident, absent, or concealed defendants; (z) in the same manner as if he were an adult; and if, upon the expiration of the time, no one applies in his behalf, the complainant may move that a guardian *ad litem* be appointed for him. (a)

On lunatics. The subpoena against a lunatic must be served upon him personally, as in the case of an infant. And it should be in the presence of some competent person, or with notice to his committee; who must also be made a party defendant, as such committee, to suits respecting the lunatic's estate, and who is bound to appear and answer, with and for the lunatic, or be attached. (b) (12)

(y) See 1 Hoff. Pr. 106.

(z) 2 R. S. 186. Laws of 1842, p. 363.

(a) Bank of Ontario v. Strong, 2 Paige. 301.

(b) 1 Dan 173, 219. Mitt. Eq. Pl. 4, 23. 82. McPherson v. Strevel, in Chan. Jan'y, 1843, (ex relatione Julius Rhoades, Esq.) Ferguson v. Smith, 2 John. Ch. Rep. 139. 1 Paige, 422. And see post, BOOK I, Ch. VI, Sec. 5.

or in whose service he shall be employed. (Sec. 134.) The Code of *Wisconsin* contains the same provision. (Code, § 39; Rev. Stat. 719, sec. 9.) Also the Code of *Minnesota*. (Public Stat. 538, § (53) XLIX.) In *Kansas*, when the defendant is a minor under the age of fourteen years, the service must be upon him and upon his guardian or father; or if neither of these can be found, then upon his mother or the person having the care or control of the infant or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone will be sufficient. The manner of service may be the same as in the case of adults. (Code, § 77.) The same rule prevails in *Ohio*, (Seney's Code, § 69, p. 84;) i. e., by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day. (Id. § 70.) In *Indiana*, infant defendants must be personally served, unless some statute authorizes service otherwise. (17 Ind. 636; Bicknell's Civil Prac. 50.) A guardian *ad litem* cannot waive service of process for an infant. (9 Ind. 132; 7 Id. 224.) Nor can a general guardian waive service of process for his infant ward. (5 Ind. 33.) Where proceedings come before the court collaterally and the record is silent upon the question of notice, the court will presume that proper steps were taken to bring infant defendants within the jurisdiction, but upon appeal such a presumption will not be made. (1 Ind. 130; 7 id. 224, 385; Bick. Civ. Prac. 50.) In *Ohio*, it is irregular to proceed against an infant until the process has been served strictly in accordance with section 69 of the Code. (*Keys v. McDonald*, 1 Handy, 287.) The summons should show, as a guide to the sheriff, the age of each infant as stated in the petition. [complaint.] (Ib. *Morse v. Grames*, 2 Law Gaz. 404.)

In *California*, in a suit against a minor under the age of fourteen years, the summons must be served by delivering a copy to the minor personally, and also to his father, mother, guardian; or, if there be none such within the State then to any person having the care or control of such minor or with whom he resides, or in whose service he is employed. (Cal. Pr. Act, § 29.)

In *Kentucky*, where the defendant is an infant under the age of fourteen years, the service must be upon him and upon his father or guardian; or if neither of these can be found, then upon his mother or any other white person having the care or control of the infant or with whom he lives. Where the infant is over fourteen years of age service on him is sufficient. (Civ. Code, § 81.)

(12) SERVICE ON LUNATICS.

The Code directs that when the action is against a person judicially declared to be of *unsound mind*, or incapable of conducting his own affairs in consequence of habit-

On a corporation. If a bill be filed against a corporation, the subpoena must be served upon some one of the members, (c) usually upon the president, cashier, secretary, or other principal officer. (13)

(c) Gray's Sol. Pr. 50. Hinde, 87.

ual drunkenness, and for whom a committee has been appointed, the summons shall be served by delivering a copy thereof to such committee, and to the defendant personally. (Code, § 134.)

It has been held that service of a summons upon one with whom a person of unsound mind resides is not good service; it should be upon the person himself, and also upon his committee, if he has one. (*Heller v. Heller*, 6 How. Pr. 194; S. C. 1 Code Rep., N. S. 309.) The provision in the Code for service on a lunatic does not dispense with the rule of law forbidding an action against one judicially declared a lunatic, unless by leave of the court. The proper course for a party who has a claim against a lunatic or his estate, after office found, is to apply to the supreme court, by petition, for the payment of the debt out of the lunatic's estate, or for leave to bring a suit for the purpose of establishing the claim. (*Soverhill v. Dickson*, 5 How. Pr. 109; *Matter of Hopper*, 5 Paige, 489; *Williams v. Estate of Cameron*, 26 Barb. 172; *Crippen v. Culver*, 13 Barb. 424.) If the court is satisfied that the debt is justly due, the committee will be ordered to pay it out of the estate; or, if the claim is doubtful, the court will either have it settled by a reference, or give the claimant permission to establish his claim by an action. (*Matter of Hopper*, 5 Paige, 489; *Williams v. Cameron*, 26 Barb. 172.) An action against a lunatic, commenced without the permission of the court, would be restrained. (*Matter of Heller*, 3 Paige, 199. But see *Robertson v. Lain*, 19 Wend. 650.) And a judgment recovered therein would be of no avail, (*Clark v. Dunham*, 4 Denio, 262; 3 Paige, 201; *Robertson v. Lain*, 19 Wend. 650,) or might be set aside on motion or by an action. (*Demitt v. Leonard*, 11 Ab. 252; 19 How. Pr. 140.) A judgment recovered against a lunatic after the appointment of a committee of his person and estate, without having first obtained leave from a court of equity to institute a suit against him, is not void, nor even erroneous, nor is the party acting under it a trespasser. The remedy of a lunatic thus improperly proceeded against is by application to the court appointing the committee to restrain the prosecution of the suit at law, and punish the plaintiff for contempt. (*Crippen v. Culver*, 13 Barb. 424; *Sternbergh v. Schoolcraft*, 2 id. 153.)

In an action for partition, where the summons has been served upon some of the defendants, and a guardian *ad litem* has been appointed for an infant lunatic, on the application of his guardian or committee, no personal service of the summons need be made on such infant lunatic. (*Rogers v. McLean*, 11 Ab. 440; S. C. 34 N. Y. 536; 31 How. 279.)

In *Kentucky*, where the defendant is a person judicially found to be of unsound mind, or a person confined in any of the State lunatic asylums, who, by the certificate of the person in charge appears to be a lunatic, the service must be upon him and upon his committee; if there is no committee, upon his wife, or the person having the care of him, or with whom he lives, or the keeper of the asylum in which he is confined. (Cir. Code, § 82.) It has been held that, upon a bill against a lunatic in the custody of a committee, service of process upon the committee is sufficient. (*Cates v. Woodson*, 2 Dana, 455.) In *Indiana*, persons of unsound mind must be personally served with the summons; their guardians have no other powers than those of infants, so far as they are applicable. (2 Rev. Stat. 335, § 8.) In *Wisconsin*, if the action be against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a guardian or committee has been appointed, the summons must be served by delivering a copy thereof to such guardian or committee, and to the defendant personally. (Code, § 39, sub. 2; Rev. Stat. 719, § 9.) A similar rule is established in *Minnesota*. (Public Stat. 538, sec. (53) 49.) In *California*, if the action is against a person judicially declared to be of unsound mind, service of the summons must be made upon his guardian, if a guardian has been appointed. (Cal. Pr. Act, § 29.)

(13) SERVICE UPON CORPORATIONS.

When the suit is against a corporation the Code requires the summons to be served by delivering a copy thereof to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof. But such service can be made, in respect to a foreign corporation, only when it has property within this

On the United States or state. Where the United States or the state

State, or the cause of action arose therein, or where such service shall be made within this State personally upon the president, treasurer, or secretary thereof. (Code, § 134.)

The provision in this section is a substitute for the service by publication. (*Bates v. New Orleans, &c., R. R. Co.* 4 Ab. 77; 13 How. Pr. 516.) The service must be on some one of the officers named in the above section. (*Arken v. Quartz Rock, &c. Co.* 6 Cal. R. 186.) Service on private corporators is no service on the corporation. (*DeWolf v. Mallett*, 3 Dana, 214.) A managing agent must be one whose agency extends to all the business of the corporation. It is not enough that he is engaged in one branch of the business. (*Brewster v. Michigan Central R. R. Co.* 5 How. Pr. 183; S. C. 3 Code Rep. 125.) A baggage master is not such a "managing agent" as the statute contemplates; but if the summons is served on him and the corporation appears, generally, the irregularity of service is waived. (*Flynn v. Hudson River R. R. Co.* 6 How. Pr. 308.) One who is employed merely to sell tickets is not to be deemed a managing agent on whom service of process may be made. (*Doty v. Michigan Cent. R. R. Co.* 8 Ab. 427.) In *Bain v. Globe Ins. Co.* (9 How. Pr. 448,) it was held that a person acting under a power of attorney to procure and effect insurance for the company, residing at a different place from that in which the principal office of the company was located, was such a "managing agent" that legal service of a summons against the company could be made upon him.

Service on the superintendent and general managing agent of a railroad corporation is a sufficient service upon the company (*Bank of Commerce v. Rutland & Wash. R. R. Co.* 10 How. Pr. 1.)

When it is uncertain whether or not the party served is a managing agent of the corporation, the burden is on the defendant to show the relation to it of the person served, and that he is not a managing agent. (*Donadi v. New York State Mu. Ins. Co.* 2 E. D. Smith, 519.)

If there are two parties who make adverse claims to be officers of the corporation, the proper person to be served is the officer *de facto*. (*Berriar v. Methodist Society in New York*, 4 Ab. 424. See Laws of 1869, ch. 157.)

Where service is made upon a foreign corporation, by delivering a copy of the summons to its managing agent or to its president, who happens to be temporarily in this State, no attachment being issued, and no appearance being made by the corporation, the court has not jurisdiction so as to render a personal judgment. It can only subject the property of the corporation in this State to the payment of its debts, by a judgment *in rem*, after such property has been attached according to the directions of chapter 4, title 7, of the Code. (*Brewster v. Mich. Cent. R. R. Co.* 5 How. Pr. 183; S. C. 3 Code Rep. 125; *Hulbert v. Hope Mu. Ins. Co.* 4 How. Pr. 275, 415.) It is to be observed, however, that these decisions were made previous to the amendment of section 134 of the Code, in 1859, (Laws of 1859, ch. 428, § 1,) allowing service on the president, secretary or treasurer of a foreign corporation, if made personally, within this State.

The service of a summons against a foreign corporation upon an officer of the company is valid only when the corporation owns property here liable to an attachment under the Code at the time of such service. (*Bates v. New Orleans, &c. R. R. Co.* 13 How. Pr. 516; S. C. 4 Ab. 72.) The regularity of the service of a summons upon such a corporation does not depend upon proof being previously made of the facts, the existence of which is necessary to give the court jurisdiction of the action. But the evidence of these facts must be shown on motion to set aside the service of the summons. (*Ibid.*)

A foreign railroad corporation, whose road and traffic are wholly outside of this State, with no office here, cannot be said to do business in this State, so as to render them liable to service of process here when it is only served on one who sells tickets here for passage over their road, to be used in the State where it is located. (*Doty v. Michigan Cent. R. R. Co.* 8 Ab. 427.)

The statute of 1855, (Laws of 1855, ch. 279,) requiring foreign corporations doing business within this State to designate some person to receive service of process, merely facilitates the service in the class of cases of which the court already had jurisdiction. It does not operate to give the court jurisdiction of cases not included in sections 134 and 427 of the Code. (*Cumberland Coal Co. v. Sherman*, 8 Ab. 243; S. C. 30 Barb. 159; 20 How. Pr. 62.)

It has been seen that section 134 of the Code allows service to be made upon a foreign corporation when the "cause of action" arose in this state. A cause of action is the right which a party has to institute, and carry through, such a proceeding.

is interested, the district attorney or the attorney general must be

(*Meyer v. Van Collum*, 28 Barb. 531.) Where a contract is made at one place and is to be performed at another, the cause of action upon such contract arises at the latter place. (*Burckle v. Eckhart*, 3 N. Y. 132; *Bright v. Judson*, 47 Barb. 29.) Where a loan is made by one non-resident to another out of this state, and received by a draft drawn upon a person residing within this state, the cause of action cannot be said to have arisen within this state. (*Western Bank v. City Bank of Columbus*, 7 How. Pr. 238.) Where a railroad company, chartered by the state of Vermont, by its president, drew a bill of exchange in that state, payable in New York, upon B., the treasurer of such company in Boston, which was accepted and indorsed in Boston by B. as such treasurer, and sold by him to the Bank of Commerce, in Boston; and it was, on maturity, presented for payment in New York, and was there protested for non-payment,—it was held that the cause of action arose in New York. (*Bank of Commerce v. Rutland & Wash. R. R. Co.* 10 How. Pr. 1; *Conn. Mut. Ins. Co. v. Cleveland R. R. Co.* 23 id. 180; 26 id. 226.)

A summons may be served upon a corporation by delivering a copy to a director; and the court will acquire thereby complete jurisdiction over the parties. (*Curtis v. Avon*, 36 R. R. Co. 49 Barb. 148.)

In an action against a municipal corporation, service of the summons upon the mayor is good. (*Mayor, &c., of New York v. Conover*, 5 Ab. 244.) In *The People ex rel. Davis v. Sturtevant*, (9 N. Y. 263; S. C. 1 Duer. 451) in an action against the mayor, &c., of the city of New York, service of the summons and complaint, together with affidavits for an injunction upon the mayor, and of the summons and injunction upon both boards of aldermen, was held sufficient to base proceedings upon for contempt in disobeying the injunction.

By the act of 1860 (ch. 379, § 4), all process and papers for the commencement of actions and legal proceedings against the corporation of New York, are required to be served either on the mayor, comptroller, or the counsel to the corporation.

As to service of summons on *Railroad Corporations*, see Laws of 1854, ch. 282, Laws of 1869, p. 274.

On *Foreign Corporations*, see Laws of 1855, ch. 279.

On *Express Corporations*, see Laws of 1861, ch. 411.

Foreign Life and Health Insurance Companies, or associations doing business in this state, are required to appoint an agent here, upon whom process may be served. (Laws of 1853, ch. 463, § 14; as amended, Laws of 1862, ch. 367, § 5.)

So as to *Foreign Fire Insurance Companies*. (Laws of 1853, ch. 466, § 23; as amended, Laws of 1862, ch. 367, § 5.)

In *Ohio*, a summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office, or usual place of business of such corporation, with the person having charge thereof. (Seney's Code, p. 83, sec. 63.) Where the defendant is a *foreign* corporation, having a managing agent in Ohio, the service may be upon such agent. (Id. p. 84, sec. 68.) Where process was issued against a foreign corporation and the sheriff returned that he served a certified copy on one of the directors personally, it was held that this was an insufficient service. (*Barney v. New Albany & Salem R. R. Co.* 1 Handy, 571.) In no case can a foreign corporation be served with process in the manner prescribed by section 66 of the Code. (Ibid.) Unless a foreign corporation has, within the state, a managing agent, for the ordinary transaction of its business, it cannot be held liable, in the Ohio courts, by any proceeding *in personam*. (Ibid.) Where the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency. (Seney's Code, p. 84, sec. 68.)

In *Indiana*, the summons for a corporation must, in general, be served on the president or presiding officer, mayor, or chairman of the board of trustees; or, if its chief officer cannot be found in the county, then upon the cashier, treasurer, secretary, clerk, general or special agent; or, if it be a municipal corporation, upon its marshal; or, if it be an incorporated library company, upon its librarian. And if none of the above officers can be found, then the summons may be served upon any person authorized to transact business in the name of the corporation. (2 Rev. Stat. 35, sec. 33; 7 Ind. 524; 8 id. 278; Bick. Civ. Pr. 51.) The summons for a *foreign* corporation may be served upon its agent, appointed pursuant to law for that purpose. (1 Rev. Stat. 244.) The conductor of a railroad is a special agent of the railroad company, and a summons against the company may be served upon him if

the chief officer thereof cannot be found in the county. (9 Ind. R. 243.) If the action against a corporation or other company grows out of, or is connected with, the business of its office or agency in any county in Indiana, the summons may be served in that county upon any agent or clerk employed in such office or agency. (2 Rev. Stat. 32, sec. 30.) If the corporation be a railroad company, whose principal office is not in Indiana, the summons may be served upon any officer, director, or general agent of said company, who is not a plaintiff in the suit, nor interested therein against the company. (Laws of 1853, p. 102.) It has been held that a conductor of a train is an officer of the company, within the meaning of this statute. (16 Ind. Rep. 438.) In an action against an express company, the summons may be served upon the agent named for that purpose in the agreement required to be filed by the express company in the recorder's office of each county in which its business is done, or in which it has an agency or office. (Laws of 1855, p. 100.) In an action against a foreign insurance company, the summons may be served upon the person named for that purpose in the writing required to be filed by such company in the recorder's office of each county in which its agency is established. (Laws of 1855, p. 137.) It seems that in all cases where the summons for a corporation or company is served upon its agent or other officer, personal service is required, and that service by copy left at the residence of such agent or officer is insufficient. (Bicknell's Civ. Prac. 52.)

In *Minnesota*, if the suit be against a corporation, the summons must be served by delivering a copy thereof to the president, or other head of the corporation, secretary, or managing agent thereof. (Pub. Stat. 538, sec. (53) 49.)

In *Kansas*, a summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of such officers can be found, by a copy left at the office, or usual place of business of such corporation, with the person having charge thereof. (Code, § 74.) If the defendant is an incorporated *insurance company*, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency. (Ib. § 75.) If the defendant is a *foreign corporation*, having a managing agent in Kansas, the service may be upon such agent. (Ib. § 76.)

In *Illinois*, the summons against a corporation, returned executed on the president thereof, or served by leaving a copy thereof with the principal clerk, cashier, or secretary of such company, at his office, within such time and under such regulations as are provided in the Code for the service of such process in suits against natural persons, is to be deemed a sufficient service whereon to ground subsequent proceedings and judgment against the company in any court of the State having jurisdiction. (1 Rev. Stat. 1858, p. 242.) An amendatory act, passed in 1853, provides that in such cases process shall be served upon the president of the company, if he resides in the county in which the suit is brought; and that if such president be absent from, or does not reside in, the county, then the summons shall be served by leaving a copy thereof with any clerk, cashier, secretary, engineer, conductor or agent of such company found in the county, at least five days before the trial. (Ib. p. 243.)

In *California*, in a suit against a corporation, the summons must be served on the person designated in the statute. (Cal. Pr. Act, § 29.) That is to say, if the suit is against a domestic corporation, by delivering a copy of the summons to the president or other head of the corporation, secretary, (*Gillig v. Indep. G. & S. M. Co.* 1 Nev. 247,) cashier, or managing agent thereof. (*Aiken v. Quartz Rock Co.* 6 Cal. 156) If against a foreign corporation, or a non-resident joint stock company, &c., to an agent, cashier, or secretary thereof. (Cal. Pr. Act, § 29; 3 Estee Pl. 8.) Serving a party in possession of the property, who does not appear to be one of the officers named, will not entitle the plaintiff to a judgment by default. (*Aiken v. Quartz Rock Co.* 6 Cal. 186.)

As to sufficiency of service of summons on a corporation by the laws of *Oregon*, see Laws of Oregon, 1866, p. 9.

In *Kentucky*, when the defendant is a corporation created by the laws of that State, the service of the summons may be upon the president, mayor, chairman of the board of trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if it is a municipal corporation, upon its marshal; or, if it is an incorporated library company, upon its librarian. (Civ. Code, § 77.) If the defendant is an incorporated *bank*, and the action is in a county in which there is a branch thereof, the service may be upon the president or cashier of that branch. (Ib. § 78.) If the defendant is an

served with a copy of the bill. (14) If he omits to enter an appearance, an order may be obtained, on petition, that he appear within a certain time, or that the bill be taken as confessed. (d)

Extraordinary, or substituted service. (15) A service by any of the

(d) 1 Hoff. Ch. Pr. 108.

incorporated insurance company, and the action is in a county in which there is an agency thereof, the service may be upon the chief officer of such agency. (Ib. § 79.) If the defendant is a *foreign* corporation, having an agent in Kentucky, the service may be upon such agent. (Id. § 80.)

(14) In a suit against the State, the service of process on the governor or chief executive magistrate, and on the attorney general of the State, is a regular service. (*Chisholm's Ex'rs v. State of Georgia*, 3 Peters' Cond. Rep. 51; 2 Dallas, 419; *Grayson v. Virginia*, 3 Dall. 320; Rules Sup. Court, U. S. Dec. Tr. 1858, No. 5.)

In *New Jersey v. New York*, (3 Peters, 461.) it was held that when a bill is brought by one state against another, the subpoena must be served upon the governor and attorney general of the defendant state; and that a service on the governor alone, there being no appearance entered for the defendant, would not authorize the court to proceed. (See *Huger v. South Carolina*, 3 Dall. 339.)

(15) SUBSTITUTED SERVICE.

The act of 1853, "to facilitate the service of process in certain cases," (Laws of 1853, chap. 511,) directs that whenever it shall satisfactorily appear to any court, or any judge of the supreme court, or any county judge, by the return or affidavit of any sheriff, deputy sheriff, or constable authorized to serve any process, &c., for the commencement, or in the prosecution of any action or proceeding, that proper and diligent effort has been made to serve such process, &c., on any defendant residing in this state, and that such defendant cannot be found, or if found, avoids or evades such service, so that the same cannot be made personally, such court or judge may by order, direct the service of any summons, &c., to be made by leaving a copy thereof at the residence of such defendant, with some person of proper age, if admittance can be obtained and such proper person found, who will receive the same; and if admittance cannot be obtained, or any such proper person found who will receive the same, by affixing the same to the outer or other door of said residence, and by putting another copy thereof, directed to the defendant at his place of residence, into the post-office at the place where he resides, and paying the postage thereon.

On filing with the clerk of the county where such defendant resides, or the county in which the complaint is by law to be filed, an affidavit, showing service according to such order, such summons, &c., shall be deemed served; and the same proceedings may be taken thereon as if the same had been served by delivery to such defendant personally or otherwise, as required by law. But the court may, upon any application deemed reasonable, at any time, permit the defendant to appear and defend, or have such other relief in any action or proceeding founded on such service, as the nature of the case may require. (Ibid.)

The above act of 1853 was amended in 1863, by adding thereto the following: "But (except in partition cases, or actions, or proceedings where no personal claim is made against any person included in the classes or description hereinafter mentioned.) none of the provisions of this act shall be deemed applicable to, or in any wise relate to officers, soldiers, or musicians, while actually absent from their town or place of residence, and actually engaged in the army or military service of the United States, nor to any sailor or marine actually absent from his place of residence and engaged in the naval service of the United States; and except in partition cases, and cases where no personal claim is made as aforesaid, no order shall be allowed by any court, justice, or judge, under the provisions of this act, directing the service of any summons, &c., as above provided, unless at the time of making the application for such order, the applicant shall show to the satisfaction of the court, &c., by affidavit, that the defendant against whom such order is desired is not an officer, soldier, or musician actually absent from his place of residence and engaged in the army or military service of the United States, nor a sailor or marine absent from his place of residence and engaged in the naval service of the United States; or shall so show that the action is one for the partition of real estate; or shall so show that no personal claim is made in the action against the defendant against whom such order is sought." (Laws of 1863, chap. 212.)

It has been decided that the provisions of the act of 1858, apply only to cases where

means above pointed out is called the *ordinary* service. Where the subpoena cannot be served by either of these ordinary methods, *extraordinary* means may be resorted to. Such service, however, ought, in general, to be warranted by a previous order of the court; though sometimes, where an extraordinary service has been effected, the court has considered it to be good. Thus, where the person who served the subpoena deposed that he hung the same upon the defendant's door, and within half an hour afterwards saw him abroad with a writ in his hand, which he supposed to be the subpoena, the court granted an attachment. (e) And it has been held good service if a person keeps the door of his house shut and refuses to open it, to leave the writ under seal hanging upon the door of the house, or to put it into the house under the door, or within the windows. But none of these are good service unless it can be proved that such subpoena afterwards came [*53] to the defendant's hands, or that he was in the house at the time, or had notice of it; as where a complainant made oath that he had heard the defendant confess that he had been served with a subpoena. (f) And so where a person made oath that he had showed and offered to deliver the subpoena to the defendant, but that he refused to accept it, and did not appear, an attachment was issued. (g)

In England, where an injunction is sought to restrain proceedings at law by a party who is abroad, the court will order service upon the

(e) *Rickers v. Stileman*, Cary, 57.

(f) *Waters v. Berd*, Cary, 104. *How v. Maddock*, id. 115.

(g) *Peris v. Thomas*, id. 134.

the defendant cannot be found, either in or out of the state, or being found, avoids or evades personal service. (*Collins v. Campfield*, 9 How. Pr. 519; *Foot v. Harris*, 2 Ab. 454.) Therefore, where upon an affidavit that the defendant was a resident of this state, but that he was then in the State of Ohio, and not expected back that summer, except on a visit, an order was made for substituted service under this statute, the court, on motion, set aside the order as not being warranted by the statute. (Ibid.) An order made under this statute should direct the substituted service to be made in the manner prescribed. If it direct any other mode of service, the order will be irregular. (*Foot v. Harris*, 2 Ab. 454.) The act will not warrant a service of the summons on the defendant by leaving it at his place of residence and business in the city of New York, when the plaintiff knows he is absent in California on business. And judgment entered and execution issued in such a case, will be set aside. (*Jones v. Derby*, 1 Ab. 458.) The statute requires the judge who makes the order to be satisfied that the defendant sought to be served resides in this state, and that he cannot be served for the reason stated in the papers on which the application is made; and when he is thus satisfied, he may make the order. (*Collins v. Ryan*, 32 Barb. 647.) If the order made is erroneous, it may be set aside upon a proper application; but it is not void, and will sustain the judgment which may subsequently be entered thereon, while the order remains in force. (Ibid.)

Under the former practice, it was decided that where a defendant was absent from home, and no person could be found at his place of abode, the subpoena might be served on a clerk or servant, at his store or place of business. (*Smith v. Parke*, 2 Paige, 298; *Dyett v. North American Coal Company*, 20 Wend. 570.) In *Somers v. Connolly*, (1 Irish Eq. 416,) substituted service was allowed upon the general agent of the defendant resident abroad, but where, unknown; though it did not appear that he was secreted or withdrawn to avoid being served.

attorney or agent of such party, to be good service of the subpoena upon the client and principal. (*h*) And in some cases also where injunctions are not sought, the court has permitted service upon the agent or factor of a defendant abroad, acting in respect of the property in dispute, to be good service upon the principal. (*i*) But as our revised statutes provide a mode of compelling the appearance of a defendant in every case, (whether he be absent, concealed, or non-resident,) or in default thereof, allow the complainant to take the bill as confessed against him, it is doubtful whether such substituted service would be allowed here, unless it were upon an attorney specially empowered to appear and defend. And it has been decided that where a solicitor has been specially authorized to appear in the very suit, if he refuses to do so, he cannot be compelled. (*k*)

In general, if an extraordinary or substituted service is necessary, the safest course is for the complainant to apply in the first instance to the court, by motion, supported by affidavit stating the circumstances, for an order that the particular mode required, may be good service. (*l*) Thus, where a defendant has quitted his residence, and cannot be found, orders have been made, in England, that service at his last place of abode might be good service. (*m*) So, an order has been granted, on motion, that service at the last place of abode of the defendant's wife might be good service. (*n*)

By whom served. A subpoena may be served by any person. (*o*) (16)

(*h*) 1 Dan. 262, 568. See 4 Wash. C. C. Rep. 370, 472.

(*i*) Id. 268, 568.

(*k*) Willings v. Loman, Hinde's Pr. 91.

(*l*) 1 Dan. 566.

(*m*) Parker v. Blackburne, 2 Vern. 369.

(*n*) Pulteney v. Shelton, 5 Ves. 147.

(*o*) Trabue's Heirs v. Holt, 2 Bibb's Rep. 393. Hoyer v. Peun, 1 Bland. 29. Id. 132.

(16) BY WHOM SERVED.

In some of the states a subpoena in chancery may be served by any person, as in Maryland, (*Hoyer v. Penn.*, 1 Bland. 29; *Taylor v. Gordon*, id. 132;) New Jersey, (*Wert v. Smith*, 1 Green. Ch. 309;) Kentucky, (*Trabue's Heirs v. Holt*, 2 Bibb. 393.)

In the United States courts, service of a subpoena is to be made by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process must make affidavit thereof. (15th Equity Rule.)

Section 133 of the Code of New York provides that the summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. The service must be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence.

It seems a sheriff, who is plaintiff, may serve his own summons. (*Bennett v. Fuller*, 4 John. 486.)

If the defendant is a non-resident, and that fact can be proved, it is unnecessary to issue the summons to the sheriff at all; but the plaintiff may at once apply for his order of publication. (*Van Sant. Eq. Pr.* 38.) If the defendant is concealed, or cannot be found, and his last known place of residence was within this state, it is proper to issue the summons to the sheriff of the county of such residence, and procure his return thereto that the defendant cannot be found, in order to use such return in making out the proof necessary to obtain an order of publication. (*Ibid.*)

The service of a summons by the plaintiff in an action is a mere irregularity, which may be corrected by motion before, but not after, judgment. But such motion must be made the first opportunity. (*Hunter v. Lester*, 18 How. Pr. 347; S. C. 10 Ab.

Alias or pluries writ.] It is never necessary to use an *alias* or *pluries* writ of subpœna. (17) If the subpœna has not been served upon

260.) If made after judgment, it will be too late. (*Myers v. Overton*, 2 Ab. 344; S. C. 4 E. D. Smith, 428.)

In *Vermont*, service of a subpœna cannot be made by an indifferent person not named in it. (*Allyn v. Davis*, 10 Verm. 547; *Burlington Bank v. Catlin*, 11 id. 106.) In *New Hampshire*, where a private person may make service of process by copy, he may himself certify and swear to the copy. (*Stone v. Anderson*, 5 Foster, 221.) In *Wisconsin*, the summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. (Code, § 38; Rev. Stat. 718, § 8.) In *Minnesota*, the same rule prevails. (Pub. Stat. 538, § 48.) In *Ohio* and *Kansas*, the summons must be served by the officer to whom it is directed, who shall indorse on the original writ the time and manner of service. It may also be served by any person, not a party to the action, appointed by the officer to whom it is directed. The authority of such person must be indorsed on the writ. (Code of Ohio, § 61; Code of Kansas, § 69.)

In *Indiana*, the summons, when served within the state, must be served by the sheriff to whom it is directed, either in person or by deputy. (2 Rev. Stat. 11, § 2; 8 Bld. 140; Bicknell's Civil Prac. 49.) Notwithstanding the above statute, the Supreme Court of that state has decided that a sheriff's deputy may empower any third person, even an infant, to serve a summons; and that service by a person so empowered is good. (9 Ind. 253.) Where no provision is otherwise made, for the service of process in any county, from any court, the sheriff of such county must serve the same. (2 Rev. Stat. 11, § 3.) Personal service may be made upon a non-resident out of the state, by any person. (Ibid; and 2 Rev. Stat. 132, § 419.) If there be no sheriff or coroner, or if both be incapacitated from serving the summons, the service must be made by an elisor, appointed for that purpose by the court. (2 Rev. Stat. 8, § 20.)

In *Illinois*, upon the filing of the bill, the clerk of the court issues a summons, directed to the sheriff of the county in which the defendant resides, if the defendant be a resident of the state, requiring him to appear and answer the bill on the return day of the summons; and where there are several defendants residing in different counties, a separate summons must be issued to each county, including all the defendants residing therein. (Chancery Code, sec. 5; Stat. of 1858, vol 1, p. 139.)

In *Kentucky*, the summons may be served: 1. By the officer to whom it is directed, or by any officer to whom it might have been directed; whose return thereon shall be proof of the time and manner of the service. 2. By any person appointed by the officer to whom the same is directed, by an indorsement on the summons, whose affidavit, indorsed thereon, shall be proof of the time and manner of service. (Civ. Code, § 73.)

In *California*, service may be made: 1. By the sheriff of the county, or by his deputy; 2. By some person specially appointed by him, or by the judge of the court in which the action is brought; 3. By any white male citizen of the United States, over twenty-one years of age, and who is competent to be a witness. (Cal. Pr. Act, § 28.) The service of a summons by a person not a sheriff, as provided by the Practice Act, is a service "according to the course of the common law." (*Peck v. Strauss*, 33 Cal. 678.) If there be several defendants, all living in the county in which the action is brought, a certified copy of the complaint need be served only on one of the defendants. (Prac Act, § 28.)

(17) FURTHER PROCESS.

In the *United States* courts, whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made. (14th Equity rule.) So in *Ohio*, when a summons is returned "not summoned," other writs may be issued, until the defendant, or defendants, shall be summoned; and when defendants reside in different counties, writs may be issued to such counties at the same time. (Seney's Code, p. 81. sec. 60.) In *Massachusetts*, if a party is not found, a copy of the subpoena may be left at his usual place of abode; and the truth of the case being returned by the officer, if it shall be made to appear to the court that the party has actual notice of the suit, no other notice shall be required; but the clerk shall issue other similar process, if the same shall be required by the plaintiff; and if, upon such second process, the party be not found, a copy shall be again left; and upon a second return that the party is not found, and that a copy has been so left,

any of the defendants, the return day may be altered by the solicitor, at any *time, to a day sufficiently distant to enable him to get [*54] it served before the time thus fixed. But if the subpœna has been served on a part of the defendants, so that the return day cannot be altered, the practice is to issue another subpœna returnable at a future day. (18)

the same proceedings may be had as if the process had been served on the defendant. (Rule 6 of the rules of practice in chancery.)

In *Illinois*, if, in any suit in chancery, the process shall not be returned executed, on the return day thereof, the clerk, if required, shall issue an *alias*, *pluries*, or other process, without an order of the court therefor. (Chancery Code, sec. 11; Stat. of 1858, vol. 1, p. 139.)

(18) PROOF OF SERVICE.

The Code (§ 138) requires that proof of the service of the summons and complaint or notice, if any accompanying the same, shall be as follows:

1. If served by the sheriff, his certificate thereof.
2. If by any other person, his affidavit thereof.
3. In case of publication, the affidavit of the printer or his foreman or principal clerk showing the same, and an affidavit of the deposit of a copy of the summons in the post office as required by law if the same shall have been deposited; or
4. The written admission of the defendant.

In case of service otherwise than by publication, the certificate, affidavit or admission must state the time and place of the service.

By Sheriff's Certificate. The sheriff's certificate of the service of a summons is not conclusive upon the defendant. He may disprove it on motion to set the proceedings aside. *Van Rensselaer v. Chadwick*, 7 How. Pr. 297; *Litchfield v. Burwell*, 5 Id. 341; *Wallis v. Lott*, 15 Id. 567. See *Moulton v. De MaCarty*, 6 Rob. 470; *Bulkley v. Bulkley*, 6 Ab. 307.) A certificate of the sheriff of Westchester of the service of a summons in the city of New York is bad, as a sheriff can do no official act out of his county. (*Farmer's Loan & Trust Co. v. Dickson*, 17 How. Pr. 477; S. C. 9 Ab. 61.) And the certificate of a sheriff of another State is not evidence here of the service of papers. He should make an affidavit of such service, the same as a private individual. (*Thurston v. King*, 1 Ab. 126; *Morrell v. Kimball*, 4 Id. 352.) A sheriff's certificate of service which merely states that he served on the defendants "a copy of a summons and complaint" is defective as to defendants who have not appeared. It should state or refer to the title of the cause, and that the summons served by him was in that action. (*Litchfield v. Burwell*, 5 How. Pr. 341; S. C. 1 Code R., N. S. 42; 6 Leg. Obs. 182.) A sheriff's certificate of the service of a summons does not lose its force by lapse of time, or by being previously used for any other purpose. And although it may have been used in reference to a judgment which is afterwards vacated, it continues to be proof of the service, and may be used on a subsequent application for judgment. (*Brien v. Casey*, 2 Ab. 416.) An affidavit by a defendant of the service of a declaration will be held conclusive as to the time of such service as against a sheriff's certificate. To sustain his service the sheriff must make an affidavit. (*Campbell v. Self*, 2 How. Pr. 35.) When the service is made by a deputy sheriff the certificate should be in the name of the sheriff. The return of a deputy in his own name is a nullity, and a certificate signed "J. C. B., under sheriff," is no proof of service. (*Joyce v. Joyce*, 5 Cal. R. 449.) If the sheriff's certificate of service is defective it may be supplied by an affidavit and filed *nunc pro tunc*. (*Farmer's Loan Co. v. Dickson*, 9 Ab. 61, 17 How. Pr. 477; *Bogert v. Bogert*, 45 Barb. 121.) A return by a sheriff in case of an infant that he has served the process on the infant alone is insufficient, unless accompanied by a statement that there could be found no guardian or father, no mother or person having the care of the infant or with whom he lived, or that the minor is over fourteen years of age. (*Morse v. Grames*, 2 Law Gaz. 404, cited Seney's Code, (Ohio) 85, note.)

In *Maryland*, service of process if made by any person other than a legal officer, must be proved. (*Hoye v. Penn*, 1 Bland. Ch. 29.)

In *Oregon*, the sheriff's certificate that he served the summons and complaint by leaving a copy at the place of residence of the defendant, with a white person over the age of fourteen who was residing with the family, is proof of a sufficient service. (Laws of Oregon, 1866, p. 98.)

SECTION II.

ATTACHMENT.

When proper.] Upon the service of the subpoena on the defendant, he is bound to enter his appearance in the proper office within twenty

In *Kentucky*, in all cases of the return of service upon a summons by an officer, the return must state the time of the service and that a copy was delivered to or offered and refused by the defendant. And if the return of service is defective in these respects the officer may be fined by the court not exceeding ten dollars, and shall be liable to the action of any person aggrieved by such defect. But the court may permit an amendment according to the truth of the case. (Civ. Code, § 75.)

By affidavit.] An affidavit of the service of a summons is defective when it does not show where and how the service was made. (*Hunter v. Lester*, 18 How. Pr. 347; S. C. 10 Ab. 260.) The affidavit of service is not conclusive upon the defendant. He may disprove the alleged service, on motion to set aside the proceedings. (*Van Rensselaer v. Chadwick*, 7 How. Pr. 297; *Litchfield v. Burwell*, 5 id. 341; *Wallis v. Lott*, 15 id. 567. See *Moulton v. De McCarty*, 6 Rob. 470; *Bulkley v. Bulkley*, 6 Ab. 307.)

Rule 23 of the supreme court, as amended in 1870, requires that where the service of the summons and of the complaint, or notice, if any, accompanying the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state, in his affidavit of service, the age of the person making the service, (if under age,) when and at what particular place he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and also to state in his affidavit that he left with the defendant such copy, as well as delivered it to him.

In actions for *divorce* the affidavit must state what knowledge the affiant had of the person served being the defendant, and how he acquired such knowledge. The court may require the affiant to appear in court, and be examined in respect thereto. (Rule 24 of Supreme Court, 1870.)

If the defendant denies the service of the summons upon him, and there is any doubt as to the truth of such denial, a positive affidavit of service on file will prevail. (*Moulton v. De McCarty*, 6 Rob. 470.) A defect in the affidavit, in respect to the name of the defendant, is a mere irregularity, which will be waived if not taken advantage of promptly. (Ib.)

In *New Hampshire*, where a private person may make service of process by copy, he may himself certify and swear to the copy. (*Stone v. Anderson*, 5 Foster, 221.)

By admission.] When the proof of service is an admission by the defendant, the admission must be verified and identified, so as to satisfy the court that the admission is indeed signed by the defendant, or with his assent. (*Litchfield v. Burwell*, 5 How. Pr. 342; S. C. 1 Code Rep., N. S. 42; 9 Leg. Obs. 182; *Re Gibson*, 5 Eng. (Ark.) 572; *Welch v. Walker*, 4 Porter, 120; *Norwood v. Riddle*, 9 id. 426.) The court takes judicial notice of the signature of its officers, but not of parties defendant. An admission not stating the mode in which the service was made is not sufficient. The admission must state that the service was personal, by the delivery of a copy thereof to him. (*Read v. French*, 28 N. Y. 285.) An admission of service by defendants residing out of the State is ineffectual as the basis of any judicial proceedings *in personam* in this State. (*Litchfield v. Burwell*, *supra*.)

In *Kentucky*, service may be acknowledged by the defendant, by an indorsement upon the summons, signed and dated by him, and attested by a witness. The affidavit of the witness shall be proof of the service. (Civ. Code, § 76.)

In *Ohio*, an acknowledgment of service, on the back of a summons, is equivalent to service. (Code, § 65.)

In *Jones v. The United States Slate Company*, (16 How. Pr. 129,) on a motion to set aside a judgment taken by default, for irregularity, because the complaint was not sworn to, and because there was no legal evidence of the service of the summons, which was made upon the managing agent of the defendant, who gave an admission of service; it was held that these were irregularities which should have been taken advantage of promptly, and at the first opportunity; that the delay in moving was

days after the appearance day mentioned in the writ. And if the appearance is not so entered, the complainant, on filing proof of the service of the subpoena, may have an order of course that an attachment issue to compel an appearance, if the subpoena has not been personally served. An order of course for an attachment may also be entered where there has been personal service of the subpoena, upon filing an affidavit that a discovery from the defendant is necessary. (*p*)

An attachment is the first process that issues against a defendant in cases of contempts. It is issued under the seal of the court, and is directed to a sheriff, commanding him to *attach* the party, so that he may have his body before the court to answer touching his contempt, &c.

This process issues for a contempt, as well in not appearing as in not answering after appearance; and as the rules of proceeding in

(*p*) Rule 22.

fatal to the motion in this respect. Under the facts and circumstances presented, the plaintiff was allowed to amend *nunc pro tunc*, by filing his affidavit of verification of the complaint; and was also allowed to annex an affidavit verifying the signature of the defendant's agent to the admission of service. (See also *Aiken v. Mariposa Mining Co.* 6 Cal. R. 186.)

In *Indiana*, when a summons is served by the sheriff, or his deputy, the proof of the service is the return signed by the sheriff or his deputy. (2 Rev. Stat. 95, § 292.) In a case in 9 Ind. Rep. 243, where the service was held good, although not made by the officer or his deputy, but by a third person, specially authorized thereto by the officer, the evidence of the service was the sworn statement of the officer that he had told the third person to serve the writ, and the sworn statement of such third person that he had served it. And it seems that under the statute of Indiana, the affidavit of the third person is the only mode of proving such service. (Bicknell's Civil Prac. 55.) Where the service of the summons is made upon a non-resident out of the state, it must be proved by the affidavit of a competent person, made before any person authorized to administer oaths. The affidavit must state the time and place and mode of the service, and may also set forth that the person served is the identical person named in the action. If the identity of the person served be not so shown, it must be proved by the affidavit of the plaintiff, or some other person. (2 R. S. 35, § 39.) And in all cases, the proof of the service of any process issued by the court may be the written admission of the defendant, stating the time and place of the service, and duly proved to have been signed by the defendant. (2 R. S. 95, § 292.) In the absence of any proof to the contrary, the Supreme Court will presume that the court below, when it ordered a default, was fully satisfied, by evidence, that the process was regularly served. (15 Ind. Rep. 183.)

In *Kansas*, when a summons is served by a person appointed by the officers to whom it is directed, or when the service is made out of the state, the return must be verified by oath or affirmation. (Code, sec. 69.) In all cases the return must state the time and manner of service. (Id. sec. 71.)

In *Wisconsin*, the summons must be returned, with proof of the service, to the person whose name is subscribed thereto. (Code, § 38; Rev. Stat. 1858, p. 718, § 8.)

In *Minnesota*, proof of the service of the summons must be as follows: 1. If served by the sheriff, his certificate thereof; or, 2. If by another person, his affidavit thereof; 3. In case of publication, the affidavit of the printer, or his foreman, showing the same, and an affidavit of the deposit of a copy of the summons in the post-office, if the same shall be deposited; or, 4. The written admission of the defendant. In case of service otherwise than by publication, the certificate, affidavit or admission, must state the time and place of service. (Public Stat. 539, sec. 53.) (57.)

both cases are similar, the following observations will apply to both species of contempt, except where a distinction is pointed out.

Against whom issued.] An attachment for not appearing, or for not answering, cannot issue against the attorney general; whose non-appearance, on being attended with a copy of the bill, will not be considered as a contempt, but as a *nil dicit*; (q) nor can such a process be issued against a corporation aggregate; which being an ideal or invisible person existing only in contemplation of law, cannot be attached or apprehended. (r)

Ordinarily, if a *feme covert* be in contempt, the husband must be included in the attachment. (s) The court has, however, stayed process of contempt against him for want of his wife's answer, where it has appeared by affidavit that she had left him and that he had no power over her. (t) And cases may exist where she may be attached alone; as where her husband is out of the state, and she is sued in respect of a debt on her separate estate; (u) or where she obstinately refuses to join with her husband in his defence, or has committed a tortious act; (v) or where she has obtained an order to answer separately and does not put in her answer in conformity with such order. (w)

It is the duty of the husband, however, as a general rule, to take care that the wife's appearance is entered as well as his own. (x) And it is also a general rule that process of contempt may be executed against him alone for the contempt of his wife, unless a special order to the contrary is obtained. (y) All the defendants residing in the same county, liable to the attachment, must be named in one writ. (z)

How obtained.] The rule authorizing attachments to issue to compel an appearance of the defendant, contemplates two cases in which it may be desirable to seek the aid of this process: 1. Where the subpœna has not been personally served; and 2. Where the subpœna has been personally served, but the complainant wishes a discovery from the defendant. In the first case an appearance is necessary, to enable the complainant to take the bill *pro confesso*; unless there has been an order for advertising under the statute. (a) An affidavit should, therefore, be made by the person who served the subpœna, showing the service of the same on or before the appearance day therein mentioned; the manner in which it was served; and an affidavit or other evidence that no appearance has been entered by the defendant. It is not suf-

(q) 1 Dan. 183, 575. Barclay v. Russell, 2 Dick. 729. (r) Id. 189, 575. (s) Prac. Reg. 53.
 (t) Leithly v. Taylor, 1 Dick. 373. Lloyd v. Basnet, id. 143. Garey v. Whittingham, 1 Sim. & Stu. 163. (u) Dubois v. Hole, 2 Vern. 613. (v) 1 Dan. 206, 575.
 (w) Powell v. Prentice. Ridgw. P. C. 358. (x) Leavitt v. Cruger, 1 Paige, 421.
 (y) Rule 26. (z) Hinde's Pr. 91. Cary's Rep. 55. (a) Sawyer v. Sawyer, 3 Paige, 263.

sufficient for the affidavit to state that the subpoena was *duly* served, or that the defendant was served with a true copy of a subpoena. The time and mode of service, as well as the cause in which the writ issues must be specified. (b) The affidavit should state the requisition of the writ, on the subpoena should be annexed. (c)

In the second case provided for in the 22d rule, i. e. where the subpoena has been personally served, the affidavit should state that the subpoena was served personally upon the defendant, on or before the appearance day therein mentioned — that no appearance has been entered — and that a discovery is necessary from the defendant [*56] as to the matters of the complainant's bill. To obtain an order for an attachment for not answering, an affidavit showing the defendant's default, is also necessary. (d)

On filing the affidavit, in either of these cases, the complainant may enter an order of course, that an attachment issue. This order may be drawn either by the complainant's solicitor, or drawn and entered by the register or clerk. Upon the entry of which the latter will seal the attachment; which is generally prepared previously by the solicitor. The affidavit must be filed before the process is issued. (e)

When to be tested and made returnable.] The attachment must be tested in the name of the chancellor, on the day it issues; (f) and it must be made returnable on a regular motion day, or some day in term, unless otherwise specially ordered by the court. (g) The rules prescribe no particular time which shall intervene between the teste and return of this writ. By the English practice, where the party in contempt resides in, or within twenty miles of London, the attachment may be made returnable immediately; and in other cases there must be fifteen days between the teste and return. (h)

To whom directed.] The attachment should be directed and delivered to the sheriff of the county in which the defendant resides, to be executed by him or one of his deputies.

Order to fix amount of bail.] Before delivering the process to the sheriff, the complainant should apply to the chancellor or vice chancellor before whom the suit is pending, for an order fixing the amount of bail to be taken. (i) If no order is procured, the defendant will be entitled to be discharged from arrest on the attachment, on giving a bond to the sheriff in the penalty of \$100, with two sureties, conditioned for his appearance on the return day. (k)

Writ how endorsed.] For the reason just stated, if bail to a greater

(b) *Hinchcliff v. Gracie*, 1 McCle. & Y. Rep. 277. (c) *Rogers v. Rogers*, 2 Paige, 458.

(d) Rule 24. (e) *Broomhead v. Smith*, 8 Ves. 357. *Gardner v. Rowe*, 4 Ru-s. 578.

(f) Rule 19. (g) Rule 26. (h) 1 Dan. 577, 8. (i) 2 R. S. 536, § 10, 11. (k) Id. 537, § 15.

amount than \$100 is required, the attachment should be endorsed as follows, before being put into the hands of the sheriff:

[*Title of cause.*] "Attachment for not appearing to the bill of A. B., returnable the . . . day of . . . , 1842. Let the defendant C. D. give security for his appearance in the sum of \$. . . . Dated . . . , 1842.

J. W., Vice Ch."

[*57] **How executed.*] The sheriff or deputy to whom the attachment is delivered ought to execute the same with all speed and secrecy; and he cannot dispute the authority of the court out of which it issues; but he is, at his peril, to execute the same according to the command thereof.(l)

An arrest on a Sunday is absolutely void.(m) If, however, a defendant arrested on a Saturday escapes, he may be retaken on a Sunday; for that is not an execution of the process, but a continuance of the former imprisonment.(n)

No arrest can take place under an attachment after the return day mentioned therein.(o) If the sheriff does not receive the attachment in time to arrest the defendant and bring him into court on the return day, at the place where the attachment is returnable, he should not arrest him thereon, but should return the process *tarde*.(p) Where the sheriff neglected to serve an attachment until it was too late for the defendant to appear at the time and place where it was returnable, the court set aside the arrest of the defendant thereon.(q)

A sheriff or other officer employed to make an arrest under an attachment, cannot justify breaking doors for that purpose. And although the arrest is made by a deputy sheriff or other officer, it is considered as the act of the sheriff, who makes his return accordingly.(r)

Upon arresting the defendant on an attachment, it is the duty of the sheriff to keep him in his actual custody, and bring him before the court issuing the writ; and to keep and detain him in his custody until the court makes some order in the premises; unless the defendant entitles himself to be discharged by giving a bond for his appearance.(s) If the sheriff lets the defendant go at large without any sureties, it is at his peril; for after once taking him, the sheriff is bound to keep him safely, so that he be forthcoming in court.(t) And for this purpose he is authorized to keep him in prison till the return day, if necessary to secure his personal attendance.(u)

Putting in bail.] In cases where a sum has been endorsed on an at-

(l) Impey's Sher. 33. 45.

(o) 11 L. 59.

(s) 2 R. S. 538, § 12.

(m) 1 R. S. 675, § 58, (orig. § 69.)

(p) Stafford v. Brown, 4 Paige, 360.

(t) 3 Black. Com. 290.

(n) Impey's Sher. 61.

(q) Id. ib.

(r) 1 Dan. 586.

(u) 2 R. S. 540, § 37.

tachment issued by the special order of the court, or where any sum has been so endorsed by any judge or other officer as prescribed by the statute, the defendant must be discharged from arrest on such attachment, upon executing and delivering to the officer making the same, at any time before the return day in the writ, a bond with two sufficient sureties in the penalty endorsed on such writ, conditioned that the [*58] defendant will appear on the return of such attachment, and abide the order and judgment of the court thereupon.(v) We have seen that where no order specifying the amount of bail is endorsed upon the attachment, the defendant must be discharged from arrest on giving a bond in the penalty of \$100.(w)

Return of.] The officer executing the attachment must return the same by the return day specified therein, without any previous rule or order for that purpose. And he must return it to the court itself, i. e. to the place where the court is sitting on the return day. In case of default, an attachment may forthwith issue against the officer; which will not be bailable.(x) But he may return the same at any time during the actual sitting of the court on the return day thereof, unless he is specially directed by the court to return it immediately. It is therefore irregular to take out an attachment against him *ex parte* during the sitting of the court on that day.(y) If the party prosecuting the attachment wishes to expedite the proceedings, however, he may, upon an affidavit of the delivery of the attachment to the proper officer a sufficient time before the return day to have enabled him to serve and return it, and that it has not been returned, move the court, previous to its adjournment on the return day, for an order that such officer return the attachment *sedente curia* on that day, or that an attachment issue against him, upon filing the register's or clerk's certificate of his default.(z)

If the sheriff does not receive the process in time to arrest the defendant and bring him into court on the return day, he should return it *tarde*.(a)

Where the sheriff takes a bond from the defendant on letting him to bail, he must return it with the attachment, and they are to be filed together.(b)

Where the defendant, on being arrested upon an attachment, refuses to give bail for his appearance, the sheriff endorses upon the writ that he has taken the body, and for want of bail has him before the court, in custody.

(v) 2 R. S. 536, § 13.

(x) 2 R. S. 537, § 17.

(z) *Id.* ib.*People v. Elmer.* 3 Paige, 85.(a) *Safford v. Brown.* 4 Paige, 360.

(w) See ante, p. 56; 2 R. S. 537, § 15.

(y) *People v. Wheeler.* 7 Paige, 433.

(b) 2 R. S. 413, § 16.

Proceedings on return of writ.] 1st. Where defendant makes default. If the defendant, on being served with the attachment, gives security for his appearance at the return day, and makes default, the bond be- [*59] *comes forfeited, and the complainant may prosecute it. And he may have a special order that the defendant's appearance be entered by the register or clerk, or that his bill be taken as confessed, as the case may be; or he may take out an *alias* attachment. If defendant makes default a second time, the complainant may have a *pluries* attachment which will not be bailable.(c)

Where the defendant fails to appear at the return day, the complainant usually waits until the close of the sitting of the court, and then moves, upon the attachment and return, that the defendant be called. This is accordingly done by the sergeant at arms, register, or clerk; stating the title of the cause, and for what the attachment issued. The court then, (upon the defendant's not answering,) grants an order that the defendant's appearance be entered and the bond be prosecuted; or for an *alias* attachment, or both. The order that the bond may be prosecuted by the complainant operates as an assignment thereof to him, and he may maintain an action upon it in his own name as assignee of the sheriff.(d)

Though the complainant is authorized, under the 27th rule, to make it a part of the order entered on the return of the attachment, that an *alias* issue, this writ is but seldom resorted to; as under the same, an order may be obtained that the register or clerk enter an appearance for the defendant. Whenever it is issued, however, it must be returnable on a motion day or in term, unless specially ordered otherwise by the court. (e) There must be the same length of time between the teste and return of this writ, and the same proceedings as to bail, return, &c., as upon the original attachment.

If the defendant gives a bond for his appearance and makes default a second time, a *pluries* attachment may issue, as before observed, which will not be bailable. This writ should not be issued without the special order of the court; and the certificate of the register or clerk that it is so issued, should be endorsed upon it. And if such certificate specifies no sum in which the defendant shall be held to bail, he is not bailable.(f) If it is issued without the special order of the court, and no sum is endorsed thereon, the defendant will be entitled to be discharged on giving bail in \$100.(g)

The court should fix the return day of the *pluries* attachment. It is

(c) Rule 27. 2 R. S. 179 § 79, (orig. § 73.)

(d) 2 R. S. 539, § 27.

(e) Rule 26. (f) 2 R. S. 537, § 14.

(g) Id. § 15.

*not strictly within the 26th rule; as it is not for a bailable contempt; and it may be made returnable in vacation. (*h*)

This writ should be endorsed, "By the special order of the court not bailable."

If the defendant is taken on the *pluries*, the proceedings will be the same as where he is taken and not bailed on an original attachment; the fact of its being a *pluries* being noticed in the proceedings. (*i*)

2d. *Where defendant appears personally, or is brought in by sheriff.* If the defendant appears personally or is brought into court by the sheriff on the return of an attachment for not appearing or not answering, he must enter his appearance or put in his answer and pay the costs incurred by his contempt instant, or within such time as the court shall then appoint, or be committed until he complies. Or the complainant may have an order that the bill be taken as confessed, and that the defendant be committed until the costs are paid. (*k*)

This rule applies only to cases in which the defendant, on being brought before the court upon an attachment, or appearing therein, admits his contempt. If he denies it, the court will cause interrogatories to be filed specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which the defendant may be required to make written answers on oath within such time as the court shall fix. The court may receive any affidavits or other proofs contradictory, or in confirmation of the answers of the defendant; and upon such evidence must determine whether the defendant has been guilty of the misconduct alleged. If the court adjudges that he is guilty, and that the misconduct was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of any party in a cause or matter depending in the court, such court will then proceed to impose a fine, or to imprison him, or both. (*l*) But the fine cannot exceed \$250, over and above the costs and expenses of the proceedings. And the defendant is to be imprisoned only until he shall have entered his appearance and paid such fine and costs. (*m*)

The mittimus or warrant under the order for imprisonment must be under the seal of the court. And the process of commitment, as well as the order therefor, must specify the act to be performed, viz. that the defendant enter his appearance and pay the fine and costs; and that he be detained until he do so. (*n*) The costs must be taxed before the

(*h*) 1 Hoff. Ch. Pr. 123.
(*l*) 2 R. S. 537, §§ 19, 20.

(*i*) Id. 127.
(*m*) Id. 537, §§ 22, 23.

(*k*) Rule 28.
(*n*) Id. ib. § 24.

[*61] *order is entered or process issued, so that the amount may be inserted therein.

Practice where defendant is already in custody for other causes.] If, when the attachment is issued against a defendant, he is already in custody of the sheriff by virtue of any execution against his body, or by virtue of any process for other contempts or misconduct, he returns the attachment *cepi corpus*, and stating that the defendant is in his custody charged at the suit of others. Upon this return, a *habeas corpus* is issued by the court, directing the sheriff to bring up the body of the defendant to answer for such misconduct. (o) If it be a case in which the party is entitled to an attachment without the special order of the court, the writ of *habeas corpus* may be allowed by any judge of the court, or by any officer authorized to perform the duties of such judge in vacation; (p) i. e. by the chancellor or by a vice chancellor.

It may be remarked here that a vice chancellor has no right to allow a *habeas corpus* except in cases where he is specially authorized to do so by statute. The article of the revised statutes respecting the constitution of the court of chancery, &c., (q) in defining the powers of the circuit judges as vice chancellors, only confers upon them, as such vice chancellors, the original jurisdiction and powers possessed by the chancellor, in causes and matters *in equity*, and such as may be vested in him by virtue of any statute. And the right of the chancellor to allow a writ of *habeas corpus* does not spring from his *equity* jurisdiction; nor is the proceeding, in such cases, on the equity side of the court, but on the *common law* side, and is had under the ancient common law jurisdiction of the court. Vice chancellors having only the equity powers of the court of chancery, cannot therefore allow a common law writ of *habeas corpus*, but only such statutory writs as are incidental to the exercise of their equity powers in suits and proceedings pending before them. (r)

The writ of *habeas corpus* when issued as above mentioned, will authorize the sheriff in whose custody the defendant is, to remove and bring him before the court, and to detain him at the place where it is sitting until some order is made for his disposition. (s)

[*62] *The practice is similar to the above where the defendant is in custody on process from this court for contempt, or otherwise. (t)

Where the defendant is in custody on criminal process, the practice is the same. (u)

(o) 2 R. S. 536, § 7.

(p) Id. ib. § 8.

(q) Id. 168, § 2 of art. 1, tit. 2.

(r) The powers of the vice chancellor and assistant vice chancellor of the first circuit and of the vice chancellor of the eighth circuit, are no more extensive in this respect than those conferred upon the other vice chancellors. See 2 R. S. 168, § 5; Laws of 1839, p. 85, 86.

(s) 2 R. S. 536, § 9.

(t) Knowles v. Chapman. 2 Russ. R. 166, n. Davison v. Colling, id. 187

(u) 1 Dan. 582. 1 Ves. & B. 77.

So, it seems, the defendant may be *charged in custody*. That is, if he is already in custody for other causes, the attachment may be left with the sheriff in whose custody he is, and he will be bound to detain him upon it until he complies with its exigency, although discharged upon the other causes of imprisonment. (*v*)

SECTION III.

ATTACHMENT WITH PROCLAMATIONS.

If the sheriff to whom the writ of attachment is directed, is not able to take the defendant under it, he returns *non est inventus*; upon which a writ called an attachment with proclamation, issues against the party, also directed to the same officer, who is commanded by it to cause public proclamation to be made in all places within his bailiwick, wheresoever he shall think it most convenient, that the defendant do, upon his allegiance, appear in the court of chancery on a certain day therein named, and nevertheless in the meantime to attach the defendant if he can be found. To obtain this writ, the attachment, with the return of *non est inventus* endorsed thereon, must be filed in the office of the register, assistant register, or clerk. Upon which the writ may be issued, without the entry of an order for that purpose. (*w*)

The writ of attachment with proclamations is in nearly the same form as the ordinary attachment, with the exception of the introduction of the command to the sheriff to cause the defendant to be proclaimed in the manner before specified.

The writ must be endorsed, "*By the court, for not appearing,*" (or, "*not answering,*" &c.; (*x*) and must be tested, signed, and made returnable in the same manner as the original attachment.

This process is bailable. (*y*)

A sheriff cannot justify breaking open doors, in executing this process. (*z*)

*If the sheriff cannot succeed in taking the defendant under [*63] the writ of attachment with proclamations, he must make the following return: "By virtue of this writ to me directed, I have caused public proclamation to be made within my bailiwick, that the within named C. D. do appear on the day and at the place within written, as

(*v*) 1 Hoff. Ch. Pr. 135. Dick. 658. (*w*) Gilb. For. Rom. 77. 1 Dan. 605. (*x*) Hinde, 113.
(*y*) Newton v. Dent, Dick. 231. Fow. Exch. Pr. 153. 1 Dan. 605. (*z*) Gilb. For. Rom. 76

within I am commanded. And I further certify that the within named C. D. is not found in my bailiwick.”(a)

If the defendant comes in upon the proclamations, or is arrested under the attachment, the return is *cepi corpus*.

The proceedings upon the return of this writ are the same with those upon the first attachment. It is to be observed, however, that after the return of this writ when issued for want of an answer of the defendant, he can only answer. He cannot demur or plead, or plead and answer, except by the special leave of the court.(b)

SECTION IV.

COMMISSION OF REBELLION.

If a defendant, after proclamation made, (whereby he is cited to appear, &c. upon his allegiance,) still continues to disobey, he is considered as a rebel and a contemner of the laws; and the next process which issues against him is a commission of rebellion; which is a writ issuing out of and under the seal of the court, directed to special commissioners therein named, commanding them jointly and severally to attach, or cause to be attached, the defendant wherever he shall be found within the state, as a rebel and contemner of the laws, &c.(c)

To whom directed.] This writ, it is to be observed, is not usually directed to the sheriff, but to commissioners named in the writ; and the reason why it is so directed is stated to be, because the sheriff cannot be supposed to execute such process in person, and it may be inconvenient to lodge the discretionary powers thereby conferred in the deputies of a ministerial officer; “wherefore the court appoints its own commissioners, who are enjoined to do every thing very carefully, and are answerable for their misbehavior.”(d)

[*64] **How issued.*] This process, like the previous processes of contempt, may issue without any order.(e) But it seems there must be fifteen days between the teste and return, unless a special order is obtained; and it appears to be the better opinion that it cannot be made returnable at any other time than in term.(f) It is therefore a safer course to apply to the court *ex parte*, for an order that the commission issue.

(a) Imp. Off. Sheriff, 338.

(c) Hinde, 117.

(e) Dove v. Dove, Dick. 618. For. Rem. 79. 1 Fow. Exch. Pr. 157. Barton, 86.

(f) See 1 Hoff. Ch. Pr. 140. 1 Dan. 612.

(b) Sanders v. Murney, 1 Sim. & Stu. Rep. 225. 1 Dan. 608.

(d) Id. 116. 1 Dan. 610.

The commission is usually directed to two, three, or four commissioners, in the discretion of the complainant; and they are named by him.(g)

How executed.] Upon the receipt of this writ, the commissioners are bound to arrest the defendant wherever they can find him; and it seems that they may, for this purpose, break open his house, or the house of any other person in which he may happen to be;(h) because the object of the writ is to deprive him of the protection by law, to which, as "a rebel and contemner of the law," he is no longer considered entitled; and therefore it implies an authority to enter into the house.(i) It seems, however, to be considered that in such a case it is advisable for the commissioners making the arrest to have a peace officer with them;(k) and for this purpose, the commission commands all mayors, sheriffs, bailiffs, and constables, and all other officers and citizens to render their aid and assistance to the commissioners in the execution of their duty.

In England, a defendant may be arrested upon a commission of rebellion on a Sunday; but only in cases of necessity.(l) In this state, however, it seems clear the arrest, even upon this process, cannot be lawfully made on Sunday, in any case.(m)

The commissioners have power, under the commission, to call in the aid of the sheriff, or any other peace officer, to assist them in taking the party.(n)

If the defendant is taken, under a commission in term time, the commissioners should bring him before the court immediately;(o) but if the arrest takes place in vacation, and good security is offered for the defendant's appearance, the commissioners not only may, but ought to, take *it.(p) If bail is not offered, in such a case, the commissioners, [*65] in analogy with the practice upon attachments, ought to keep the defendant in their actual custody until the sitting of the court, and then to bring him personally before the court, and to keep and detain him in their custody until the court shall have made some order in the premises.(q) And it is presumed the commissioners would not be required or even authorized to confine the defendant in prison or otherwise restrain him of his liberty, except so far as necessary to secure his personal attendance.(r) Though the English practice is to lodge

(g) 1 Fow. Exch. Pr. 157. Hinde's Pr. 123.

(h) 1 Newl. 14.

(i) Hinde, 116.

(k) Prac. Reg. 129. 1 Dan. 613.

(l) Id. 116, 131. Prac. Reg. 30.

(m) See 1 R. S. 675, § 58, (orig. § 69.) Unless indeed it is a crime to rebel against and contemn the laws. If so, this process may, upon that ground, be executed on Sunday, under the section referred to.

(n) 1 Fow. Ex. Pr. 162.

(o) Prac. Reg. 129.

(p) Jones v. Clement, Bunb. 50. Hinde, 119. Cary, 82. Prac. High Court Ch. 3. Tothill's Trans. 37.

(q) See 2 R. S. 536, § 12.

(r) Id. 540, § 37.

the defendant either in the Fleet prison, (s) or in the custody of the sheriff, for safe keeping. (t)

If the commissioners permit the defendant to escape after they have arrested him, they will be committed till they produce him. (u) If he be rescued, the rescuer will be committed. (v)

Return.] The return to this process is made by two or more of the commissioners who act under it. When the commissioners are unable to find the defendant, the return shall be endorsed upon the writ in the following form :

“ We whose names are hereunto subscribed, being two of the commissioners within named, do hereby certify to this honorable court that we have made diligent search and inquiry after the within named C. D.; but notwithstanding all our endeavors for the purpose, we cannot meet with him, so as to attach his body by virtue of this commission. Witness our hands this day of

A. B. }
C. D. } Commissioners.”(w)

Return, how compelled.] By the English practice, if the commissioners neglect or refuse to make a return to the commission, the court, on motion or petition, will order them to return it ; and upon disobedience to the order, the court will, upon motion, grounded on affidavit of service of the order, commit them ; for not being parties to the suit, no writ of execution of the order is required to bring them into contempt. (x) Under the revised statutes, the order would be that they return the writ by a certain specified day, or that an attachment issue against them. (y)

[*66] **Cepi Corpus.*] Where the party is arrested upon a commission and brought before the court, the practice is substantially the same as that upon the return of an attachment.(z)

SECTION V.

SERGEANT AT ARMS.

By the English practice, upon a return of *non est inventus* by the commissioners, or any two of them, the court will, on motion, order the party to stand committed, and for that purpose grants a warrant to the

(s) 1 Harr. Ch. Pr. 129.

(v) Hinde, 118.

(y) 2 R. S. 536, § 6; 534, § 1, sub. 1.

(t) Cary, 115.

(w) 1 Smith, 118.

(u) Sacheverell v. Sacheverell, Toth. 38.

(x) 1 Dan. 615.

(z) See ante, p. 58 et seq.

sergeant at arms to take him into custody. (a) It seems, however, from Mr. Hoffman's Practice, that the English course in this respect cannot be pursued here; our statute having virtually taken away from the sergeant at arms the power of executing the process of the court. (b) The sheriffs of the respective counties are made officers of the court of chancery for the purpose of executing the process thereof. (c) And the sheriff of the county in which any stated term shall be held by the chancellor, or by any vice chancellor, is required to attend during its sitting, and to execute all the powers and duties of a sergeant at arms, and may execute the lawful process and orders of the court in any county of the state. (d)

Under these provisions of the statute, Mr. Hoffman lays it down that upon the return of a commission of rebellion *non est*, the court, on application made in term, may issue a warrant to the attending sheriff, describing him as "the sheriff attending the court and executing all the powers and duties of a sergeant at arms," directing him to apprehend the defendant. (e)

The practice of sending the sergeant at arms, when the ordinary processés of contempt have failed, has been adopted by the court, *ex abundanti cautela*, lest there may have been any negligence in the ordinary officers or ministers of justice to whom the execution of the writs of attachment are entrusted, or lest the commissioners of rebellion (persons nominated by the complainant,) should collude with, or be warped by, their employer to the prejudice of the defendant. To guard against which, the court, to satisfy its conscience, and to be informed whether *the defendant doth actually hide himself from justice or not, [*67] sends an officer of its own; upon whose return only can a regular sequestration be issued. (f)

No return day is fixed in the order for this process; but it should be made returnable immediately. (g)

The duty of the sergeant at arms, or sheriff acting as such, upon receiving the warrant, is to arrest the defendant wherever he can find him; and it appears that he is armed with very extensive powers for that purpose. (h)

Bail.] The sergeant at arms can take no bail bond. Therefore if he takes a party in execution, he must keep him in custody until the return, if any return day is specified, and if not, he must bring him up to the bar of the court immediately. But if the defendant be taken for want of appearance or answer, he may, upon entering his

(a) 1 Dan. 616.

(b) See 1 Hoff. Ch. Pr. 126, n.

(c) 2 R. S. 172, § 32. (orig. § 29.)

(d) 1 l. ib. § 34. (orig. § 31.)

(e) 1 Hoff. Ch. Pr. 144.

(f) 1 Dan. 617. Hinde, 123.

(g) 1 Hoff. 144.

(h) 1 Dan. 625.

appearance or filing his answer and paying the costs of his contempt, be discharged. And if the complainant's solicitor refuses to discharge him, the court will, upon motion or petition, order his discharge. (*i*)

Where the sergeant at arms has been sent, for a contempt in not putting in an answer, the defendant is entitled to his discharge *immediately* on putting in his answer and clearing his contempt; and is not to be kept in custody until the sufficiency of the answer has been decided upon. And if in such a case, the sergeant at arms refuse to discharge him, the defendant must apply, by motion or petition, upon a certificate from the register or clerk, that the answer has been filed and the costs of the contempt have been tendered or paid (as the case may be); and the court will make an order for his discharge; which must be served upon the sheriff or his deputy having the defendant in his custody. And a refusal to obey such an order would be a contempt of court. (*k*)

When the party is brought up to the bar of the court by the sergeant at arms, he will be dealt with in the same manner as upon an attachment; the style of the process being changed.

If the sergeant at arms cannot succeed in arresting the defendant, he makes a certificate or return of *non est inventus* upon the back of the warrant; which must be filed in the proper office before a writ of sequestration, which is the next process, can regularly issue. (*l*)

[*68]

*SECTION VI.

SEQUESTRATION.

After the sergeant at arms has been ordered to take a defendant into custody for a contempt upon *mesne process*, and has returned *non est inventus*, or, "a rescue," or, "that he has been resisted in the execution of his duty," the next process which issues to compel the obedience of the party is a *sequestration*.

Nature of the process.] The process of sequestration is a writ or commission issuing out of, and under the seal of the court, directed to the sheriff, or, (which is most usual,) to certain persons of the complainant's own nomination, empowering him or them to enter upon and sequester the real and personal estate and effects of the defendant,

(*i*) *Ib.* *id.* Hinde, 126.(*k*) *Waters v. Taylor*, 16 Ves. 418.(*l*) Hinde, 123.

(or some particular part or parcel of his lands,) and to take, receive, and sequester the rents, issues, and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the court shall, in its discretion, appoint, until the defendant shall have appeared to or answered the complainant's bill, (or performed some other matter which has been ordered and enjoined by the court, in the process specifically mentioned,) and for not doing whereof he is in contempt. (*m*)

To whom directed.] A sequestration upon *mesne* process is usually directed to four sequestrators; and care ought to be taken that the persons named are such as are able to answer for what shall come to their hands in case they should be called upon to account. (*n*)

When issued.] A sequestration may not only be issued upon a return of *non est inventus* by the sergeant at arms, but it may issue where the defendant resists the sergeant at arms, or makes a rescue. (*o*) And in cases of contempts in the non-performance of a decree or order of the court, sequestrations may be issued, although the sergeant at arms has not been sent; as where a defendant is already in custody under an attachment or other process of contempt, and obstinately persists in his contempt. It may also be issued to enforce a decree or order where the defendant is in custody in another suit, either at law or in equity, or upon criminal process. (*p*)

**Obtained upon motion only.*] This writ is always obtained up- [*69] on motion. If it be moved for upon a return of *non est inventus* by the sergeant at arms, the return must be filed before the motion is made. (*q*) If the party in contempt has resisted the sergeant, or having been taken has made his escape and stands out in contempt, the motion should be supported by an affidavit of the facts. (*r*)

Order for.] The motion for a sequestration having been granted, the order is drawn and entered, and the writ made out in the proper form and sealed by the register or clerk.

Writ, how endorsed.] The writ having been sealed, and signed by the register or clerk, and the solicitor for the complainant, is to be endorsed as follows: "A commission of sequestration against C. D. defendant, at the suit of A. B. complainant. (*s*)

When to be executed.] An opinion formerly prevailed in the profession that a sequestration upon *mesne* process ought not to be executed, and that the complainant, instead of having it carried into effect, ought merely, upon its issuing, to proceed to take the bill *pro confesso* against

(*m*) Hinde, 127.

(*n*) 1 Har. 143.

(*o*) 1 Dan. 630.

(*p*) Id. ib. Morrice v. Bank of England, Talb. Cas. 222. Kinsey v. Yardley, Dick. 266.

(*q*) Hinde, 136. Floyd v. Nangle, 3 Atk. 569.

(*r*) Hinde, 136.

(*s*) Id. 138.

the defendant. (*t*) The practice, whatever doubt there might have been about it formerly, appears to be now settled that if the process is for an appearance, the court will authorize the execution of it by directing the sequestrators to take possession of what is tangible, to sequester rents or money in the hands of others, by notice and service of the order; and will follow this up if necessary by the usual order to attorn, or for payment into court. (*u*) If the process issues for want of an answer, the complainant has an option whether he will proceed to take the bill *pro confesso* or to compel an answer. If the circumstances of the case are such that justice can be obtained by taking the bill *pro confesso*, he ought not to cause the sequestration to be executed; but if the case is such that an answer is necessary, he may enforce it in this manner. The cases, however, in which a complainant can have occasion to compel an answer from a defendant, instead of taking the bill *pro confesso* against him, are comparatively rare; and are in general confined to bills of discovery, where the answer is wanted, to be read at law, or to obtain some admission on which to found some application to the court. Except in such cases, the proper course is to take the bill *pro confesso*. (*v*)

[*70] **How to be executed.*] Where a sequestration upon *mesne* process is to be executed, it should be delivered by the solicitor to the sequestrators, with proper instructions for carrying it into effect. (*w*)

Notice should be given to any persons holding funds or property of the defendant not to pay over or deliver the same to him or for his use. Regularly, a copy of the commission should be served with this notice. (*x*)

The sequestrators are officers of the court, and, as such, are amenable to its authority, and are to act from time to time in the execution of their office as they shall be directed. They are to account for what comes to their hands, and are to bring the money into court as they shall be directed. Such money, however, is not usually paid to the complainant, but is to remain in court until the defendant has appeared, or answered, or cleared his contempt; and then whatsoever has been seized shall be accounted for and paid over to him. (*y*) In this respect, there is a difference between a sequestration upon *mesne* process and a sequestration to compel the payment of money under an order or decree. In the latter case, after the process has been executed and goods and estate sequestered under it, the complainant may have them applied

(*t*) 1 Dan. 631. Rowley v. Ridley, Dick. 677.

(*u*) Franklin v. Colquhoun, 3 Swanst. 309. 1 Hoff. Ch. Pr. 149.

(*v*) 1 Dan. 632.

(*w*) 1 Dan. 635.

(*x*) Simmons v. Kinnaird, 4 Ves. 743. Rowley v. Ridley, Dick. 632.

(*y*) Hinde, 133.

to satisfy his demand; which cannot be done upon process of contempt. (z) It is said, however, that even in the case of a sequestration upon *mesne* process, the court has the whole under its power, and may do therein as it pleases, and as shall be most agreeable to the justice and equity of the case. (a) And, in one case, (b) where a defendant in contempt for want of an answer, had stood out the whole process to a sequestration, whereupon the bill was taken *pro confesso* against him, and a decree made *ad computandum*, the court refused to discharge the sequestration on the defendant's paying the costs of contempt only; but kept it on foot as a security for his appearing before the master to account. (c)

What things may be seized under sequestration.] Under a sequestration upon *mesne* process, the sequestrators may take possession of all the defendant's goods and chattels. (d) By this is meant those goods and chattels only which are in the possession of the defendant, or which can *be reached without suit, or action; for *choses in action* cannot [*71] be sequestered. (e)

Powers and duty of sequestrators.] Sequestrators have the power to break open doors, in the execution of their duty. (f) So they may open boxes and rooms that are locked, if the keys are denied them, and schedule the goods in them. But they have no right to remove any thing from the house without the special order of the court. (g) Indeed, it seems, that if the sequestrators take upon themselves to remove the defendant's property, they will be liable to an attachment. (h) They are bound, however, to keep the defendant not merely nominally, but really out of possession of his property. The court must not be trifled with, and its process must be made effectual. (i)

The sequestrators are authorized to enter into the possession of such parts of the defendant's real estate as are in his own occupation, whether freehold or copyhold. (k)

Attornment of tenants.] On entering upon a defendant's estate, the sequestrators should serve the tenants in possession, if there are any, with a notice in writing to attorn and pay their arrears and growing rents to them. This may be done either personally, by serving the tenant with the notice, and at the same time showing him the sequestration under seal; or by leaving the notice at his dwelling-house,

(z) *Davis v. Davis*, 2 Atk. 21.

(a) 1 Dan. 635.

(b) *Maynard v. Pomfret*, 3 Atk. 468.(c) See also *Shaw v. Wright* 3 Ves. 22.

(d) 1 Barnard. 431.

(e) 1 Dan. 637. 4 Ves. 744. *Johnson v. Chippindall*, 2 Sim. 55. *Fenton v. Lowther*, 1 Cox, 315. *Dundass v. Dutens*, 1 Ves. jun. 196.(f) *Lowten v. Mayor of Colchester*, 2 Meriv. 395.(g) *Lord Pelham v. Duchess of Newcastle*, 3 Swans. 290, n.(h) *Desbrow v. Crommie*, Bunb. 272.(i) *Hales v. Shaftoe*, 1 Ves. jun. 86.(k) 1 Barnard. 431. *Coulston v. Gardiner*, 2 Ch. Ca. 76.

with some member of his family, together with a copy of the sequestration, and showing the original writ to the person served.(l) Upon an affidavit of this service, an order will be granted that the tenants attorn, and pay their rents to the sequestrators.(m) This order should be made upon the tenants by name, and not upon the tenants of the defendant generally.(n)

The tenants will be protected if they voluntarily pay their rents to the sequestrators.(o) And if they refuse to attorn or pay their rents, after service of the order, they may be proceeded against as for a contempt.

Where the sequestration is for the non-performance of a decree, the court will, on proper application, give them authority to let the proper- [*72] *ty;(p) but no such authority will be given where the sequestration is upon *mesne* process.(q)

Sale of goods.] As the sequestrators, upon *mesne* process, have no power to remove goods, much less have they power to sell them. If a sale is necessary, application should be made to the court for permission to sell; but an order for the sale of goods taken upon *mesne* process, will scarcely ever be made, unless for the purpose of raising money to pay the expenses of the sequestration, or where the goods are of a perishable nature, such as rents paid in kind, or the natural produce of a farm.(r) And whenever an order to sell property taken under a sequestration to enforce a decree or order is applied for, it must be upon notice.(s) Whether such an order can be made without notice, upon a sequestration on *mesne* process, does not appear. If notice is necessary, however, it can only be where the process was issued to compel an answer, after appearance. Where the process is to compel appearance, no personal notice can be given, because there is no person upon whom it can be served.(t)

The application for a sale may be made either by motion or petition.(u)

Sequestrators to account, &c.] Sequestrators upon *mesne* process are accountable for all that they receive, and can only retain so far as to satisfy for the contempt.(v) They are bound, from time to time, to make returns to the court of what comes to their hands under the sequestration.(w) And if they omit to do so, they will not be permitted to set off their fees.(x)

(l) 1 Dan. Ch. Pr. 461. Fow. Ex. Pr. 176.

(n) Anon. 2 Cha. Ca. 163.

(p) Neale v. Neale, 3 Swanst. 304. n. (c). Harvey v. Harvey, 2 Ch. Rep. 49.

(q) Ray v. —, 3 Swanst. 306. n. (a).

(r) Shaw v. Wright, 3 Ves. 22. Wilcocks v. Wilcocks, Amb. 421. 1 Dan. Ch. Pr. 639.

(s) Mitchell v. Draper, 9 Ves. 208.

(t) 1 Dan. 640. (u) 9 Ves. 208. Amb. 421.

(v) Gibson v. Scévengton, 1 Vern. 247.

(w) Desbrow v. Crommie, Bunb. 272.

(m) 1 Fow. Ex. Pr. 176.

(o) 2 How. Eq. Side, 781.

(p) Neale v. Neale, 3 Swanst. 304. n. (c).

(q) Ray v. —, 3 Swanst. 306. n. (a).

(r) Shaw v. Wright, 3 Ves. 22.

(s) Mitchell v. Draper, 9 Ves. 208.

(t) 1 Dan. 640.

(u) 9 Ves. 208.

(v) Gibson v. Scévengton, 1 Vern. 247.

(w) Desbrow v. Crommie, Bunb. 272.

(x) Hawkins v. Crook, 3 Atk. 394.

Upon the sequestrators returning that they have money in their possession, the court will, upon application, order it to be paid into court, to the credit of the cause, and invested; but the costs may be previously taxed and retained.(y)

Writ of assistance.] If the sequestrators are obstructed in the execution of their duty, the court will grant a writ of assistance to the sheriff, to aid them.(z) And it is a contempt of court to disturb them in their possession of property taken under the sequestration.(a)

**Examination pro interesse suo.*] Where any person claims [*73] title to an estate or other property sequestrated, whether by mortgage or judgment, lease or otherwise, or he has a title paramount to the sequestration, the proper course for him is to apply to the court to direct the complainant to exhibit interrogatories before a master, in order that the party applying may be examined as to his title to the estate.(b) An examination of this sort is called an examination *pro interesse suo*, and an order for it may be obtained as well where the property consists of goods and chattels, or personalty, as where it is real estate.(c)

An order for the examination of a party *pro interesse suo* may be obtained as a matter of course by the party claiming. But it cannot be granted until after the sequestrators have made a return; because, till then, it cannot appear to the court what is sequestered.(d) The application for this order may be made either by motion or petition.(e) If made by the former, it should be supported by affidavit, stating the facts under which the claim arises. If made by the latter, the petition ought to state the circumstances of the case.(f)

An order for the examination of a party *pro interesse suo* may not only be granted upon his own application, but upon the application of the complainant in the suit.(g)

In all orders for the complainant to examine a party *pro interesse suo*, there should be a time limited within which the interrogatories must be exhibited.(h) According to the English practice, the interrogatories must be settled by a master;(i) and if the claimant, after the interrogatories have been exhibited and settled, neglects to put in his examination, the court will order him to do so, and to procure the master's report within a specified time.(k) When the examination has

(y) *Howell v. Lord Coningsby*, 1 Fow. Ex. Pr. 161.

(z) *Greenslade v. Baker*, Bubb. 168. 1 Dan. 643.

(a) *Angel v. Smith*, 9 Ves. 336. 3 Swanst. 290, n.

(b) *Anon.* 6 Ves. 287. 9 id. 336. *Brooks v. Greathead*, 1 Jac. & W. 178.

(c) *Lord Pelham v. The Duchess of Newcastle*, 3 Swanst. 290, n. 1 Fow. Ex. Pr. 160.

(d) *Id.* ib. (e) *Hunt v. Priest*, 2 Dick. 540. (f) 1 Dan. 644.

(g) *Bird v. Littlehales*, 3 Swaust. 299, 300, n. (a). *Hamlyn v. Lee*, Seaton on Decrees, 412. *Johns v. Cloughton*, Jac. 573.

(h) *Hunt v. Priest*, 2 Dick. 540.

(i) *Bowles v. Parsons*, 1 id. 142.

(k) *Cooper v. Thornton*, id. 72.

been put in, the complainant, if he disputes its truth, must reply to it; otherwise it will be conclusive;(*l*) and the claimant may then apply for a reference to a master to look into the interrogatories and the examination, and to certify whether the claimant has made out a title or not.(*m*)

If the examination is replied to, leave will be given to either party to examine witnesses; and this will be done by order made upon motion [*74] without notice.(*n*) After the witnesses have been examined, publication passes, by order; and an order is then entered to refer it to a master to look into the examination and depositions, and to certify whether the claimant has made out any, and what, interest in the premises, or in any, and what, part thereof.(*o*) (19)

When the master has made his report, the case should be set down for hearing upon the report. This report cannot be excepted to: if either party objects to the master's finding, the matter should be discussed upon hearing the report.(*p*) Upon the hearing on the report, the court will either make a final order,(*q*) or send it back to the master to make further inquiries, or to compute principal and interest upon the amount due to the claimant.(*r*) If it is sent back to the master, it may, if necessary, be heard upon further directions.(*s*)

When it appears that a party who has been examined *pro interesse suo* has a plain title to the property, and is not affected by the sequestration, then it is to be discharged against him, with or without costs, as the court shall determine upon the circumstances of the case; and so *vice versa*.(*t*)

Injunction to stay proceedings at law.] Where sequestrators or a receiver are in the possession of property belonging to a defendant, and a party claiming that property adversely to the defendant brings an action of ejectment against the sequestrators or receiver, for the purpose of enforcing his claim, the court will interfere by injunction to prevent the party claiming from proceeding with the ejectment; for although the court will sometimes permit the party to proceed at law against the sequestrators or receiver, where a matter is in a fit state for the right to be ascertained by a trial at law, such a proceeding cannot be adopted unless the permission of the court has been first obtained.(*u*)

(*l*) Attorney Gen. v. Mayor of Coventry, 4 Swanst. 311, n.

(*m*) Seaton on Decrees. 415. 1 Dick. 143.

(*n*) Rowley v. Ridley, 3 Swanst. 308, n.

(*o*) Hunt v. Priest, 2 Dick. 541.

(*p*) 1 Dan. 649. Cooper v. Thornton, 1 Dick. 73.

Hamlyn v. Lee, id. 94.

(*q*) 1 Dick. 73.

(*r*) Id. 94.

(*s*) Id. ib.

(*t*) 1 Dan. 649. Gibb. For. Rom. 81.

(*u*) Seaton on Decrees. 413. Jac. 573. Attorney Gen. v. Mayor of Coventry, 1 P. Wms. 308. Angel v. Smith, 9 Ves. 335. Brooks v. Greathead, 1 Jac. & W. 178.

(19.) Here, under the old chancery system, the party was examined *pro interesse suo*, before the master directly, and not on interrogatories before an examiner.

When trial at law, or reference will be directed.] Where a party claiming the legal right to property sequestered has made an application to be examined *pro interesse suo*, the court has sometimes, instead of granting the order prayed for, given the party leave to try his title at law, either by ejectment or in such other manner as may be necessary for the purpose of deciding the point.(v) And sometimes the court *has at once referred it to the master to inquire whether the [*75] party claiming is entitled to any interest in the property; and where the right of the party has been clear and undisputed, the court has at once made the order in his behalf, without either directing an examination *pro interesse suo*, or referring it to the master to inquire into the existence of the right.(w)

Effect of appointing a receiver.] The appointment of a receiver of the rents and profits of lands of which sequestrators are in possession, will discharge the sequestration. (x)

Abatement of suit by death of parties.] A sequestration against a defendant upon *mesne* process abates on the death of the complainant, but it is revived with the suit, if that is revived; (y) and the court will not, immediately upon the abatement of the suit, turn the sequestrators out of possession, but will give time for the revival of the suit. (z) Where the defendant himself, against whom the sequestration has issued, dies, the process, being personal, not only abates, but falls altogether, and cannot be revived; though it is otherwise where it has issued for the non-performance of a decree. (a)

Sequestrator abusing his power.] Where a sequestrator abuses his power, the court will, upon a representation of the facts, make an order that he shall show cause on a particular day why he should not be committed, and pay the costs to the party complaining. (b)

Costs.] The costs of a sequestration are not liquidated, but are costs to be taxed by one of the masters of the court. Sometimes the sequestrators are allowed a poundage, and sometimes, under circumstances of trouble and expense, a specific sum *in solido*. (c)

(v) Walker v. Bell, 2 Mad. 21. 1 P. Wins. 308.

(w) Dixon v. Smith. 1 Swanst. 457. Dickinson v. Smith, 4 Mad. 177.

(x) Heyn v. Heyn, Jac. 49.

(y) Hyde v. Foster, 1 Dick. 132.

(z) White v. Heyward, 2 Ves. 461.

(a) Hawkins v. Crook, 3 Atk. 594

(b) Lord Pelham v. Lord Harley, 3 Swanst. 291, n.

(c) 1 Dan. Ch. Pr. 654

SECTION VII.

PROCESS AGAINST CORPORATIONS.

A corporation aggregate, being an ideal and invisible person, existing only in contemplation of law, cannot be attached or apprehended. The proceedings against them, either for the purpose of compelling an [*76] appearance *or an answer, are therefore commenced by distraining the property of the corporation. For this purpose a writ of *distringas* is the first process. It is a writ directed to the sheriff, commanding him to distrain the land, goods, and chattels of the corporation, so that they may not possess them till the court shall make other order to the contrary; and that in the meantime the sheriff do answer to the court for what he so distrains, so that the defendant may be compelled to appear in chancery and answer the contempt. (*d*)

Teste and return.] By the English practice, there must be fifteen days between the teste and return of this writ. It is made out by the register or clerk, upon an affidavit of the proper service of the subpoena. (*e*)

An order must be entered before this writ issues; and it would be the safest course to apply to the court, *ex parte*, for such order, and have the return day fixed by the court. (*f*)

Alias and pluries distringas.] Upon a *distringas*, if the corporation has property, the sheriff usually levies 40s. only, and makes his return accordingly; and if this execution does not procure the obedience of the corporation, an *alias distringas* may be obtained. This is a writ commanding the sheriff again to distrain the goods and chattels, lands and tenements of the corporation. Upon this writ, the sheriff usually levies 4l.; and if, after that, the corporation still continues disobedient, a *pluries distringas* issues, upon which he levies on the whole property. (*g*)

Sequestration.] If the *pluries distringas* fails of effect, upon its being returned by the sheriff, a commission of sequestration may be obtained against the corporation. This commission is usually directed to five persons named by the complainant, directing them to sequester the goods and chattels, the rents and profits and real estate of the corporation, until they shall appear or answer the complainant's bill, or

(*d*) 1 Dan. 190.(*f*) 1 Hoff. Ch. Pr. 164.(*e*) 1 Harr. Ch. Pr. 197.(*g*) 1 Dan. 190. 1 Hoff. Ch. Pr. 164.

the court make further order to the contrary. A sequestration cannot be discharged till the corporation have performed what they are enjoined to do, and paid the costs of the several *distringases*, and of the sequestration, including the commissioners' fees. But upon their doing this, they may, upon motion, get the sequestration discharged. (*h*)

After a sequestration has been issued against a corporation, the complainant may, if he pleases, set down the cause to be heard, and have *the bill taken *pro confesso* against them, in the same way as [*77] may be done in the case of an ordinary person. (*i*)

Process to compel appearance of corporation where it has no property.] In the case of *Curzon v. The African Company*, (*k*) Lord Keeper North is reported to have said, that he did not see how a company who had no property could be compelled to appear. In answer to which it was said, in argument, that in such a case the complainant might sue out a *distringas* against the company and have it returned *nihil*, and so get a sequestration against them; and then by the course of the court, the complainant need not bring them to a hearing.

(*h*) *Id.* *ib.*(*i*) 1 Dan. 190.(*k*) 1 Vern. 132.

CHAPTER III.

APPEARANCE.

Sect. 1. OF APPEARANCE IN GENERAL.

2. VOLUNTARY APPEARANCE.

3. COMPULSORY APPEARANCE.

4. APPEARING GRATIS.

5. APPEARANCE BY MARRIED WOMEN.

6. APPEARANCE BY INFANTS.

7. APPEARANCE BY IDIOTS, LUNATICS, &c.

8. APPEARANCE BY CORPORATIONS.

SECTION I.

OF APPEARANCE IN GENERAL.

Nature of.] Appearance is the formal proceeding by which the defendant submits himself to the jurisdiction of the court. (1)

(1) APPEARANCE IN GENERAL.

No appearance by the defendant is now necessary, to enable the plaintiff to obtain a judgment against him; for, from the time of the service of the summons, or the allowance of a provisional remedy, the court is deemed to have acquired *jurisdiction*, and to have control of all the subsequent proceedings. (Code, § 139.) But if the defendant intends to defend the suit, his attorney, (assuming that the summons is regular and has been regularly served, in order to obtain a copy of the complaint, in case none has been served upon him,) must, within twenty days after personal service of the summons, or twenty days after the expiration of the full time specified in the order of publication, from the first publishing of the notice, (in case service has been made in that way,) serve a notice in writing that he appears for the defendants, or one or more of them, demanding that a copy of the complaint be served on him, at some specified place within the state. (Code, § 130.) A copy thereof must be served within twenty days thereafter, if the notice is served personally, or forty, if served by mail. (Ib. § 412.) If the defendant's attorney chooses, he may serve notice of appearance merely, without demanding a copy of the complaint. This will entitle him to notice of the application for judgment, (which may then be made, by the plaintiff, at the end of the twenty days,) and of every subsequent step in the action. (Van Sant. Eq. Pr. 147.) But a notice of retainer, served *after* the time to answer has expired, does not entitle the defendant to notice of an application for judgment. (*Pearl v. Robitschek*, 2 Daly, 50.)

In *California*, and some other states, a defendant, after the filing of the complaint, may appear, answer or demur; whether the summons has been issued or not. (Cal. Pr. Act, § 22; Code of Oregon, § 59; of Arizona, § 22; of Idaho, § 22; Swan's Ohio Pl. 22; Code of Wash. T. § 40.) But a defendant cannot appear in an action, so as to give the court jurisdiction of his person, except by answering or demurring, or giving the plaintiff written notice that he appears. (*Steinback v. Leese*, 27 Cal. 297.)

Formerly an appearance was absolutely necessary to be entered, before a decree *pro confesso* could be had against the defendant. But the rule is now otherwise, as we shall see in a future Chapter.

Appearances are either voluntary or compulsory—*voluntary*, when the *defendant comes in upon the return of the subpoena; (2) [*78] *compulsory*, where the appearance is the consequence of any of the processes of contempt before mentioned.

A defendant may also appear *gratis*; which takes place where he does so before he has been served with a subpoena. (a)

What amounts to.] Putting in an answer is an appearance on the records of the court. (b) So if a party is named as defendant in the bill, but no subpoena is served nor appearance entered, yet if he appear by counsel at the hearing and consent to be bound by the decree, no objection can be taken. (c) And although the defendant has not appeared, yet he may move to dissolve an injunction or set aside an at-

(a) 2 Dan. 4. 5. See also *Georgia Lumber Co. v. Bissel*, 9 Paige, 225.

(b) *Livingston v. Gibbons*, 4 John. Ch. Rep. 94. And in a suit brought in the supreme court of the United States, against a state, a demurrer to the bill signed by the attorney general of the state, is a sufficient appearance by such state. *State of New Jersey v. State of New York*, 6 Peters. 323.

(c) *Capel v. Butler*, 2 Sim. & Stu. 462.

Where the record shows, in general terms, the appearance of parties, the appearance will be confined to those parties who are served with process. (*Chester v. Miller*, 13 Cal. 558; *Hinchfield v. Franklin*, 6 id. 607; *Kelly v. Van Austin*, 17 id. 564.) If it does not appear affirmatively upon the face of a record of a court of general jurisdiction that the court had jurisdiction of the defendant, that fact will be presumed; unless the record shows, affirmatively, that no jurisdiction was acquired. It can be shown only by the record. (*Carpenter v. City of Oakland*, 30 Cal. 439.)

In *Minnesota*, a defendant, after appearance, is entitled to notice of all subsequent proceedings; but when he has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him, unless he be imprisoned for want of bail. (Public Stat. p. 628, sec. 26.)

In *Indiana*, there is no appearance to the action, except by plea, motion, entry on the record, or some other official act. (Bick. Civ. Prac. 81.) And the question as to appearance can be tried only by the record. (Ibid; 14 Ind. 136.) Appearance must be either in person or by attorney. (2 R. S. 201, sec. 765; 1 Bld. 327.)

(2) SPECIAL OR LIMITED RETAINER.

Rule 14 of the Supreme Court declares that service of notice of an appearance or retainer generally, by an attorney for the defendant, shall, in all cases be deemed an appearance.

It has been held that the above rule recognizes, by its very language, a *special* or *limited* retainer, and which would not be deemed an appearance in the action, on the part of the defendant. (*Webb v. Mott*, 6 How. Pr. 440.) If the defendant intends to retain an attorney for the special object and purpose of making a motion to set aside the plaintiff's proceedings, for irregularity, a notice of such limited or special retainer will not be deemed or taken as a general retainer or appearance in the action. (Ibid.) In *Shafer v. Humphrey*, (15 How. Pr. 564.) however, it was held that a general appearance in the suit by the defendant, before service of the complaint, was not a waiver of the irregularity that the complaint was an unauthorized departure from the summons in respect to the nature of the action.

In *Indiana*, some motions may be made before a *an* appearance to the action; and a special appearance for the purpose of making such a motion does not waive defects in the process. (Bicknell's Civ. Prac. 61; 3 Ind. Rep. 194; 2 id. 233; 7 id. 447; 12 id. 70; 13 id. 490; 5 Bld. 212.) Where a summons was issued without any complaint, and the defendants were defaulted, it was held that the defendants did not waive the

tachment on the ground of an insufficient service of the subpœna. (d) (3)

Where the defendant applies to set aside proceedings to compel his appearance, upon a service of the subpœna on his servant, at his place of residence, on the ground of an alleged irregularity, he must, by the English practice, enter a conditional appearance in the suit, so that the complainant may proceed thereon if the defendant's application is not successful. (e)

Effect of.] The entry of an appearance at the time the defendant serves notice of a motion to set aside process for want of an appearance, on the ground of irregularity, is no waiver of the irregularity complained of; but the motion may be made before the appearance is entered. (f)

An appearance cures all defects in the process or its service. (g) (4)

(d) *Menzies v. Rodrigues*, 1 Price, 92. *Hume v. Babington*, 1 Hogan, 8.
(e) *Davison v. Hastings*, 2 Lond. Jurist, 464. (f) *Halpin v. Hamilton*, 1 Hogan, 103.
(g) *Strange's Rep.* 155. 1 Anst. 76. *Parker v. Williams*, 4 Paige, 439.

error, and affirm the validity of the summons, by appearing and unsuccessfully moving to set aside the default. (10 Ind. Rep. 114.)

(3) WHAT IS DEEMED AN APPEARANCE.

Service of an order extending the time to answer, with a copy of the affidavit on which the order was made, is equivalent to a notice of appearance. (*Quin v. Tilton*, 2 Duer. 648.) So is a notice of motion signed by an attorney, "as attorney for the defendant." (*Kelsey v. Covert*, 15 How. Pr. 92; S. C. 6 Ab. 336 n; *McKenster v. Van Zandt*, 1 Wend. 13; *Baxter v. Arnold*, 9 How. Pr. 445;) or a notice of bail. (*Quick v. Merrill*, 3 Caines, 133; *Bogardus v. Livingston*, 7 Ab. 429;) or arguing a motion in open court. (*Cooley v. Lawrence*, 12 How. Pr. 176; S. C. 5 Duer, 605;) or filing a general demurrer. (3 Estee Pr. 41.)

A notice of retainer is not an appearance entered within the meaning of the act of Congress regulating the removal of causes from a state to a federal court. But filing such notice with the clerk will be considered an appearance entered. (*Field v. Blair*, 1 Code Rep., N. S. 292, 361.) The execution of an undertaking by the defendant, in order to procure his discharge from arrest in a state court, is not an appearance entered, within the statute. (*Durand v. Hollins*, 3 Duer. 635.)

A notice to the plaintiff's attorney that the defendant will move before a court commissioner that an attachment issued in the case be dissolved, does not constitute an appearance in the action. (*Glidden v. Packard*, 28 Cal. 649.)

(4) EFFECT OF APPEARANCE.

A voluntary and general appearance not only gives jurisdiction, but cures defects in previous process. (*Dix v. Palmer*, 5 How. Pr. 233; S. C. 3 Code R. 214; *Webb v. Mott*, 6 How. Pr. 440; *Sprague v. Irwin*, 27 id. 51; *Baxter v. Arnold*, 9 id. 445; *Dole v. Manley*, 11 id. 138; *Hyde v. Patterson*, 1 Ab. 248; *Pierce v. Smith*, 2 id. 411; *Macomber v. Mayor, &c., of New York*, 17 id. 36; *The Merino*, 9 Wheat. 391; *Flanders v. Aetna Ins. Co.* 3 Mass. 158; *Segee v. Thomas*, 3 Blatch. 11; *Harrison v. Rowan*, 1 Pet. C. C. 489; 2 Stra. 1072; 4 Cranch. 180; 3 id. 498; *McCoy v. Lemons*, Hempst. 216.) And it gives jurisdiction over the person, in cases where the writ was void. (*State v. McCullough*, 3 Nev. 202; *Farrar v. United States*, 3 Pet. 459; *Pollard v. Dwight*, 4 Cranch. 421.) A general appearance cures an irregularity in the summons; e. g. the want of an indorsement upon it referring to the statute under which the action is claimed to have been brought. (*Sprague v. Irwin*, 27 How. 51.) But it will not cure a substantial defect in the writ of error (such as naming a return day for the writ,) or an omission to file a transcript of the record at the term next succeeding the issuing of the writ, or the taking of the appeal. (*Carroll v. Dorsey*, 20 How. U. S. 204.) Nor does it preclude a party from moving to dismiss for want

Where a solicitor or other officer of the court neglects to appear in

of jurisdiction, or any other sufficient ground, except for want of a citation, or for mere irregularity in its service. (*United States v. Yates*, 6 How. U. S. 605.)

Where a defendant appears for the purpose of taking advantage of an irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect. (*Deidesheimer v. Brown*, 3 Cal. 339.)

And a general appearance by the defendant before the service of the complaint, is not a waiver of the objection that the complaint does not conform to the summons. (*Foorhees v. Schofield*, 7 How. Pr. 51; *Shafer v. Humphrey*, 15 id. 564.) It is otherwise where the summons and complaint are served together. (*Hewitt v. Howell*, 8 How. Pr. 356.)

Although an appearance admits the regularity of the summons and its service, by which the party is brought into court, yet it does not admit the identity of the *cause of action* indicated by the summons with that set out in the complaint, although both are served together. (*Tuttle v. Smith*, 14 How. Pr. 395.) An appearance by putting in an answer which protests against the exercise of jurisdiction is not such an appearance as waives the objection to the jurisdiction of the court. (*Sullivan v. Fraser*, 4 Rob. 616; *Mahoney v. Penman*, 1 Ab. 34; 4 Duer. 603; *Hewitt v. Howell*, 8 How. Pr. 347.) Nor is the mere subscription of an answer with the name of an attorney such an appearance as waives any objection to the jurisdiction. (Ib.) Where one of several defendants jointly liable in a judgment (upon which the action was brought,) appeared and by answer protested against the jurisdiction of the court, on the ground that it did not appear on the face of the proceedings, either that he resided, or was personally served with process, within the city of New York, it was held, by the Superior Court of New York, that such appearance was equivalent to personal service. (*Mahoney v. Penman*, 1 Ab. 34; S. C. 4 Duer. 603.)

Although the court has no jurisdiction of a suit against a foreign corporation, such corporation may confer jurisdiction by appearing and answering without objecting to the jurisdiction. (*Paulding v. Hudson Manuf. Co.* 2 E. D. Smith, 233.) So, a party who takes a copy of a bill, filed against him as committee of a lunatic, and enters his appearance without his addition of committee, &c., cannot, after suffering the plaintiff to go on to a final decree, object that the subpoena was against him individually, and not as committee, &c. (*Brasher v. Van Cortlandt*, 2 John. Ch. 247.)

An appearance entitles a defendant to notice of assessment of damages. (Code, § 246; *Cook v. Pomeroy*, 10 How. Pr. 103; *Van Horn v. Montgomery*, 5 id. 233.) But where, after the time for answering had expired, the defendant served notice of appearance, and the plaintiff, on the same day, but after the receipt of such notice, entered judgment, it was held regular, and that he was not, under the circumstances, bound to delay the entry of judgment for the purpose of giving notice of the assessment of damages. (*White v. Featherstonhaugh*, 7 How. Pr. 357. But see *Abbott v. Smith*, 8 id. 463.) So where, in an action on a contract, to recover money only, the complaint was verified, and the defendant gave notice of appearance, but did not answer; and at the expiration of the time to answer, the plaintiff took judgment without any notice to the defendant; it was held that he was regular, and that the defendant was not entitled to any notice; there being, in such a case, no assessment. (*Dix v. Palmer*, 5 How. Pr. 233; *Southworth v. Curtis*, 6 id. 271.)

If a defendant demurs to a complaint, it is an appearance; and although the demurrer be set aside, or held to be frivolous, the defendant is nevertheless entitled to notice of the assessment of damages, or of the amount due the plaintiff, in like manner as if he had given a simple notice of appearance. (*King v. Stafford*, 5 How. Pr. 30; *Aymer v. Chase*, 1 Code Rep., N. S. 141; *Salters v. Kipp*, 2 Ab. 382; 12 How. Pr. 342; 5 Duer. 646.)

Where all the defendants appear, but only some of them put in an answer, notice of trial must be given to all the defendants — those who answer, and those who do not answer. (*Tracy v. N. Y. Steam Faucet Co.* 1 E. D. Smith, 349; *Brown v. Richardson*, 4 Rob. 603.)

After a defendant has appeared, an application by the plaintiff for leave to amend must be on notice to him. (*Hewett v. Howell*, 8 How. Pr. 346.)

But an appearance does not entitle the defendant to notice of an application for a *provisional remedy*. The provision in section 414 of the Code, that where a defendant shall not have demurred or answered, service of notice or papers in the *ordinary proceedings* in an action need not be made upon him; but if notice of appearance has been given, service shall be made upon him, or his attorney, does not embrace provisional remedies. (*Becker v. Heyer*, 8 How. Pr. 69.) These are not "ordinary proceedings" within the sense of that term as used in this section. Hence, though

the cause, after personal service of the subpoena, he will not be entitled to the service of subsequent notices and papers upon him or his agent. (*h*) But a party who has appeared in the cause is entitled to notice of such of the subsequent proceedings as may affect his rights or interests, although he is in contempt and the bill has been taken as confessed against him for want of an answer. (*i*)

[*79]

*SECTION II.

VOLUNTARY APPEARANCE.

A voluntary appearance is where the defendant, on being served with a subpoena, obeys its injunction by entering his appearance in the proper place, and serving notice thereof on the complainant's solicitor, within the time limited by the rules of the court. (5)

(*h*) *Wells v. Cruger*, 5 Paige, 161.(*i*) *King v. Bryant*, 3 Myl. & Craig, 191.

a defendant has appeared, he is not entitled to notice of an application for an order to arrest him. Neither is he entitled to notice of an application for an injunction, before he has answered. (Ib.)

In *Indiana*, a full appearance, at any stage of the proceedings, waives previous irregularities. Thus, an appearance at a trial, after a continuance of the cause to the next term, waives that irregularity. (Bick. Civil Pr. 81; 2 Bld. 402.) Appearance and trial waive irregularities in a change of venue. (Ib. 2 Bld. 61; 4 Ind. Rep. 268.) So an appearance without objection waives a previous discontinuance. (12 Ind. Rep. 426;) even after verdict. (4 Ind. Rep. 268.) The defendant's appearance, however, will not cure a defect of jurisdiction in the court as to the subject of the action. Whenever that defect appears, the suit must be dismissed. (8 Ind. R. 320.)

If an attorney appears for a part only of the defendants, and inadvertently answers for all, and obtains leave of the court to withdraw the answer, and substitute a new one answering for the parties only, for whom he appears, the court acquires jurisdiction only of those for whom he appears. (*Forbes v. Hyde*, 31 Cal. 342.)

(5) VOLUNTARY APPEARANCE.

A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. (Code of New York, § 139; of Ohio, § 65; of Wisconsin, § 44; of Kansas, § 73; Pub. Stat. of Minnesota, 1859, p. 539, § 50.) That is, for the purposes of jurisdiction, unless he expressly limits the appearance of his attorney to the purpose of setting aside proceedings. (*Freeman v. Young*, 3 Rob. 666.) Yet it was held, in *Macomber v. The Mayor, &c. of New York*, (17 Ab. 35,) that a voluntary appearance in an action gives jurisdiction and cures defects in previous process, but will not justify a judgment on failure to answer, without proof of the actual service of the summons.

In *California*, a voluntary appearance by a defendant gives jurisdiction without the issuing of a summons. (Cal. Pr. Act, § 35; *Hayes v. Shattuck*, 21 Cal. 51. See also *Carrington v. Bents*, 1 McLean, 174; *Shields v. Thomas*, 18 How. U. S. 253.) The only object of a summons is to bring a party into court, and if that object is attained without issuing or serving process, there can be no injury to the defendant. (*Smith v. Curtis*, 7 Cal. 587.)

One of several defendants who has not been served with a summons or complaint cannot voluntarily appear and move to dismiss the complaint, under section 274 of the Code, where his rights are not affected. He must be contented to remain out of

Where to be entered.] If the suit is before the chancellor, the defendant's appearance must be entered with the register or assistant register: if before a vice chancellor, it must be entered with the clerk residing in the circuit where the suit is pending. (*k.*) (6)

When to be entered.] The appearance is to be entered within twenty days after the appearance day mentioned in the subpoena. (*l.*) (7)

(*k.*) Rule 22.

(*l.*) Idem.

court until invited to appear there. (*Tracy v. Reynolds*, 7 How. Pr. 327.) Under section 139 of the Code, one named as a defendant, against whom, personally, a judgment is prayed, has a right to appear and answer before he has been served with a summons. (*Higgins v. Freeman*, 2 Duer. 650.) And where two defendants are sought to be made jointly liable, as partners, in an action on contract, and the summons and complaint are served on only one of them, the other may voluntarily appear, under section 139, and put in an answer, and the plaintiff is bound to receive it, although the defence set up is infancy. (*Wellington v. Claason*, 18 How. Pr. 10; S. C. 9 Ab. 175.)

A defendant may appear after default and before judgment in all cases where an assessment of damages is necessary. (*Abbott v. Smith*, 8 How. Pr. 463; *Baxter v. Arnold*, 9 id. 445. See 2 Daly, 53; 11 How. Pr. 481, 483.) In *Tracy v. Reynolds*, (7 How. Pr. 328,) Justice HARRIS says a party uninvited cannot intrude himself upon the court and the plaintiff unless he has *some right to protect* which renders an appearance necessary. See, also, *The Waterbury Manuf. Co. v. Krame*, (1 Hilt. 560; S. C. 9 Ab. 175, note,) where the plaintiff was allowed to discontinue, without costs, against a defendant who had not been served with process, and who, by appearing and answering, had "intruded himself into a litigation, the result of which could in no way affect him or his interests."

(6) Notice of appearance should be filed in the county specified in the complaint as the *place of trial*, or in the county to which the place of trial has been changed. (Rule 3, Sup. Court.)

Service of notice of appearance must antedate, or become contemporaneous with, the service of all other notices and papers. (*Steinback v. Leese*, 27 Cal. 297.)

(7) APPEARANCE, WHEN TO BE ENTERED.

A defendant may appear at any time before judgment is actually entered. (*Abbott v. Smith*, 8 How. Pr. 463; *Baxter v. Arnold*, 9 id. 447.)

The plaintiff, on receiving a notice of appearance or retainer, may, at any time thereafter, on filing such notice, with proof of service thereof, have the appearance of the defendant entered as of the time when such notice was served. (Rule 14.)

In order to obtain a copy of the complaint where none has been served, the attorney of the defendant must, within twenty days after personal service of the summons, or twenty days after the expiration of the time specified in the order of publication, from the first publication of the notice, serve a notice that he appears for the defendant, and demand that a copy of the complaint be served upon him. (Code, § 130.)

In the *United States courts* the appearance day of the defendant is the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable. (17th Equity Rule.) By the 16th Rule, "upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry."

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk. (Rule 17.)

In *Maine*, each defendant must enter his appearance on the docket on the return day; and upon proof of neglect, when there has been personal notice, a default may be entered, the bill be taken as confessed, and a decree be entered accordingly. (Rule 4 of Chancery Practice.)

In *Massachusetts*, "the day of appearance shall be the rule day next after the subpoena is returned, when personal service shall be made on the defendant, or he shall have had personal notice of the suit; or next after the second return of a copy left, when the defendant shall not be found; or next after the expiration of an order

How to be entered.] The appearance is usually entered in this manner. The solicitor for the defendant sends a written request to the register or clerk in this form :

[*Title of the cause.*]

Sir,

Please to enter my appearance for the defendant in the above cause. Dated, 1843.

Yours, &c.

E. F., Sol'r for deft.

To J. M. D. Esq., Register,
(or clerk.)

Upon receiving which request, the register or clerk will enter the appearance of the defendant by his solicitor.

[*Notice of appearance.*] The defendant's solicitor should then give notice of his appearance, to the complainant's solicitor, as follows :

[*Title of cause.*]

Sir,—You will please take notice that my appearance for the defendant in this cause has been duly entered with J [*80] *M. D. Esq., the register (or clerk) of this court, at his office in Albany.

Dated, 1843.

Yours, &c.

E. F., Sol'r for deft.

To G. H. Esq., Sol'r for compt.

A defendant may appear in person, if he chooses to do so ; but in case he employs a solicitor, he cannot appear on the record in person. (m) (8)

(m) 2 R. S. 276, § 11.

for appearance, where the defendant shall reside out of the commonwealth. (Rule 9, Practice in Chancery.)

By the practice in *California*, at any time after the commencement of an action, any one, or all, of the defendants may appear by attorney, without service of summons, and the defendant so appearing must plead to the action within the same time thereafter as he would had the summons been served upon him. (3 *Estee* Pr. 43; *Suydam v. Pitcher*, 4 Cal. 280; *Holmes v. Rogers*, 13 id. 191; *Turner v. Carruthers*, 17 id. 431.) A party has ten days to answer after service of the summons, if it be served in the county ; twenty days if out of the county but within the judicial district ; and forty days in all other cases. (Cal. Pr. Act, § 25; *Grewell v. Henderson*, 5 Cal. 465.) A non-resident of the State comes under the latter clause. (Ib.) Where a summons is made returnable in thirty instead of forty days, and does not state that judgment by default will be taken unless the defendant appears and answers, nor specify the amount for which judgment will be taken, the summons will not support a judgment by default. (*People v. Woodlief*, 2 Cal. 241. Where the first clause of a summons required the defendant to appear and answer within forty days, and the concluding clause notified him that if he did not answer in twenty days a default would be taken, it was held that it was too contradictory or uncertain to require an appearance and answer within the shorter period. (*Kidd v. Four Twenty*, 3 Nev. 361.)

(8) A party to an action may appear in his own person or by attorney ; but he cannot do both. If he appears by attorney, he cannot assume the control of the case.

SECTION III

COMPULSORY APPEARANCE.

A compulsory appearance is where the defendant is either taken and brought in upon an attachment, or other process of contempt, and is thereby compelled to enter an appearance for himself; or where, upon

(3 Estee Pr. 43; *Board of Commissioners v. Younger*, 29 Cal. 147.) A defendant, having appeared by attorney, cannot appear in person while the retainer continues. (*Halsey v. Carter*, 6 Rob. 535.) And a notice signed by a "defendant in person," while he has an attorney, may be disregarded. (Ibid.) While an attorney of record remains such, his right to manage and control the action can not be questioned by the opposite party. (*Board of Com'rs v. Younger*, *supra*.) The corporation of New York may, with the consent of the corporation counsel, appear by other attorney and counsel. (*Mayor, &c., of New York v. Exchange Fire Ins. Co.* 9 Bosw. 424; *The Same v. Hamilton Fire Ins. Co.* 10 id. 537.)

By the practice in *California*, at any time after the commencement of an action, any one or all of the defendants may appear by attorney without service of summons; and the defendant so appearing must plead to the action within the same time thereafter as he would, had the summons been served upon him. (3 Estee Pr. 43.)

When an attorney appears for a party, the general rule is that a retainer will be presumed, where nothing to the contrary appears; and the adverse party, having no notice to the contrary, may act upon the presumption. (*Hamilton v. Wright*, 37 N. Y. 502; *Hayes v. Shattuck*, 21 Cal. 51; *Wilson v. Cleveland*, 30 id. 192; *Holmes v. Rogers*, 13 id. 191.) But where process is served upon a party, and there is an appearance by an unauthorized attorney, the party will not be relieved if the attorney is responsible. (*Allen v. Stone*, 10 Barb. 547.) In such a case, the court will not, unless the attorney is irresponsible, set aside the judgment, but will leave the defendant to his action against the attorney. (*Armstrong v. Craig*, 18 Barb. 387; *Bogardus v. Livingston*, 7 Ab. 428.) But in *Bean v. Mather*, (1 Daly, 440,) the appearance of an attorney without authority was held, by BRADY, J., to be a nullity. Thus, where one partner, without the knowledge or authority of his co-partners, endorsed the name of the firm upon a promissory note made for his individual benefit, and, being sued upon the note, he, without the knowledge or authority of his co-partners, upon whom process had not been served, employed an attorney to appear not only for himself, but for them, and judgment was rendered against all: *Held*, notwithstanding there was an appearance by attorney, that the judgment would be set aside, under such circumstances, against the other partners; and that they should be allowed to come in and defend. (Ibid. See also *Bogardus v. Livingston*, 7 Ab. 429; *Yates v. Horan-son*, 7 Rob. 12.)

In *California*, an appearance entered by attorney, whether authorized or not, is a good and sufficient appearance to bind the party. (*Suydam v. Pitcher*, 4 Cal. 280; *Holmes v. Rogers*, 13 id. 191; *Turner v. Carruthers*, 17 id. 431.) Attorneys are officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in the proceedings only by the license of the court. (*Clark v. Willett*, 35 Cal. 534.) An attorney's license is *prima facie* evidence of his authority to appear for the person whom he professes to represent; but if the supposed client denies his authority, the court may require him to produce the evidence of his retainer, either upon the direct application of the party represented, or upon the motion of the attorney of the opposite party to dismiss, founded upon the affidavit of the person or party concerning whom the motion is made. (Ib.) The practice of permitting an appearance, without the production of a warrant of attorney, is as applicable to an appearance for a corporation as for a natural person. (*Osborn v. Bank of the United States*, 7 Wheat. 738.)

In *Ohio*, a defendant pleading to the action, thereby, by implication of law, enters his appearance in the action, and is estopped from denying the service of process. (*Evans v. Iles*, 7 Ohio State Rep. 233.)

In *Minnesota*, a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance. (Public Stat. p. 623, § 26.) So in *California*. (*Steinbach v. Leese*, 27 Cal. 297.)

the service of an attachment, the defendant gives bail for his appearance at the return day thereof, and failing to do so, the court orders that his appearance be entered by the proper officer thereof. (*n*) (9)

If the defendant appears personally, or is brought into court by the sheriff on the return of an attachment for not appearing, he must enter his appearance and pay the costs incurred by his contempt, instant, or within such time as the court shall then appoint, or be committed until he complies. (*o*)

So where a defendant brought into court by writ of *habeas corpus* or other process, shall neglect or refuse to enter his appearance, according to the rules of the court, the court shall order his appearance to be entered; and the suit shall then proceed, as if the party had actually appeared. (*p*)

[*81]

*SECTION IV.

APPEARING GRATIS.

Appearing gratis, is where the defendant, on being informed that a bill has been filed against him, causes an appearance to be entered for him without waiting to be served with a subpœna.

This method of appearing is generally resorted to where a complainant serves only a part of the defendants with a subpœna, and a defendant who is not served wishes to make an immediate application to the court in the cause. Thus a defendant may appear gratis, in order to move to refer the bill for impertinence. (*q*) So he may appear gratis for the purpose of ascertaining whether the bill was on file at the time of issuing the subpœna, and in order to prevent its being ante-dated. (*r*)

(*n*) See Rules 27, 28

(*o*) Rule 28.

(*p*) 2 R. S. 179. § 79, (orig. § 73.)

(*q*) *Fell v. Christ's College*, 2 Bro. C. R. 279. *Bowhee v. Grills*, Dick. 38. (*r*) 2 Dan. 8, 16.

(9) In New York, there seems to be no provision in the Code, for compelling a defendant to appear; no appearance being necessary to enable the plaintiff to obtain a judgment against him. Section 139 declares that from the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings.

The Chancery Code of *Illinois* provides that if the defendant shall be brought into court by virtue of any process, being in contempt for refusing to appear, and shall continue to refuse or neglect to enter his appearance, or appoint a solicitor of the court to do it for him, the court may appoint a solicitor to enter an appearance of such defendant; and such further proceedings may be had, in the cause, as if the party had actually appeared. (Statutes of 1853, p. 140, sec. 16.)

In an action in the *United States courts*, against a state, if the state neglects or refuses to appear, upon due service of process, no coercive measures will be taken to compel an appearance, but the plaintiff will be allowed to proceed *ex parte*. (*New Jersey v. New York*, 5 Peters, 284; *Massachusetts v. Rhode Island*, 12 id. 755; 3 Dall. 230; 2 id. 419.)

And a defendant arrested upon a *ne exeat*, but upon whom no subpoena has been served, may also appear gratis and demand a copy of the bill, in order to move to be discharged from the *ne exeat*.(s) So a defendant may appear gratis for the purpose of moving to dissolve an injunction affecting his rights.(t)

A party may likewise, in certain cases, appear gratis at the hearing, and consent to be bound by the decree.(u) But in such cases it is necessary that the party should be named as a defendant upon the record. Thus where a person not a party to the suit was interested in a question, and appeared by counsel and submitted to be bound by the decision, the court held that they could not hear him without the consent of the other defendants.(v) But it seems that if, in such a case, all parties consent, the record may be brought into court and the defendant's name inserted therein.(w)

It is to be observed, however, that by appearing gratis, the defendant cannot deprive the complainant of his right to move for an injunction, *ex parte*. Therefore, where a motion was made for an injunction to restrain the cutting of timber, and the defendant, on the day before the motion was made, entered an appearance gratis, Lord Eldon [*82] nevertheless granted the injunction; observing, that if a person about to commit waste, and against whom a bill is filed, could, by appearing the evening before the motion, prevent it, he would get two days for cutting timber.(x) His lordship, however, said, that perhaps it might be different where the defendant had appeared so long before the motion, that the complainant might have given him notice. And there is no doubt that if a complainant serves a defendant with a subpoena, he thereby puts him in a situation which entitles him to notice of the application to be made against him.(y) Such notice, however, before the defendant has appeared, is irregular, unless it have the previous leave of the court to sanction it.(z)

Whether a defendant appears gratis, or after service of the subpoena, he has forty days to put in his answer after service of a copy of the bill and notice of the order to answer.(a)

By appearing gratis, the defendant does not lose his costs.(b) And after appearing in this manner, he is as much amenable to the court for contempts as if the subpoena had been served upon him.(c)

(s) *Georgia Lumber Co. v. Bissell*, 9 Paige, 225.

(t) *Waffle v. Vanderheyden*, 8 Paige, 45.

(u) *Capel v. Butler*, 2 Sim. & Stu. 45.

(v) *Bozon v. Bolland*, 1 Russ. & My. 69. *Atty. Gen. v. Rouen*, 7 Sim. 290.

(w) *Id. ib.* (x) *Aler v. Jones*, 15 Ves. 605. *Perry v. Weller*, 3 Russ. 519.

(y) *Perry v. Weller*, *supra*.

(z) *Hill v. Rimell*, 2 My. & Craig, 641.

(a) Rule 24.

(b) 1 Dick. 38.

(c) *Webster v. Threlfall*, 1 Sim. & Stu. 136.

SECTION V.

APPEARANCE BY MARRIED WOMEN.

Where a bill is filed against husband and wife, the husband is bound to enter a joint appearance for himself and wife.(*d*) (10) And if the husband only be served, and has notice that his wife is also a defendant, he must enter an appearance for her: otherwise an attachment will issue against him, even though he appear and answer the bill.(*e*) And if an appearance is entered for the wife, and she does not answer, an attachment will issue against both.(*f*)

But where a man's wife refuses to join with him in his defence, or lives separate from him, and is not under his influence or control, he may apply to the court, by motion, for leave to put in a separate answer from her, which will be granted, and in the meantime process will be stayed against him. And it seems the like order may be obtained where he has already answered without having made such an application previously.(*g*) But in all cases after due service, process of contempt may be awarded against the husband for the default of the wife, unless an order be obtained to the contrary.(*h*)

If the bill be brought against husband and wife for a demand against the separate estate of the wife, and the husband is abroad and not amenable to the process of the court, the subpoena may be served upon the wife alone, and she must appear and answer the bill.(*i*) In such a case the proper course is for the complainant to make an application to the court, by petition, upon notice to the wife, for an order that she appear and answer separately; and that if her appearance be not entered within such time as the court shall appoint, an attachment may issue.(*k*)

The husband has the right to appear for his wife in all cases, even where she is sued as executrix.(*l*)

Whenever a married woman appears separately from her husband, she appears without a guardian, unless she is an infant.(11)

(*d*) *Leavitt v. Cruger* and wife, 1 Paige. 421. Cary, 92. (*e*) *Toth. Proceed.* 11.
 (*f*) *Ibid.* 1 Dan. 217. (*g*) 1 Dan. 209, 217. (*h*) *Prac. Reg.* 37. *Hinde*, 94.
 (*i*) *Dubois v. Hole*, 2 Vern. 614. *Bell v. Hyde*, *Prec. in Ch.* 328.
 (*k*) *Buuyan v. Mortimer*, 6 Mad. 278. (*l*) *Ibid.*

(10) Where an action is brought against husband and wife, not seeking to charge the wife's separate estate, an attorney may appear for both, on the retainer of the husband; and a judgment cannot be avoided by the wife on the ground that she was not served with process, in the action, and did not appear therein. (*Footte v. Lathrop*, 53 Barb. 183; S. C. 41 N. Y. 358; *Leavitt v. Cruger*, 1 Paige, 421.) In no case need a married woman prosecute or defend by guardian or next friend. (Code, § 114.)

(11) This agrees with the English practice. (1 Dan. Ch. Pr. 559.) Infants can only appear and answer by their guardian appointed for that purpose. And it is

SECTION VI.

APPEARANCE BY INFANTS.

Guardian ad litem.] In this state, the appearance of an infant is entered by his guardian *ad litem*; who is appointed by the court, on petition for that purpose. (12)

How appointed. The petition for the appointment of a guardian *ad litem* must be by the infant in person, if he is of the age of fourteen or upwards; but if he is under fourteen, it must be presented by his next of kin, or some other friend who has no interest in the suit adverse to that of the infant. If the infant, or some disinterested relative or friend in his behalf, does not procure the appointment of a guardian *ad litem* within the usual time for appearance, (13) the com-

mon law is erroneous to proceed against them, until such appointment has been made. (*Irons v. Crist*, 3 A. K. Marsh, 143; *Bradwell v. Weeks*, 1 John. Ch. 325.) It is irregular, after the appointment of a guardian *ad litem*, for an infant, to take the bill *pro confesso* against him, for want of an appearance or of an answer. (*Carneal v. Sthreshly*, 1 A. K. Marsh, 471.)

A guardian for an infant wife is not necessary, when she joins with her husband, in an action, as plaintiff, unless the action is to recover her separate property. (*Cook v. Rawdon*, 6 How. Pr. 233; S. C. 1 Code Rep., N. S. 382.)

The Code, (§ 114,) provides that in no case need a married woman prosecute or defend by guardian or next friend.

(12) Section 115 of the Code provides that when an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

If no guardian is appointed for an infant defendant, a judgment taken against him will be irregular. (*Kellog v. Klock*, 2 Code R. 28; *Boylan v. McAvoy*, 29 How. Pr. 278. See *Parks v. Parks*, 19 Ab. 161.) And the infant cannot waive the irregularity, (*Fairweather v. Satterly*, 7 Rob. 546,) or perform any valid act in the conduct of his defence. (Ib.) In *Boylan v. McAvoy*, (*supra*) where no guardian had been appointed, the plaintiff moved, after verdict, but before judgment, for the appointment of such guardian as of the time of the appearance of the infant. The court refused the application and vacated the proceedings.

When an infant defendant is a lunatic and a non-resident, the proper course is for his committee or guardian to petition for the appointment of a suitable guardian *ad litem*, within the jurisdiction of the court. (*Rogers v. McLean*, 31 How. Pr. 279.) A voluntary appearance of such a defendant is equivalent to a personal service of process. (Ib.)

There is no statute that authorizes the appointment of a guardian for an infant, to appear for him in an action without controversy. (*Fisher v. Stilson*, 9 Ab. 33.)

An action cannot now be commenced by next friend. (*Hoftailing v. Teal*, 11 How. Pr. 88.)

A copy of the order appointing a guardian *ad litem* for infant defendants should be served with the answer. The regularity of such an order or its service, cannot be questioned after judgment has been entered, nor collaterally. (*Rogers v. McLean*, 31 How. 279; *Barnard v. Heydrick*, 2 Ab., N. S. 48; 32 How. 97; *Graham v. Pinckney*, 7 Rob. 147.)

Where, in an action for partition, the appointment of a guardian *ad litem* for an infant defendant, is not strictly formal and conformable to the rules of the court, by reason of the non-verification of the petition by the infant, it is not jurisdictionally defective. The court has the power to recognize and make valid any other mode of verification which satisfies it of the truth of the facts therein contained. (*Van Wyck v. Hardy*, 20 How. Pr. 222.)

(13) A motion to appoint a guardian for an infant defendant may be made at any

plainant may apply to the court to appoint a suitable person as the [*84] guardian of such infant. The *petition for this purpose must briefly state the age and residence of the infant, the general object of the suit or proceeding, and the nature of the infant's interest therein. (m) (14)

The order entered under this rule, when the complainant applies for the appointment of a guardian, is not absolute in the first instance, but only *nisi*; i. e. that the person designated by the court be appointed guardian, unless the infant, within ten days after service of a copy of such order, shall himself procure a guardian to be appointed. A copy of such order may be served personally upon the infant, if he is of the age of fourteen years; and if he is under that age, then upon his gen-

(m) Rule 144.

time before a motion is made by the plaintiff for that purpose. (*McConnell v. Adams*, 1 Code Rep., N. S. 114. See 8 Ab. 44; 28 Barb. 299.)

An infant plaintiff should have a guardian appointed before the action is commenced. (*Hill v. Thaxter*, 3 How. Pr. 407.) Where a married woman suing with her husband, is an infant, a guardian is not necessary however; unless the action is to recover her separate property. (*Cook v. Rawdon*, 6 How. Pr. 233; S. C. 1 Code Rep., N. S. 382.) The omission to have a guardian appointed is an irregularity only; it may be waived, and is cured by the plaintiff coming of age pending the action. (*Rucker v. Puckhofer*, 9 Bosw. 638,) or by the omission of the defendant to raise the objection. If an infant was without a guardian, the defendant may either move to set aside the proceedings, (*Freyberg v. Pelerin*, 24 How. Pr. 202.) or set up the infancy in his answer. (*Treadwell v. Bruder*, 3 E. D. Smith, 597.) On an appeal where one of the parties is, after the appeal, ascertained to be an infant, the court upon application, will appoint a guardian *ad litem*. (*Fish v. Ferris*, 3 E. D. Smith, 567, and see *Moody v. Gleason*, 7 Cow. 480.)

When an infant is *defendant*, a guardian *ad litem* may be appointed by the court upon the application of the infant, if he is of the age of fourteen years and applies within twenty days after the service of the summons. (Code, § 116.) If he is of the age of fourteen years, or neglects so to apply, then a guardian may be appointed upon the application of any other party to the action, or of a relative or friend of the infant, upon notice to the general or testamentary guardian of the infant, if he has one within the state; if he has none, then to the infant himself, if over fourteen years of age, and within the state; or if under that age, and within the state, to the person with whom he resides. (Ib.) In actions for *partition* or *foreclosure*, if an infant defendant resides out of this state, or is temporarily absent therefrom, the plaintiff may apply to the court at special term, for an order designating a guardian for the infant, unless he or some one in his behalf, within a time to be specified therein, shall procure the appointment of a guardian. (Ib.)

These provisions of the Code are intended for the benefit of the infant, by giving him twenty days after the service of process, (in suits other than for partition or foreclosure,) to make his own selection. After that time the plaintiff or any relative or friend may apply, but the infant may still make the application, if the other parties authorized fail to do so. (*McConnell v. Adams*, 1 Code Rep., N. S. 114.)

(14) The Code, (§ 116,) directs as to the manner in which guardians *ad litem* are to be appointed. A distinction is to be noticed between ordinary actions and *partition suits*. In all ordinary actions, the appointment may be made by the court in which the action is pending, or by a judge thereof, or by a county judge. In actions for the partition of lands, the guardian can be appointed by the court only. An appointment by a county judge is a nullity. (*Lyle v. Smith*, 13 How. Pr. 105; *Lansing v. Gulick*, 26 id. 250; *Varian v. Stevens*, 2 Duer. 635. But see *Towsey v. Harrison*, 25 How. Pr. 263.) The appointment of a guardian to protect the rights of an infant plaintiff in partition, under sec. 116 of the Code, is a nullity. A next friend should be appointed pursuant to the Act of 1852, chap. 277. (*Lansing v. Gulick*, 26 How. 250; *Lyle v. Smith*, 13 id. 105.)

eral guardian, or his relative, friend, or other person with whom he resides. (n)

At the expiration of the ten days, upon an affidavit of the service, and that no notice of the appointment of a guardian by the infant has been received, the complainant may have an order of course that the former order be made absolute. (o)

In partition suits, if an infant defendant does not procure a guardian *ad litem* to be appointed, the court, upon the petition of the complainant, will appoint the register, assistant register, or a clerk of the court, as such guardian. (p)

An order for the appointment of a guardian *ad litem*, except in a partition suit, may be entered of course, on filing the petition of the infant, if he is over fourteen years of age, or of some person in his behalf, if under fourteen, together with the consent of the guardian and the usual affidavit, and the certificate of a vice chancellor or master endorsed thereon, that he has examined into the circumstances, and that the guardian proposed is a suitable and proper person, and has no interest in the suit in opposition to the interest of the infant. (q) But to authorize the entry of an order of course, appointing a guardian *ad litem* under this rule, the petition should distinctly show an authority to make the appointment on the ground that the infant had been served with process to appear in the suit, or that he had been proceeded against as an absentee, and an order obtained for his appearance under the statute. (r)

Who may be appointed. No person can be appointed guardian *ad litem* for an infant, unless he be the general guardian of the infant, or a master, solicitor, or other officer of the court, who is fully competent to *understand and protect the rights of the infant, and who has [*85] no interest adverse to his, and is not connected in business with the solicitor or counsel of the adverse party. He must also be of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defence of the suit. (s) (15)

(n) *Knickerbacker v. De Freest* and al. 2 Paige, 304.

(p) 2 R. S. 330. § 95. Laws of 1833, chap. 227.

(r) *Grant v. Schoonhoven* and al. 9 Paige, 255.

(o) *Id. ib.*

(q) Rule 146.

(s) Rule 145.*

(15) The above provisions are continued in force by Rule 16 of the Supreme Court, which is nearly identical, in its phraseology.

A person cannot be appointed guardian *ad litem* against his consent. (*The People v. New York Common Pleas*, 11 Wend. 166); nor upon his or her own nomination, without the consent of the infant. (*E. B. v. E. C. B.* 28 Barb. 299; S. C. 8 Ab. 44.) The guardian should be a responsible person. (*Cook v. Rawdon*, 6 How. Pr. 233; *Robertson v. Robertson*, 3 Paige, 387); because he is liable for costs. (*Cook v. Rawdon*, *supra*: S. C. 1 Code Rep., N. S. 332; *Fulton v. Rosevelt*, 1 Paige, 178; *Leopold*

If an infant defendant is a married woman, her husband may be appointed her guardian *ad litem*, in case he has no interest in the suit adverse to hers, and is competent in other respects. And it is usual to appoint him the guardian in such cases. (16)

The court will not appoint a guardian for an infant upon the nomination of the complainant. (t) That is, the complainant has no right to select the guardian.

Duty, compensation, and liability of guardian ad litem. (17) It is

(t) *Knickerbacker v. De Freest*, 2 Paige, 304.

v. Meyer, 10 Ab. 40; S. C. 2 Hilton, 580; Code, § 316. And see *Robertson v. Robertson*, 3 Paige, 387.)

In the appointment of a guardian *ad litem*, the court should always select such person as will be most likely to protect the rights of the infants. Thus, where the father is plaintiff, the next nearest relative should be heard on the appointment of a guardian. To authorize the appointment of a guardian *ad litem* for an infant defendant, it should appear by the petition that the infant has either been personally served with process, or has been proceeded against as an absentee. (*Grant v. Van Schoonhoven*, 9 Paige, 255.) But a voluntary appearance is equivalent to personal service. (Code, § 139; *Varian v. Stevens*, 2 Duer. 635.)

The guardian *ad litem* for the plaintiff need not be the general guardian or an attorney, &c., or other officer of the court, as prescribed by rule 60, (61.) (*Cook v. Rawdon*, 6 How. Pr. 233; S. C. 1 Code Rep., N. S. 382.)

(16) *Disbrow v. Folger*, 5 Ab. 33.

(17) Rule 62 of the Supreme Court declares that it shall be the duty of every attorney or officer of the court to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of the court. And that it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defence, when necessary for the protection of the rights of the infant; and that he shall be entitled to such compensation for his services as the court may deem reasonable. But that no order allowing compensation to a guardian *ad litem* shall be made, except upon an affidavit, to be made by him, if he be an attorney of the court, or if not, then on an affidavit to be made by his attorney, showing that he has examined into the circumstances of the case, and has, to the best of his ability, made himself acquainted with the rights of his ward; and that such guardian has taken all the steps necessary for the protection of such rights, to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward.

It has been held that the only source of power for a guardian *ad litem* is the court. The appointment is not made by the infant, but by the court. He is appointed to prosecute the action, and he may employ the ordinary and customary means to bring it, if possible, to a successful termination. The authority is to prosecute, and not to settle; and no settlement made by him can be binding on the infant, except when made with the express sanction of the court. (*Easall v. Vandemark*, 39 Barb. 589.)

Section 420 of the Code, and Rule 63 of the Supreme Court, require guardians *ad litem* to give security before receiving any money or property belonging to infants.

Section 316 of the Code makes the guardian of an infant plaintiff responsible for the costs of the action, when they are adjudged against such infant, and provides that payment thereof may be enforced by attachment. This means a process in the nature of a *ca. sa.* The poverty of the guardian is no defence on a motion for an attachment. (*Grantman v. Thrall*, 31 How. 464; *Cook v. Rawdon*, 6 id. 233; S. C. 1 Code Rep., N. S. 382; *Ten Broeck v. Reynolds*, 13 How. 462.)

The admissions of a guardian *ad litem* are not necessarily binding upon his ward, nor will the latter be prejudiced by errors or omissions in his answer. (*Litchfield v. Burwell*, 5 How. Pr. 341; *Bulkley v. Van Wyck*, 5 Paige, 537.) Payment to him is not a legal satisfaction, unless ratified by the ward after he attains his majority. (*Allen v. Roundtree*, 1 Speers, (S. C.) 80.)

The guardian *ad litem* may be reimbursed, out of the proceeds of the action, for his disbursements, &c.; but the court will not order such re-payment after the funds have passed out of the attorney's hands. (*Leopold v. Meyer*, 10 Ab. 40.) He is under no obligation to make advancements for the purposes of the suit; nor can he be

the duty of every master, solicitor, or other officer of the court, to act as guardian *ad litem* for an infant defendant, whenever appointed by the court. And it is his duty to examine into the circumstances of the case, so far as to enable him to make the proper defence when necessary for the protection of the rights of the infant.

He is entitled to such compensation for his services as the court may deem reasonable.

If he improperly subjects the infant or his estate to cost or expense, or neglects to make a proper defence when necessary, he will be personally responsible to the infant for such misconduct or neglect. (*u*) And he may also be punished by the court for his misconduct. (*v*)

Where a special answer is necessary or advisable, to bring the rights of the infant properly before the court, it is the duty of the guardian *ad litem* to put in such an answer. (*w*) But the guardian *ad litem* and his counsel may exercise a discretion in taking proceedings in a cause; and may decline doing so, where they are satisfied it is a clear case against the infant. (*x*)

The guardian *ad litem* is responsible for the propriety and conduct of the defence; and if the answer put in by him for the infant is reported scandalous or impertinent, he is liable for the costs of it. (*y*)

Sometimes the guardian is ordered or decreed to perform a duty on behalf of the infant; his refusal or neglect to do which will subject him to the censure of the court. (*z*)

*If a guardian *ad litem* does not do his duty, or other sufficient ground be made out, the court will remove him. (*a*)

Appearance, how entered by guardian ad litem.] In ordinary cases, the guardian *ad litem* employs a solicitor to enter the appearance of the infant, and to defend the suit for him; but where a solicitor or other officer of the court is appointed guardian, it is usual for him to enter the appearance himself with the register or clerk.

(*u*) Rule 143. *Knickerbacker v. De Freest*, 2 Paige, 304.

(*v*) *Knickerbacker v. De Freest*, *supra*.

(*w*) *Id. ib.*

(*y*) *Hinde*, 241.

(*a*) *Russell v. Sharpe*, 1 Jac. & W. 482.

(*x*) *Levy v. Levy*, 3 Mad. Rep. 243.

(*z*) *Id. ib.*

Litchfield v. Burwell, 5 How. Pr. 341; S. C. 1 Code, Rep., N. S. 42; 9 Leg. Obs. 182.

compelled to incur any liability, other than for the costs of his adversary; and for these he has his remedy against the estate of the infant. (*Ib.*; Code, § 316.)

SECTION VII.

APPEARANCE BY IDIOTS, LUNATICS, &c.

An idiot or lunatic, when made a defendant to a suit, must appear and defend by the committee of his estate, if one has been appointed. (*b*) In cases where there is a committee, he generally applies by motion or petition to be appointed guardian to answer and defend the suit; which is ordered of course. (*c*) (18)

If it happens that the idiot or lunatic has no committee, or the committee has an interest opposite to that of the idiot or lunatic, an order may be obtained, on affidavit of the defendant's incompetency, for appointing another person as guardian for the purpose of defending the suit against him. (*d*)

If a bill is brought against a lunatic, stating him to be such, it is a motion of course to apply to the court for a commission to assign him a guardian, and to take his answer by such guardian. But if the bill does not state the defendant to be a lunatic, an affidavit, or other evidence, will be required to show the defendant's lunacy, before he will be permitted to answer by guardian. (*e*)

The application for the appointment of a guardian to appear and answer for the defendant may, in some cases, be made by the complainant. (*f*)

Where the defendant has a committee, and he refuses to appear, an application should be made that he appear within a limited time, or that a new committee be appointed. (*g*)

[*87] *A similar practice is to be pursued in order to procure the appointment of a guardian for the defendant, in cases where such defendant is so infirm in body and mind as to be incapable of putting in an answer; (*h*) or where he is deaf and dumb. (*i*)

The application, whether made by the complainant or by some person on behalf of the defendant, may be either by petition, or by motion founded on an affidavit of the facts. In the former case, it would pro-

(*b*) Mitf. Eq. Pl. 82.
 (*c*) Hinde, 252. Westcombe v. Westcombe, Dick. Rep. 233. Snell v. Hyat, id. 227. 1 Coll. Lu. 353. Shelford, 426.
 (*d*) Mitf. 82.
 (*e*) 1 Dan. 220.
 (*f*) Wilson v. Grace, 14 Ves. 172. Gason v. Garnier, Dick. 256.
 (*g*) 1 Fow. Ex. Pr. 477.
 (*h*) Lloyd v. —, Dick. 460.
 (*i*) Markle v. Markle, 4 John. Ch. R. 163.

(18) If the committee of a lunatic infant resides out of the jurisdiction of the court, it is proper for him to apply by petition for the appointment of a guardian *ad litem* residing within the jurisdiction. (*Rogers v. McLean*, 31 How. Pr. 279.)

bably be considered necessary that notice should be given to the relative of the defendant, or the person with whom he resides.

SECTION VIII.

APPEARANCE BY CORPORATIONS.

Corporations aggregate appear by a solicitor in the same manner as civil person.

CHAPTER IV.

PROCEEDINGS TO COMPEL AN ANSWER.

THE writ of subpoena taken out by the complainant on filing his bill, not only commands the defendant to enter his appearance, but also requires him to answer the bill. Accordingly, after the defendant's appearance has been entered, the complainant may have an order of course that he put in his answer in forty days after service of a copy of the bill and notice of the order, or that the bill be taken as confessed. Or, in case the complainant wishes a discovery, on filing an affidavit that it is necessary, the order may be varied so as to require the defendant to answer, in like manner, or that an attachment issue. (1) And in either case, if the defendant does not file his answer and serve a copy thereof, within the forty days, the complainant, on filing an affidavit showing the defendant's default, may have an order to take the bill as confessed, or that *an attachment issue, as the original order may be. (a) And the [*88] court will not, in that stage of the cause, inquire whether an answer is actually necessary for the purposes of the suit. (b)

The attachment issued under this rule is in the same form as the process for not appearing. (c) The endorsement of the writ, recitals, &c. should state it to be issued for not answering.

(a) Rule 24.

(b) *Stafford v. Brown*, 4 Paige, 360.

(c) See ante, p. 54.

(1) There is no provision in the Code, for compelling an answer, where the defendant does not choose to put in an answer. No action to obtain a discovery under oath, in aid of the prosecution or defence of another action, being allowed under the present system, (Code, § 339) if the defendant fails to put in an answer, within the time specified in the summons, (see Code, sec. 120) the only remedy of the plaintiff is to apply to the court for judgment for the sum specified in the summons, or for the relief demanded in the complaint, as the case may be.

If the defendant appears personally, or is brought into court by the sheriff on the return of the attachment for not answering, he must put in his answer and pay the costs incurred by his contempt, *instanter*, or within such time as the court shall appoint, or be committed until he complies. (*d*) Or, if the contempt is persisted in, the court may commit the defendant; and upon a certificate of the sheriff of his detainer, and proof by affidavit of his continued contempt in not filing his answer, a sequestration may be granted. (*e*)

Where a party is in contempt, the court will not grant an application in his favor which is not a matter of strict right, until he has purged his contempt. (*f*) He must clear his contempt before he can take any effectual proceedings in the cause; and if he be in custody for want of an answer, he cannot be liberated therefrom before he has filed his answer, paid or tendered the costs of his contempt, and obtained an order for his discharge. (*g*)

The complainant, by amending his bill, waives his process of contempt; (*h*) but he will be allowed, upon motion or petition, and giving personal notice to defendant, to amend his bill without its operating as a discharge of such contempt, and to commence *de novo*, where the defendant, upon being brought to the bar of the court for his contempt refuses to put in his answer. (*i*)

If the complainant accepts the defendant's answer, or replies, or moves upon it, which implies acceptance, he cannot use the process of contempt for the purpose of getting costs. (*k*)

The same proceedings are also had to compel the several answers of a married woman, an infant, a person of unsound mind, and a corporation, as are used to enforce their appearance. (*l*)

In a suit against husband and wife, if an order to answer separately [*89] *has not been obtained, the husband must put in a joint answer for himself and wife, or the bill may be taken *pro confesso* against both. (*m*) And process for an answer may go against both. (*n*) If the wife is absent, the husband may obtain time to issue a commission to obtain her oath to the answer. (*o*) If he has no control over her, he must, upon affidavit, obtain an order to exempt him from the process of contempt, and that the wife may answer separately, and then (an order for the purpose being obtained,) the attachment and other process will go against the wife. If a bill is filed against husband and

(*d*) Rule 28.

(*e*) *Lupton v. Hescott*, 1 Sim. & Stu. 274. *Detillin v. Gale*, *id.* 275, n.

(*f*) *Johnson v. Pinney*, 1 Paige, 646.

(*h*) *Gray v. Campbell*, 1 Russ. & My. 323.

(*k*) *Anon.* 15 Ves. 174.

(*m*) *Bilton v. Bennett and wife*, 4 Sim. 17. *Leavitt v. Cruger and wife*, 1 Paige, 421.

(*n*) 1 Hoff. Ch. Pr. 231.

(*g*) *Golds. Doct. of Eq.* 136.

(*i*) *Golds. Doct. of Eq.* 137.

(*l*) See *ante*, p. 51. 52. 54.

(*o*) *Leavitt v. Cruger and wife*, *supra*.

wife in respect of a demand against her out of her separate estate, or in her character of executrix, &c., and the husband is out of the jurisdiction of the court, the complainant, before he can issue an attachment against the wife, must obtain an order for her to appear and answer separately; and then the proceedings are the same as where the husband obtains the order.(p)

In cases where infants or lunatics are defendants, the guardian *ad litem* of the former and the committee of the latter may be proceeded against in order to compel an answer, in the same manner as other persons.

The answer of a corporation is enforced by process of *distringas* and sequestration.(q)

*CHAPTER V.

[*90]

TAKING BILLS AS CONFESSED.

- Sect. 1. NATURE OF THE PROCEEDING.
2. FOR WANT OF AN APPEARANCE.
3. FOR WANT OF AN ANSWER.

SECTION I.

NATURE OF THE PROCEEDING.

IN previous chapters we have pointed out the methods which the court adopts to compel a defendant to appear, or to put in his answer. As it is obvious, however, that in a court of equity, where the nature of the relief to be granted frequently depends upon the discovery to be elicited from a defendant by his answer, the mere taking a party into custody, or sequestrating his property, will not accomplish the object of doing complete justice to the complainant, the court has adopted a method of rendering its process effectual by treating the defendant's contumacy as an admission of the complainant's case. It will therefore, in certain cases, hereafter specified, make an order that the facts stated in the bill shall be considered as true, and decree against the defendant according to the equity arising upon the case

(p) Gray's Solicitor's Prac. 165.

(q) See ante, p. 68. Gray's Solicitor's Prac. 165.

stated by the complainant. This proceeding is termed taking a bill *pro confesso*, or as confessed.(1)

This practice is not of very ancient standing. Formerly no bill could be taken as confessed unless an appearance had been entered.(a)

The revised statutes empower the chancellor to establish rules from time to time for taking bills as confessed, in all cases not otherwise provided for by law.(b) Under this section, rules have been made for [*91] *taking bills as confessed *for want of an appearance* in the following cases:—on personal service of the subpœna;—where the defendant is taken on an attachment for not appearing, and being bailed, he makes default;—or where he appears personally on the return of the attachment or is brought in by the sheriff, but refuses to enter his appearance. The bill may also be taken as confessed against non-resident, absent, or concealed defendants who fail to appear after the publication of notice of an order to appear against them.

And the bill may be taken as confessed *for want of an answer*, after the defendant's appearance has been entered.

SECTION II.

FOR WANT OF AN APPEARANCE. (2).

Where the subpœna has been personally served.] When the subpœna is served on the defendant in person, if he does not appear within twenty days after the appearance day mentioned therein, the complainant, on filing proof of the service of the subpœna, may have an order of course to take the bill as confessed. (c)

Where defendant is taken on an attachment, and being bailed, he fails

(a) 1 Dan. 679, 680.

(b) 2 R. S. 179, § 80, (orig. § 74.)

(c) Rule 23. Sawyer v. Sawyer, 3 Paige, 263.

(1) JUDGMENT BY DEFAULT.

There is now, properly speaking, no such thing as a decree by default. Indeed, the term *decree* is not used in the Code, the word *judgment* being substituted in its place. And a uniform mode is provided for obtaining a final judgment in actions both of a legal and an equitable nature. (Van Sant. Eq. Pr. 124.) In equitable actions, a judgment may now be obtained by application to the court, on a failure to answer, in a manner similar to the old method of obtaining a decree *pro confesso*, at the hearing; and after answer, if the defendant fails to appear at the trial, on proof of service of notice of trial, and proving the plaintiff's case. (Ibid.)

(2) JUDGMENT ON FAILURE TO APPEAR AT THE TRIAL.

It has already been stated that there is no provision in the Code for taking a complaint as confessed, or judgment by default for want of an appearance *in the cause*; nor for compelling an appearance by the defendant. But upon default of either party to appear *at the trial*, which is equivalent to *default at the hearing*, under the former practice, judgment will be given in the manner pointed out in chapter XI, section 2, post. p. 323.

to appear.] If an attachment for not appearing is served, and the defendant gives security for his appearance at the return day of the attachment, as required by law, if he does not comply with the condition of the bond, the complainant may have a special order that his bill be taken as confessed against the defendant. (*d*) The complainant may at the same time have leave to prosecute the bond for his costs. The order authorized by this rule should be applied for upon affidavit showing that an attachment has been issued, returnable at such a time, that the defendant has been taken upon it, and has given a bond for his appearance, &c., as required by law; but that he has not complied with the condition thereof by appearing in court and causing his appearance to be entered and clearing his contempt, &c.; or if he has appeared, his refusal to enter his appearance. And the order shall recite the same facts, and thereupon direct the bill to be taken as confessed.

*Where defendant appears personally on return of attachment, or is *brought in by sheriff, but refuses to enter his appearance.*] The [*92] statute provides that when a defendant brought into court upon *habeas corpus* or other process, shall neglect or refuse to enter his appearance according to the rules of the court, the court shall order his appearance to be entered; and the suit shall then proceed as if the party had actually appeared. (*e*) And the 28th rule requires that if the defendant appears personally, or is brought into court by the sheriff, on the return of an attachment for not appearing, he shall enter his appearance and pay the costs of his contempt instant; or the complainant may have an order that the bill be taken as confessed, and that the defendant be committed until the costs are paid.

When the appearance is entered by the court, under the above section of the statute, the proceedings to take the bill *pro confesso* may be had under the 24th rule. In such case the usual order to answer, &c., should be entered, and a copy of the bill and notice of the order must be served either personally or at the defendant's residence or place of business in case he is absent, or by putting them in the post-office, as directed by rule 16.

Against non-resident, absent, or concealed defendants.] The manner in which bills may be taken *pro confesso* against absent, concealed and non-resident defendants upon whom process of subpoena cannot be served, is prescribed by the statute and rules of the court as follows:

There are five cases in which an order for the appearance of defendants may be made and directed to be published by the court. 1. When

(*d*) Rule 27.

(*e*) 2 R. S. § 79, (orig. § 73.)

the defendant resides out of the state. 2. When he is a resident of this state, but process cannot be served upon him by reason of his absence from it. 3. Where process cannot be served by reason of his concealment within this state. 4. Where process cannot be served by reason of the defendant's continued absence from his place of residence. (f) 5. When the defendant's last known place of residence was within this state, but his residence at the time cannot, on due inquiry, be ascertained by the complainant or his solicitor. (g) (3)

(f) 2 R. S. 186, § 128, (orig § 122.)

(g) Laws of 1842, p. 363, § 1.

(3) SERVICE OF SUMMONS BY PUBLICATION.

The Code (§ 135) provides that where the person on whom the service of the summons is to be made cannot after due diligence be found within the State, and that appears by affidavit to the satisfaction of the court or a judge thereof or of the county judge of the county where the trial is to be had, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this State, such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases:

1. Where the defendant is a foreign corporation, has property within the State, or the cause of action arose therein;

2. Where the defendant being a resident of this State has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent;

3. Where he is not a resident of this State but has property therein and the court has jurisdiction of the subject of the action;

4. Where the subject of the action is real or personal property in this State and the defendant has or claims a lien or interest actual or contingent therein;

5. Where the action is for divorce in the cases prescribed by law.

The section also directs as to the manner in which the publication shall be made, and the time, and directs that in case of publication the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office directed to the person to be served, at his place of residence, unless it appears that such residence is neither known to the plaintiff, nor can with reasonable diligence be ascertained by him.

When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office. (Ibid.)

In all cases where publication is made the complaint must be first filed and the summons, as published, must state the time and place of such filing. (Ibid.)

6. In actions for the foreclosure of mortgages on real estate, if any party or parties having any interest in or lien upon such mortgaged premises are unknown to the plaintiff, and the residence of such party or parties cannot with reasonable diligence be ascertained by him, and such fact shall be made to appear by affidavit to the court or to a justice thereof or to the county judge of the county where the trial is to be had, such court, justice or county judge may grant an order that the summons be served on such unknown party or parties by publishing the same for six weeks successively in the State paper and in a newspaper printed in the county where the premises are situated, which publication shall be equivalent to a personal service on such unknown party or parties. (Ibid.)

It is settled by repeated decisions that the requirements of section 135 must be strictly pursued and fully complied with, in order to confer jurisdiction. (*Cook v. Farren*, 34 Barb. 95; *S. C.* 11 Ab. 40, and 12 id. 359, *sub. nom. Cook v. Farmer*; *Hallett v. Righters*, 13 How. Pr. 43; *Titus v. Relyea*, 16 id. 371; *Brisbane v. Peabody*, 3 id. 109; *Kendall v. Washburn*, 14 id. 380; *Wortman v. Wortman*, 17 Ab. 66.)

An order for publication, and all proceedings founded thereon, are absolute nullities unless the case is *in fact* within this section. It is not sufficient that the affidavit on which the order is made states the case to be within, nor that the judge making the order is satisfied the case is within, this section. (*Fiske v. Anderson*, 33 Barb. 71; 12 Ab. 8; *Peck v. Cook*, 41 Barb. 549.) The affidavit must show that the case is within the law, (*Peck v. Cook*, *supra*.) and the necessary facts cannot be

If the defendant resides out of the state, there must be proof, by

shown in any other manner than by affidavit. The return of the sheriff upon the summons forms no part of such proof. (*Waffle v. Goble*, 53 Barb. 517.) Nor is the official certificate of a sheriff of another State evidence here of the service of papers. His affidavit should be presented. (*Morrell v. Kimball*, 4 Ab. 352.) Section 138 of the Code, (sub. 3,) directs that in case of publication the affidavit of the printer, or his foreman or principal clerk, showing the same, shall be produced, and an affidavit of the deposit of a copy of the summons in the postoffice, as required by law, if the same shall have been deposited, or the written admission of the defendant.

Although this section requires that the affidavit of publication be made by the printer, his foreman or principal clerk, yet it seems that it will be sufficient if made by the publisher of the newspaper. (*Bunce v. Reed*, 16 Barb. 347; explained in *Howard v. Hatch*, 29 id. 297, 301.)

An admission of service, purporting to be signed by some of the defendants, without some evidence of their signatures being genuine, or that they were written to the admission with their assent, is defective. The court takes judicial notice of the signatures of its officers, but is not presumed to know the signature of a party defendant who has not appeared in the action. (*Litchfield v. Burwell*, 5 How. Pr. 342; S. C. 1 Code Rep., N. S. 42; 9 Leg. Obs. 182; *Matter of Gibson*, 5 English, (Ark.) 572; *Welch v. Walker*, 4 Porter, (Ala.) 120; *Norwood v. Riddle*, 9 id. 425.)

If the affidavit is insufficient it will not be aided by the personal service of the summons out of the State. (*Peck v. Cook*, *supra*.) Nor can jurisdiction be conferred *nunc pro tunc* by amendment. (*Wortman v. Wortman*, 17 Ab. 67; *Hallett v. Richters*, 13 How. Pr. 43.) If there is a total absence of proof of the facts necessary to confer jurisdiction, the order for publication, and all proceedings founded upon it, are absolutely void. (*Towsley v. McDonald*, 32 Barb. 604; *Wells v. Thornton*, 45 id. 390.) But a mistake, or error of judgment or opinion, in passing upon the force and weight of affidavits presented on an application for an order of publication, will not render the order or process void, but simply irregular and erroneous. Such order may be reviewed and rectified on appeal, or on motion to set aside the order and proceedings, but cannot be questioned collaterally. (*Welles v. Thornton*, 45 Barb. 390; *Roche v. Ward*, 7 How. Pr. 416.)

On application for service of summons by publication, where it appeared that although the defendant could be found and seen, yet with due diligence access to him could not be obtained so as to effect a service of the summons upon him, it was held that as it could not be said that the defendant could not be found, and kept concealed, &c., the case did not come within the provisions of section 135 of the Code. (*Van Rensselaer v. Dunbar*, 4 How. Pr. 151.) Such a case, however, is now provided for by the Act of 1853, relative to substituted service. (See Ante, chap. 2, note 15.)

An affidavit for an order of publication must show the residence of the defendant, or that it is neither known to the plaintiff, nor can, with reasonable diligence, be ascertained by him. (*Hyatt v. Wagenright*, 18 How. Pr. 248; *Cook v. Farren*, 34 Barb. 95; S. C. 21 How. Pr. 286; 12 Ab. 359; 11 id. 40.) In an action for the foreclosure of a mortgage, the non-residence of the defendant is not necessary to be shown. It is sufficient to establish the fact satisfactorily that he could not, after due diligence, be found within this State, so as to enable the plaintiff to effect the service of the summons upon him. There is no good reason why this may not be shown by an affidavit properly made, and forming a part of the records of the court, although made in another action, and not in the particular action in which the order is asked. (*Boinerd v. Heydrick*, 32 How. 97; S. C. 2 Ab., N. S. 47; 49 Barb. 62.) The plaintiff in the action may make the affidavit for an order of publication. The statute does not prescribe who shall make it, but it must show, to the satisfaction of the court or jury, that due diligence has been used, and that the person to be served cannot be found within the State. (*Waffle v. Goble*, 53 Barb. 517; S. C. 35 How. 356; *Van Wyck v. Hardy*, 20 How. Pr. 222; 11 Ab. 473.) An affidavit upon information and belief, that the defendant is absent from the State for the purpose of defrauding his creditors, without stating the grounds for such belief, is insufficient. (*Warren v. Tiffany*, 17 How. Pr. 106; S. C. 9 Ab. 66.) So as to an affidavit, upon information and belief, that the defendant has property within the State. (*Evertson v. Thomas*, 5 How. Pr. 46; S. C. 3 Code Rep. 74, *sub. nom.* *Everts v. Thomas*.) And an affidavit stating upon belief that the defendant keeps out of the way to avoid personal service, must state circumstances to show that such belief is well founded. (*Godkin v. Redgate*, 1 Crompt. & Jer. 401; S. C. 1 Tyrw. 287.) But in

affidavit, of the fact. It is not sufficient for the complainant to state,

Van Wyck v. Hardy, (20 How. Pr. 222; S. C. 11 Ab. 474,) an affidavit on information as to the non-residence of the defendant was held sufficient.

An affidavit which states that the defendants reside in another State, but that the deponent is unable to state their present place of residence therein, is not sufficient. It should show that the residence of the defendants is unknown to the deponent, and cannot, with reasonable diligence, be ascertained. (*Cook v. Farren*, 34 Barb. 95.) The affidavit must not only show the existence of a cause of action, and that the defendant cannot, after due effort and diligence, be found within the State, but it must further appear, when the application is under subdivision 2 of section 135, that, being a resident of the State, the defendant has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with a like intent. (*Towsley v. McDonald*, 32 Barb. 604.) The intent must be established by showing by affidavit that the defendant has some kind of property, and that he has made, or is about to make, a fraudulent or illegal disposition of it; or that he has unjustly refused to apply it to the payment of his debts; or has secreted or removed, or is about to secrete or remove, it; or has fraudulently incumbered it. (Ib.) An order for publication, on the ground of the defendant's departure from the State with the intent of avoiding service, must be based upon an affidavit furnishing proof of such intent. (Ib.)

In *Lefferts v. Harris*, (10 Ab., N. S. 2, note,) where it appeared that the defendant was a non-resident of this State, but had property here, on application for an order of publication, Justice Sutherland held that he had no authority under the Code to grant the order, on the ground that jurisdiction could not under it be obtained in equity suits *in personam* where personal service could not be effected in this State, but added that if any authority for such an order could be found under the old chancery practice he would grant it. He subsequently decided that in an action of an equitable nature the summons might be served by publication on an absent defendant who had property within this State.

But where the plaintiff procured an order for the publication of a summons on an affidavit that the defendant had property within this State, and on motion to vacate the judgment it appeared that such property consisted only of a team driven temporarily within the State, with the design of returning forthwith, it was held that the order was irregular, and that the plaintiff's proceedings must be set aside. (*Haight v. Husted*, 5 Ab. 170; S. C. 4 id. 348.) The validity of the order for publication must be determined solely upon the sufficiency of the affidavits on which it was granted. (*Wortman v. Wortman*, 17 Ab. 66.)

The service of a summons out of the state has no validity unless an order for publication has previously been made. (*Litchfield v. Burwell*, 5 How. Pr. 341; S. C. 1 Code, Rep., N. S. 42; 9 N. Y. Leg. Obs. 182; *Fiske v. Anderson*, 33 Barb. 75; S. C. 12 Ab. 8; *Morrell v. Kimball*, 4 id. 352.)

By rule 7 of the Supreme Court, all papers used upon a non-enumerated motion are required to be filed with the clerk. Under this rule, affidavits used upon a motion for an order of publication must be filed, otherwise the order may be set aside as irregular.

An order for service by publication should recite the summons, or refer to it as being annexed, in order to show that there is a summons and to identify it. (*Rawdon v. Corbin*, 3 How. Pr. 416; S. C. 2 Code R. 3.) An order which does not direct service of the summons and complaint to be made by mail, in a proper case for such a service, is fatally defective. (*Towsley v. McDonald*, 33 Barb. 604; *Warren v. Tiffany*, 17 How. Pr. 106; S. C. 9 Ab. 66.) An order for the publication of a summons which merely directs that "a copy of the summons and complaint be deposited in the post-office, addressed to the defendant," is defective and insufficient. It should direct that it be done *forthwith*, and that the summons and complaint be deposited in the post-office, directed to the defendant at his residence, naming it, if known. (*Hyatt v. Wagenright*, 18 How. 248.) It is to be presumed, from the fact of making the order for publication, that the affidavits recited therein, afforded satisfactory evidence to the court of the necessary requisites; and the omission so to state in the order will not affect its validity. (*Barnard v. Heydrick*, 49 Barb. 62; S. C. 2 Ab., N. S. 47; 32 How. 97.) It is not necessary that an order requiring service of papers by mail should be filed before mailing such papers. The previous deposit is at most, an irregularity which can be remedied at any time by filing the order *nunc pro tunc*. (Ib.)

The service by publication of a summons for the commencement of an action is

in his affidavit, that he is informed and believes the defendant lives

insufficient, unless the complaint is filed before publication, and the summons as published state the time and place of such filing; and a judgment entered upon a service thus defective is a nullity. (*Kendall v. Washburn*, 14 How. 380; *Titus v. Kelyea*, 16 id. 371; S. C. 8 Ab. 177.) Such a judgment is not aided by section 139 of the Code; and the fact that an attachment was issued in the proceeding, and an order of the court subsequent to the judgment in such a case, for the filing of the complaint *nunc pro tunc*, as of the day the summons was first published, will not give validity to the judgment. (Id.) The statement in a summons to be served by publication, that "the complaint has *this day* been filed," when in fact it was filed the day before, is not an irregularity which affects the judgment. (*Jacquerson v. Erben*, 2 Ab. 315.)

It is not necessary that a summons to be served by publication against a non-resident should mention the name of this state in designating the place where it has been or will be filed. The publication is good where the only mention of the time and place of its filing is contained in a note appended after the attorney's signature, saying that it "has been filed in said clerk's office," referring to a statement in the summons, immediately preceding, of the city and county where such clerk's office is situated. (*Cook v. Kelsey*, 19 N. Y. 412; S. C. 17 How. Pr. 134; 8 Ab. 170.) Where the summons as published, omitted the words "in said city of New York," after the words "number 13 Chambers Street," designating the office of the plaintiff's attorney, it was held this was not such a defect as to render the publication void. (*Van Wyck v. Hardy*, 20 How. Pr. 222; S. C. 11 Ab. 473.) The omission, through inadvertence of the name of a party, in a copy of the summons filed for publication, is such an error as may be corrected by amendment. (Id.) Where the order for publication requires the summons and complaint to be served upon non-residents by depositing the same *forthwith* in the post-office, directed to such persons, the word "forthwith" should be construed as synonymous with *all reasonable despatch*; hence some little delay may elapse (in this case four days,) without forfeiting jurisdiction over the persons of the defendants. (Id.) But in *Back v. Crussell*, (2 Ab. 333,) it was held that a delay in depositing in the post-office a copy of the summons and complaint in a foreclosure suit, for *fifteen days* after the granting of the order of publication, was an irregularity which affected the title, and for which the purchaser should be relieved from his purchase. The purchaser of premises at a sale in a suit where publication has been ordered, must be deemed to know that he purchases subject to the power of the court to relieve parties against whom publication is ordered, upon good cause shown, both before and after judgment, within seven years after the rendition thereof. (*Van Wyck v. Hardy*, *supra*.)

A judgment obtained by publication of the summons against a defendant then out of the state in which the judgment is rendered, may be enforced against his property in that state, but has no binding force *in personam*, and is a mere nullity when attempted to be enforced in another state. (*Kane v. Cook*, 8 Cal. 449; *Force v. Goner*, 23 How. 294; *Fiske v. Anderson*, 33 Barb. 71; S. C. 12 Ab. 8.)

The act of 1866 (Laws of 1866, ch. 690,) directs as to the mode of publishing notices required by law to be published in Hamilton county, until there shall be a public newspaper actually printed and published in said county. (But see Laws of 1870, ch. 662; Laws of 1867, ch. 162.)

To obtain an order of publication against a *foreign corporation*, (the case provided for in the 1st subdivision of section 135,) it must be proved to the officer who is to make that order, that the *person to be served* (not the defendant) cannot, after due diligence, be found in the state. (*Hurlbut v. The Hope Mutual Insurance Company*, 4 How. Pr. 278; *Wortman v. Wortman*, 17 Ab. 66; *Irving Savings Institution v. Hardman*, id. 67, note.)

If in an action authorized by any law of this state against the *stockholders* of a corporation or *joint-stock company*, any of such stockholders named as defendants, cannot, after due diligence, be found within the state, and the fact appears to the satisfaction of the court or judge thereof, or of a county judge of the county where the trial is to be had, such court or judge may grant an order that the service be made by publication as directed by, and pursuant to the provisions of section 135 of the Code. (Laws of 1869, ch. 157, § 1.)

The fact that a non-resident defendant against whom judgment has been obtained on a service by publication, is allowed to come in and defend, does not of itself, open the judgment or stay proceedings upon the execution. (*Carswell v. Neville*, 12 How. Pr. 445.)

out of the state; but he must swear from whom he received his information. (*h*) And the affidavit should state the place of the defendant's residence, as particularly as possible.

(*h*) *Burton v. Maloon, Barnard, 403.*

Section 135 of the Code directs that the defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, shall be allowed to defend the action; and that except in actions for divorce, the defendant against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defence be successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct; but that the title to property sold under such judgment, to a purchaser in good faith, shall not be thereby affected.

Where a defendant in a foreclosure suit, who is proceeded against as an absentee, applies to be let in to defend, after decree and before sale of the mortgaged premises, and does not swear to a defence on the merits, he must pay the costs already accrued, subsequent to the time for his appearance, and must also give security to pay the future costs of the suit if he does not succeed in his defence. But when he swears to merits, and applies, at the earliest opportunity, costs will not be required of him, although the plaintiff denies the existence of any defence. (*Hartwell v. White, 9 Paige, 368.*)

The fact that a non-resident defendant, against whom judgment has been obtained on a service by publication, is allowed to come in and defend, does not, of itself, open the judgment, or stay proceedings upon the execution. (*Carswell v. Neville, 12 How. Pr. 445.*)

In the cases mentioned in section 135 of the Code, the service of the summons will be deemed complete, at the expiration of the time prescribed in the order of publication. (Code. § 137.)

On a service by publication, the time is to be computed by excluding the first day, and including the full period required for publication. (*Brod v. Heymann, 3 Ab., N. S. 396.*)

A publication through each of ten successive weeks is not sufficient, if the time between the first publication and the proceeding taken is less than seventy days. (*People ex rel. Demarest v. Gray, 10 Ab. 463; S. C. 19 How. Pr. 233.*)

A defendant has twenty days to appear and answer, after the expiration of the time prescribed by the order for the publication of the summons. (*Tomlinson v. Van Vechten, 6 How. Pr. 199; S. C. 1 Code Rep., N. S. 317; Abrahams v. Mitchell, 8 Ab. 123; Richardson v. Bates, 23 How. 516; Brod v. Heymann, 3 Ab., N. S. 396.*) So, where publication of the summons has been ordered, and service of a copy of the summons and complaint has been personally made, out of the state. (*Ib.*) But see *Dykers v. Woodward, (7 How. Pr. 313.)* to the effect that the time for answering begins to run from the day of personal service out of the state. (Approved. *Sherman v. Strakosh, Transcript of March 3, 1865.*)

Where there has been service by publication, the name of the state should certainly appear in the summons, and probably in the complaint. This statement, below the signature of the attorney, will not suffice: "The complaint in this action was filed in the clerk's office of the county of Montgomery, on the first day of October, 1857." (*Titus v. Relyea, 16 How. Pr. 371; S. C. 8 Ab. 177.*)

In *California*, before jurisdiction of a defendant can be acquired by publication of the summons, it must appear by affidavit either that the defendant *resides out of the state*; or has *departed from the state*; or cannot, after due diligence, be *found within the state*; or that he *conceals himself* to avoid the service of a summons. And in addition thereto, it must also appear by affidavit that a cause of action exists against the defendant; or that he is a necessary or proper party. (*Brady v. Seaman, 30 Cal. 610.*) The affidavit must show whether the residence of the person upon whom service is sought, is known to the affiant; and if known, the residence must be stated. (*Ricketson v. Richardson, 26 Cal. 149; Brady v. Seaman, 30 id. 610.*) and must show a compliance with all the requirements of the law. (*McMillan v. Reynolds, 11 Cal. 372.*) Nor is it sufficient merely to repeat the language or substance of the statute. (*Ricketson v. Richardson, supra.*) The affidavit must set forth facts which show that due diligence to find the defendant has been used;

*To obtain an order for publication against a defendant who [*93] resides in the state but who is absent therefrom, or concealed within the same, the affidavit should state the place of residence of the defendant, the particular circumstances of his absence, and the probable duration thereof, and if the person making the affidavit is not himself knowing to the facts, it should state the names and residences, or other descriptions of the persons from whom the information of such absence or concealment was obtained; to enable the court to judge of the necessity or propriety of proceeding against the defendant by a publication of the notice, instead of a personal service of the subpoena. An affidavit which merely states that the deponent believes the defendant resides in the state, and that the subpoena could not be served on him by reason of his concealment within the state, or of his continued absence from the place of his residence, is not sufficient to authorize the court

and it must also appear therefrom, that such diligence has not been rewarded with a discovery. (*Brady v. Seaman, supra*; *Forbes v. Hyde*, 31 Cal. 312.) Where the affidavit presents some evidence tending to prove each jurisdictional fact, but of a character too inconclusive to justify an order of publication, the order is erroneous, and the judgment, though not void, will be reversed on appeal, but cannot be attached collaterally. (*Forbes v. Hyde*, 31 Cal. 342.) If there is a total want of evidence upon which to base the order, the judgment is void. (*Ibid.*) Facts should be set out, and not a general expression of opinion or belief that an ultimate jurisdictional fact exists without the probative facts upon which such opinion or belief is founded. (*Forbes v. Hyde, supra*. See also *Collins v. Ryan*, 32 Barb. 647; *Towsley v. McDonald*, id. 604; *Roche v. Ward*, 7 How. Pr. 416.) An affidavit which states that the deponent "has a good cause of action in this suit against the said defendant, and that he is a proper party defendant thereto, as he verily believes," does not state any facts tending to show a cause of action, and an order and publication based on it are void. (*Forbes v. Hyde, supra*; *Sharp v. Daugney*, 33 Cal. 515; *Sharp v. Lumley*, 34 id. 616; *Hahn v. Kelly*, id. 391.) It is not sufficient to state generally in such an affidavit, that, after due diligence, the defendant cannot be found within the state; or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated. (*Ricketson v. Richardson*, 26 Cal. 152; *Warren v. Tiffany*, 9 Ab. 66; 17 How. Pr. 106.) If the affidavit is insufficient, the court acquires no jurisdiction over the defendant, and the judgment is void. (*Brady v. Seaman*, 30 Cal. 610; *Swain v. Chase*, 12 id. 283; *Forbes v. Hyde*, 31 id. 342,) the affidavit being only *prima facie* evidence of the facts stated therein. (*Ware v. Robinson*, 9 Cal. 111.)

The order for publication must state the facts proved by the affidavit upon which it is based. (*Ricketson v. Richardson*, 26 Cal. 149.) It is not sufficient for the order to state generally that the defendant resides out of the state; or cannot, after due diligence, be found within the state; or that a cause of action exists against the defendant. (*Ibid.*) The judge has no power to order a summons to issue, but only to order a summons already issued to be served in a special manner. (*McMinn v. Whelan*, 27 Cal. 304; *Forbes v. Hyde*, 31 id. 342. See *People v. Huber*, 20 id. 81.) An order to publish a summons, made in advance of the issuing of the summons, is a nullity. (*People v. Huber, supra.*)

If the affidavit of publication does not show facts sufficient to give jurisdiction, but the judgment, in the recitals, supplies those facts, or recites that service has been had upon the defendant, the judgment will control. It will be presumed that other evidence than that contained in the judgment roll was given. The recital imports absolute verity. (*Hahn v. Kelly*, 34 Cal. 391.) Proof of publication can only be made by the affidavit of the printer, his foreman or clerk, and the affidavit should state that the affiant holds one of these positions. (*Steinback v. Leese*, 27 Cal. 295.) But where the affidavit was made by a publisher and proprietor, and not by the printer, foreman, or chief clerk, it was held sufficient as being within the spirit of the statute. (*Sharp v. Daugney*, 33 Cal. 505.)

to grant an order of publication. (*i*) The affidavit should state all the particulars as to the place and manner of the defendant's residence, and the length of time it has continued in the place sworn to; whether the defendant is a householder, or has a family, &c.; so that the court may see whether he was an actual resident of the state at the commencement of the suit.

Where process cannot be served, by reason of the defendant's continued absence from his place of residence, the affidavit should state the party's place of residence in this state, and his *continued* absence therefrom. What is to be deemed a continued absence has not been decided, and must depend upon the particular circumstances of each case. A mere temporary absence, with the intention of returning within the two months specified in the order for his appearance, would not probably authorize a publication of notice of the order. But if the party is expected to be absent such a length of time as to produce an unreasonable delay in the cause, the court would undoubtedly consider this a "continued absence" within the statute. In determining, as to the propriety of granting an order for publication, the court will consider the question whether it is necessary, for the purpose of expediting the proceedings.

Order to appear.] Upon this affidavit a motion must be made to the court, either in term or on a motion day, for an order that the defendant appear and answer the complainant's bill. (*k*) This order requires the defendant to appear and answer the bill as follows: 1. If he be a resident of the state, within two months from its date. 2. If his last [*94] known *place of residence was in this state, but his present place of residence cannot, on due enquiry, be ascertained; or if he be a resident of some other of the United States, or of one of the territories thereof, or of either of the British provinces in North America, or the Republic of Texas, within three months from its date. 3. If he be a resident of any other state or country, not before mentioned, within six months from its date. (*l*)

Publication of notice of order.] Instead of requiring the order itself to be published, as was formerly necessary, the act of 1842 directs that within twenty days from the date of such order a notice thereof shall be inserted in the state paper, and in such other public newspaper printed in this state as the court shall direct. Such publication must be continued in each of such papers once at least in each week, for three weeks in succession; which notice must be substantially in this form: "*Before the chancellor,*" or, "*Before the vice chancellor of the*"

(*i*) *Evarts et al. v. Becker*, 8 Paige, 506.

(*k*) Rule 25.

(*l*) Laws of 1842, p. 363, § 2.

circuit," as the case may be. "A. B. v. C. D. and others. Bill for foreclosure of mortgage," or, "Bill for partition of lands, as the case may be. "E. F. of ———, complainant's solicitor. G. H., one of the defendants in this cause, whose place of residence is in ———," or, "whose place of residence is unknown"—"is required to appear in this cause by the ——— day of ——— next, or the bill filed therein will be taken as confessed by him."

But such publication will not be necessary, provided a copy of such order shall have been personally served on the defendant at least twenty days before the time prescribed for his appearance. (*m*)

The above provisions of the act apply to suits instituted for the partition of lands as well as to all other suits instituted in this court, and to unknown owners in partition suits. (*n*)

The chancellor may, if necessary, by further order, extend the time for the appearance of the defendant, and may direct the publication of such further order for so long a time as he shall see fit to fix. (*o*)

Order to take bill as confessed.] If the defendant fails to appear within the time limited in the order, on due proof of the publication for the time directed, or of the personal service of the order, the bill may be taken as confessed; and the court will direct a reference to a master to take proof of the facts and circumstances stated in the bill. (*p*) The publication of the order must be proved by affidavits of the printers of *the papers or their foreman or principal clerk. (*q*) If the order [*95] is served personally upon the defendant, the affidavit of the person serving it will be necessary. An affidavit that the defendant has not appeared must also be filed. (*r*)

An order of reference as to the rights of an absent defendant may be entered of course under the 25th rule, at any time after the bill has been taken as confessed against the absentees, although there are other defendants who appear and contest the suit. (*s*)

The master to whom the reference is made is to take such proofs as may be offered. The bill is not to be considered as evidence of any fact stated in it; but when so directed by the chancellor, the master may receive the testimony of the complainant as evidence. (*t*)

This order directing the master to receive the testimony of the complainant as evidence, can only be obtained by a special application to the court. (*u*)

Whenever the bill is for the payment or satisfaction of any sum of

(*m*) Id. ib. § 3.

(*n*) Id. ib. § 4.

(*o*) 2 R. S. 188, § 131, (orig. § 125.)

(*p*) Id. § 132, (orig. § 126.)

(*q*) 2 R. S. 403, § 63. (orig. § 56.)

(*r*) Rule 25. Christy v. Christy, 6 Paige, 170.

(*s*) Corning v. Baxter, id. 178.

(*t*) 2 R. S. 186, § 133, (orig. § 127.)

(*u*) Rule 25.

money, the court shall direct that the complainant be examined by the master as to any payments that may have been made to him or to any person for his use, on account of the demand mentioned in the bill, and which ought to be credited on such demand.(v)

The direction to examine the complainant under this section is usually made a part of the order of reference, and under the 25th rule is an order of course.

The master must report the proofs and examinations had before him; and on the coming in of his report, the court will make such order thereupon as shall be just.(w)

Infant defendants.] Where there is an infant absentee, the course under the statute must be pursued; and on the expiration of the time fixed for his appearance, if no one applies in his behalf, the complainant may move, as in ordinary cases, for a guardian *ad litem*.(x)

Proceedings may also be had by publication under the statute where the infant is concealed.(y)

Lunatic absentee.] And the court has directed a similar course to be pursued where the defendant was a resident of another state and a lunatic.(z)

[*96] **Foreign corporation.*] In a suit against a foreign corporation an affidavit should be made of the place of its institution, and that no officer has been found within this state upon whom the subpoena could be served. Upon this an application should be made to this court, by petition or motion, for an order to advertise that the corporation appear pursuant to the statute.

SECTION III.

FOR WANT OF AN ANSWER.

Where defendant appears voluntarily.] If the complainant has received notice of the defendant's appearance, he may have an order of course that he put in his answer in forty days after service of a copy of the bill and notice of the order, or that the bill be taken as confessed. If the defendant does not file his answer and serve a copy thereof within the forty days, or such further time as may be allowed him for the purpose, the complainant, on filing an affidavit showing

(v) 2 R. S. 186. § 134, (orig. § 128.)

(w) Id. ib. § 135, (orig. § 129.)

(x) *The Bank of Ontario v. Strong*, 2 Palg. 301. (y) *Mortimer v. Copsey*, 1 Hoff. Ch. Pr. 194.

(z) *Otis v. Wells*, id. ib.

the defendant's default, may have an order to take the bill as confessed.(a) (4)

(a) Rule 24.

(4) JUDGMENT ON FAILURE TO ANSWER.

It has been already seen that the plaintiff is required to insert in the summons a notice (1) in an action *arising on contract* for the recovery of money only, that he will take judgment for a sum specified therein if the defendant fails to answer the complaint in twenty days after the service of the summons; (2) in *other actions* that if the defendant shall fail to answer the complaint within twenty days after such service, the plaintiff will apply to the court for the relief demanded in the complaint. (Code, § 129.)

If the defendant fails to answer within the prescribed time after service of the summons and complaint or the summons alone, on all the defendants, is complete, the plaintiff is entitled to judgment on application to the court. (Van Sant. Eq. Pr. 125.)

Whenever the summons contains a notice under the 2d subdivision of section 129 of the Code, an *application to the court* for judgment is necessary if the defendant fails to answer, and a judgment entered without such application will be irregular. (McNeff v. Short, 14 How. Pr. 463.)

Rule 33 of the Supreme Court provides that when a plaintiff is entitled to judgment upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any special term in the district embracing the county in which the action is triable, or in an adjoining county. Such application may also be made at a circuit court in the county in which the action is triable. (See also *Ryan v. McCannell*, 1 Sandf. 709; S. C. 1 Code Rep. 93.) The motion will not be entertained at a general term. (Ib.) Nor at Chambers. (*Aymar v. Chace*, 12 Barb. 301. See Rules 6 and 8 Superior Court.) An application for judgment on failure to answer is a motion as well as an application for judgment under section 247 of the Code, which has been held to be a motion. (Van Sant. Eq. Pr. 126; *Roberts v. Clark*, 10 How. Pr. 451.)

In every description of equitable actions the application for judgment may be made in the manner above mentioned, even in actions which are properly triable in another county. Thus, in a foreclosure suit judgment may be applied for and rendered in a county other than that in which the mortgaged premises are situated. (*La Farge v. Van Wagoner*, 14 How. Pr. 54.)

Where the defendant has not given notice of appearance, the application for relief is *ex parte*. The mode of application in equitable actions is thus pointed out by the Code.

After the expiration of the time for answering (twenty days after the service of the complaint—Code, § 143,) the plaintiff, upon proof of personal service of the summons and complaint on one or more of the defendants, and that no answer has been received, may apply to the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, be necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. (Code, § 246.) If the defendant gives notice of appearance in the action before the expiration of the time for answering, he is entitled to eight days' notice of the time and place of application to the court for the relief demanded by the complaint. (Ib.)

It is the intention of the Code that the plaintiff shall show to the court that no answer has been served upon him at the time he makes his application. Hence, an affidavit sworn more than five years before that time will not be received. (*Brien v. Carey*, 2 Ab. 416.) An affidavit is not indispensable. Parol proof will be received. (*Phillips v. Prescott*, 9 How. Pr. 430.)

When no notice of appearance has been given, the plaintiff, on applying for judgment, is not required to show that fact, by affidavit or otherwise. The court will not in general inquire into it; but the plaintiff takes his judgment at his peril, and should it turn out that notice of appearance has been served, and no notice of the application for judgment given, such judgment is irregular, and will be set aside on motion. (Van Sant. Eq. Pr. 126.)

The provision of section 246, requiring proof that no answer has been received, includes a demurrer, and is usually and properly so stated in the affidavit; for if a defendant has interposed a demurrer a judgment for failure to answer cannot regularly be entered against him. (*Broadhead v. Broadhead*, 4 How. Pr. 408; S. C. 3 Code Rep. 8.) But if there is a direction for judgment under section 247 of the

In a suit against husband and wife, if an order to answer separately

Code, or the demurrer has been overruled, in either case there is a failure to answer, and the same proceedings may be taken as where neither demurrer nor answer has been put in. (*King v. Stafford*, 5 How. Pr. 30; *Aymar v. Chase*, 1 Code Rep., N. S. 141; *Saltus v. Kipp*, 5 Duer. 646; S. C. 2 Ab. 382; 12 How. Pr. 342.) Where an order is made to strike out an answer as sham, the case stands as if no answer had been put in; and if the time to answer has expired, the plaintiff can enter judgment as in case of default. An order for judgment is neither necessary nor proper. If one is entered, the defendant should appeal from the order and not from the judgment. (*Potter v. Carreras*, 4 Rob. 629; *Watson v. Brigham*, 3 How. Pr. 290; S. C. 1 Code Rep. 66.) Where the defendants are sued on a joint liability, and a part of them answer and a part make default, and the plaintiff at the trial has a verdict, he may take judgment against all the defendants served with the summons. No affidavit that no answer has been received is necessary. And it seems that if it were, the plaintiff might be permitted to supply the defect. (*Catlin v. Billings*, 13 How. Pr. 511; S. C. 4 Ab. 248. See, also, *Sluyter v. Smith*, 2 Bosw. 673; *Ford v. David*, 1 id. 570; *Jones v. United States State Co.* 16 How. Pr. 129.)

The proof above mentioned is all that is usually required on an application for judgment for want of an answer, except in special cases regulated either by statute or the rules of the court, (Van Sant. Eq. Pr. 127,) as, in a foreclosure suit, where the plaintiff must show that notice of *lis pendens* has been filed, (Code, § 132; Sup. Court Rule, 72); or that any of the defendants who have not appeared are absentees (Rule 72); or, in partition suits, that there are infants, absentees, or unknown owners (Rule 79); or in an action for divorce for adultery; or to annul a marriage on the ground of non-age or want of consent, that the parties have not cohabited, &c., as prescribed by the rules of the court. (Rules 87, 88.)

The plaintiff's affidavit should show service on all the defendants; for the court will not ordinarily render judgment against a portion only of the defendants where there are others who are necessary parties. (Van Sant. Eq. Pr. 118, 127.) Yet if the summons and complaint name as defendants persons who are not necessary parties, or whose interest has terminated, the plaintiff may, on an affidavit showing their want of interest originally, or that their interest has ceased, obtain an order to strike them out, and take judgment against the residue of the defendants. (Id. 127.)

The failure of the defendant to appear, after personal service of the summons, where there are no infant defendants, is usually regarded by the court as an admission of the truth of the complaint, even though it be unverified; and as excusing any further proof of the facts stated therein. Though, where the summons, only, has been served, the court may, upon its own motion, require further proof of the truth of the complaint, it seems. (Van Sant. Eq. Pr. 128.)

Upon an equitable cause of action admitted by the defendant's failure to answer, the court directs such a judgment as it considers the nature of the case, as set forth in the complaint, requires. But the relief granted to the plaintiff cannot exceed that which he has set forth in his complaint. (Code, § 275; *Hurd v. Leavenworth*, 1 Code Rep., N. S. 278.) This section relieves a plaintiff from any technical objection that he has not prayed for the precise relief to which he may seem entitled on the trial; but the relief to be granted must still be consistent with the case made by the complaint. (*Bradley v. Aldrich*, 40 N. Y. 504.) It is not sufficient that the plaintiff, in his complaint, states facts sufficient to entitle him to the relief. He must ask for it. (*Simonsen v. Blake*, 20 How. Pr. 484; S. C. 12 Ab. 331.) In an action against several defendants, for partition, none of the defendants answered, and the action having been referred, judgment was rendered, on the report of a referee for partition, and against one of the defendants for *rent*. Held, that as the complaint did not ask for an accounting as to rents, the plaintiff could not have such additional relief in that action. (*Bullwinker v. Ryker*, 12 Ab. 311.) Where the prayer for relief was that certain notes amounting to \$5,000 might be ordered to be delivered up, and that the plaintiff might recover \$2,000, with interest thereon, it was held that a judgment for \$7,000 and interest, (the notes not being on interest,) exceeded the relief demanded in the complaint, and must be reversed. (*Hurd v. Leavenworth*, 1 Code Rep., N. S. 278.) So, where the prayer in the complaint was for the usual judgment in a foreclosure suit, and for general relief, there being no specific prayer for judgment for the deficiency, if there should be any, it was held that the defendant could not be adjudged to pay what the mortgaged premises failed to satisfy of the mortgage. (*Simonsen v. Blake*, 20 How. Pr. 484; S. C. 12 Ab. 331.)

The plaintiff may obtain much less relief than he has demanded in his complaint; for he is by no means entitled, as a matter of course, to take judgment even in strict

has not been obtained, the husband must procure the joint answer of

conformity to the prayer for relief in his complaint. (Van Sant. Eq. Pr. 128.) In *London v. Ready*, (1 Sim. and Stn. 44,) where it appeared on the face of the bill that the plaintiff had no equity, the bill was dismissed.

It is not a matter of course to award costs, although the complaint demands it; costs, in equity cases, being in the discretion of the court. (Code, § 303.) Where it is not apparent on the face of the complaint that the plaintiff would be entitled to costs, the court has power to order a reference. (*Elmore v. Thomas*, 7 Ab. 70.)

That portion of section 246 of the Code which relates to the taking of an account, or directing a reference, applies to many cases in which the complaint itself, even though admitted, will not enable the court to render final judgment; as, if it seeks to wind up the affairs of a partnership; or be filed by a trustee, or receiver, for the settlement of his accounts; or the action be brought to call an executor, guardian or other trustee to account. In these and similar cases, it is necessary, if the court declines to take the account, or hear proof of the fact, to apply for an order of reference to take and state such account, or take proof of such fact, before final judgment. (Van Sant. Eq. Pr. 129.) If the defendant has appeared, he must have the usual notice of the time and place of reference. (Ib.) Rule 33 of the Supreme Court directs that in references of this kind, the testimony of the witnesses shall be signed by them, and the report of the referee shall be filed with the testimony, and note of the day of filing shall be entered by the clerk, in the proper book, under the title of the cause or proceeding, and the said report shall become absolute, unless exceptions thereto are filed and served within eight days after the service of notice of filing the same. If exceptions are filed and served within that time, they may be brought to a hearing at any special term thereafter, on the notice of any party interested therein.

The court, on such report, and upon proof of service of notice, will grant final judgment, if no exception has been taken to the report. (Van Sant. Eq. Pr. 130.)

Judgment, upon a failure to answer, is, in the first instance, to be entered upon the direction of a single judge, or report of a referee, subject to review at the general term, on the demand of either party. (Code, § 278.) There is only one case in which a judge, at chambers, can grant a judgment; and that is under section 247 of the Code, where judgment may be given on a frivolous demurrer, answer or reply. In all other cases, judgment can be rendered only by the court, when sitting as such. (*Aymar v. Chace*, 12 Barb. 301; S. C. 1 Code Rep., N. S. 330.) A final decree, in a court of equity, containing special provisions, cannot be entered, unless it has been brought to the notice of the court, and the sanction of the court obtained. (*Beuch v. Shaw*, 4 Barb. 288.) No order or decree, excepting in a few specified cases provided for by rule, which only relate to the form and manner of proceeding, and do not affect the merits, can ever be taken by default, or without the actual direction or approval of the court. (Ibid.) Thus, where a final decree, purporting, on its face, to have been made at a general term of the court, was entered in vacation, upon the report of a referee, in pursuance of a stipulation between the parties, without any direction or consent of the court having been given, such decree, and all subsequent proceedings, were set aside as irregular. (Ibid.)

It is not material whether the order of the court is reduced to form, and receives the fiat of the judge, at the time the order is actually made, or at a subsequent period. (*Smith v. Coe*, 7 Rob. 477.)

Rule 72 of the Supreme Court provides that in a *foreclosure suit*, on a failure to answer, or when the right of the plaintiff is admitted by the answer, the plaintiff may have an order of reference to compute the amount due; to inquire and report whether the mortgaged premises can be sold in parcels; to take proof of the facts stated in the complaint; and to examine the plaintiff on oath, as to any payments, &c. And after the cause is in readiness for trial, as to all the defendants, the plaintiff may apply, at any special term, for judgment. He must show, by affidavit, or otherwise, whether any of the defendants who have not appeared are absentees; and if so, he must produce the report as to the proof of the facts, &c., stated in the complaint, and of the examination of the plaintiff, or his agent, as to payments. And he must prove the filing of a notice of *his pendens* as required by § 132 of the Code.

It has been held regular for a plaintiff to obtain his order of reference to compute the amount due, and proceed thereon forthwith without any further notice to the opposite party, and having obtained a report, to present it to the court on the same day, and obtain final judgment. (*Kelly v. Scaring*, 4 Ab. 354.)

In actions to obtain a *divorce* or *separation*, if the defendant fails to answer, or to deny the facts charged in the complaint, the court, on application for judgment, will

himself and wife to be put in, or the bill may be taken as confessed against both.(b)

(b) *Bilton v. Bennett and wife*, 4 Sim. 17. *Leavitt v. Cruger and wife*, 1 Paige, 421.

order a reference to take proof of "all the material facts charged in the complaint." (Rule 87.) This includes proof of the marriage and residence of the parties, as well as of the adultery charged. (9 Paige, 589; 3 Edw. 377; 8 How. Pr. 298.)

In a suit to *annul a marriage*, on the ground that the party was *under the age of legal consent*, the plaintiff, to obtain an order of reference, must produce an affidavit, showing that the parties have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. To annul it, on the ground that his consent was obtained by *force* or *fraud*, the plaintiff must show, by affidavit, that there has been no voluntary cohabitation between the parties as husband and wife. To annul it, on the ground that the plaintiff was a *lunatic*, an affidavit must be produced, showing that the lunacy still continues; or, the plaintiff must show, by his affidavit, that the parties have not cohabited as husband and wife, after the plaintiff was restored to his reason. (Rule 87.)

In *partition*, or other suits, affecting real estate, if the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants, or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply, at a special term, for an order of reference, to take proof of plaintiff's title and interest in the premises, and of the several matters set forth in the complaint, or petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances, by which the same are held. (Rule 78, Sup. Court.) And where the premises sought to be partitioned are so situated, that a partition cannot be made without prejudice, &c. the plaintiff, in the affidavit mentioned in Rule 78, may have a further provision inserted in the order of reference, directing the referee to inquire and report whether the whole premises, or any lot, or separate parcel thereof, are so circumstanced that an actual partition cannot be made, and as to liens and incumbrances, and the amounts thereof, &c. (Rule 79.)

Where Service has been Made by Publication.

The Code (§ 246, sub. 3) provides that, in actions where the service of the summons was by publication, the plaintiff, on the defendant's failure to answer, may, in like manner, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the State, must require the plaintiff, or his agent, to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand; and may recover judgment for the amount which he is entitled to recover. Before rendering judgment, the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security, to abide the order of the court, touching the restitution of any estate, or effects, which may be directed by such judgment, to be transferred or delivered; or the restitution of any money that may be collected under, or by virtue of such judgment, in case the defendant, or his representatives, shall apply, and be admitted to defend the action, and shall succeed in such defence.

On an application for judgment, under this subdivision, the papers on which the plaintiff moves, besides the affidavit that no answer or demurrer has been received, and the proof of filing notice of *lis pendens*, &c. consist of the order (or certified copy thereof) of publication, the affidavits of the printer, or his foreman, or principal clerk, of the publication of the summons for the requisite time, proof by affidavit, of the filing of the complaint, before publication, and of the service, by mail, of a copy on the defendant, according to the requirements of the order. (Van Sant. Eq. Pr. 131.) Also, an affidavit, showing whether the defendant is a *non-resident*, or not. If he be not, the order of reference need not contain the clause that the plaintiff, or his agent, be examined; but may be simply that the referee take proof of the allegations of the complaint, and report to the court. (Id. 132.) The affidavits must show that the requirements of the Code have been strictly complied with, or the judgment entered thereon will be void. (*Kendall v. Washburn*, 14 How. Pr. 380; *Hallett v. Righters*, 13 id. 43.) Where judgment was entered against non-resident defendants, by the clerk, upon a service by publication; and it appeared upon the face of the record that the affidavit of the printer did not show six weeks publication of the summons, under, and in *pursuance* of the judge's order; that it did not contain any proof that the summons and complaint were deposited in the post office, directed to the defend-

When a joint answer by husband and wife is put in, it must be

ants, at their place of residence, or that such residence was unknown, or could not, with reasonable diligence, be ascertained; and the affidavit presented to the judge for the order of publication, formed no part of the record; it was held, that the record did not show jurisdiction on its face; and that judgment could not regularly have been entered up, except by the special order of the court, and upon due proof of the service of the summons, in conformity with the judge's order. (*Hallett v. Righters*, *supra*. See, also, *Flynn v. Hudson River R. R. Co.*, 6 How. Pr. 308; S. C., 10 N. Y. Leg. Obs., 153; *Trapp v. N. Y. & Erie R. R. Co.*, 6 How. Pr. 237.) In *Chapman v. Lemon* (11 How. Pr. 235) where an absconding husband was proceeded against, by publication, and the wife, by personal service; it was held, that the reference, as to the husband, was irregular, but was regular, as to the wife; and that she could not take advantage of the irregularity, and have the judgment set aside on that account.

As to the place where a reference shall be executed, a rule of court directs that it shall be executed in the county in which the action is triable, unless the court shall otherwise order. (Rule 33.)

Requiring security to be given by the plaintiff. We have seen that the provision contained in section 243 of the Code, in respect to requiring security to be given by the plaintiff, before judgment, to abide the order of the court touching a restitution of the property, is discretionary with the court. And the rule of court (Rule 34) which renders it obligatory upon the plaintiff when the summons has been served by publication, to comply with that provision, applies to "actions for the recovery of money only," and not to actions of an equitable character. In the latter class of actions it is still discretionary with the court to compel the security to be filed or not, according to circumstances.

Where matters are set up as a counter-claim which really do not constitute one, or constitute a bar to a recovery, an application for judgment should be granted, notwithstanding such counter-claim, by reason of there being no reply, stands admitted on the record as true. (*Van Valen v. Lapham*, 13 How. Pr. 243.)

Entering and perfecting judgment; judgment roll. The judgment must specify clearly the relief granted, or other determination of the action. (Code, § 280.) In a foreclosure suit the judgment must contain the description and particular boundaries of the premises to be sold, so far at least as the same can be ascertained from the mortgage. It is also to contain directions as to the mode of sale, &c. (Rule 73.) If the defendant has not appeared, costs may be taxed immediately, and judgment perfected, the clerk entering the amount of costs in the judgment and signing it. If there has been an appearance, notice of taxation of the costs must be given, or the costs taxed *ex parte*, and notice of re-adjustment given immediately, as in taxing costs in an ordinary litigated suit. (*Van Sant*, Eq. Pr. 135.) Judgment having been given either on the original application and proof of the demand before the court, or after reference and report of the referee, such judgment, if obtained in a county other than that in which the roll is to be filed, must be verified, either by the allowance of the judge or the certificate of the clerk indorsed thereon, "allowed; to be entered in ——— county." The papers read on the application must also be marked by the clerk and certified to the county in which the judgment is to be entered. The papers and judgment are then to be filed in the proper county, and the judgment entered and the roll made up. (*Ibid*.)

Every judgment-roll should contain the evidence within itself that the court had authority to render judgment, and that a judgment has in fact, been rendered by the court. If it be a judgment upon default, besides the summons and complaint, the roll must contain evidence that the summons was served, and that no answer had been received, thus showing that the court had jurisdiction over the defendant, and that he had waived his right to defend. (*Thomas v. Tanner*, 14 How. Pr. 426.) Especially where the summons is served by publication, the record must show jurisdiction on its face, as that is in the nature of a special proceeding, and nothing can be intended in its favor. (*Hallett v. Righters*, 13 id. 43.) Hence, if the judgment-roll do not show affirmatively, that publication was made for the proper time; or that a complaint was first filed; or a summons in the form required was published for the requisite time; or contain proof of service by mail, &c., jurisdiction will not be shown and the judgment is void, (*Ibid*.) and so of any other material omission. (*Titus v. Relyea*, 16 How. Pr. 371; *Kendall v. Washburn*, 14 id. 330; *Buckley v. Buckley*, 6 Ab. 307.)

The Code directs that the clerk shall keep among the records of the court a book for the entry of judgments, to be called the "judgment book," in which the judgment shall be entered. (Code, § 279, 280.) The clerk, on being tendered his fee

sworn to by both. If not so sworn to, and no valid defence is set up

for entering judgment, is bound to enter it, although a fee for a previous service rendered remains unpaid. (*Purdy v. Peters*, 15 Ab. 160; S. C. 23 How. Pr. 328.) His delay, however, to enter a final decree in the judgment book will not affect its validity. (*Butler v. Lee*, 3 Keyes, 70; S. C. 23 How. 251; *Lynch v. Rome Gas Light Co.* 42 Barb. 591.) Where an actual entry of the judgment was delayed over two months, it appearing that the clerk had filed a request to enter a transcript, it was held that this did not invalidate proceedings on execution, nor an order for the examination of the judgment debtor. (*Appleby v. Barry*, 2 Rob. 689.) Where a judgment, contingent on the performance of some condition, is rendered, the entry of such judgment will be irregular if made before the expiration of the time allowed for the performance of the condition. (*Butler v. Niles*, 3 Rob. 644.) The clerk may correct his own error, and conform his entry to the decision which has been made by the court. (*Smith v. Coe*, 7 Rob. 477.)

The Code provides (§ 281) that unless the party shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file, in cases where the complainant has not been answered by any defendant, the following papers, which shall constitute the judgment roll, viz: the summons and complaint, or copies thereof, proof of service, and that no answer has been received; the report, if any, and a copy of the judgment.

It is the duty of the clerk to attach together the papers which constitute the judgment roll. (*Earle v. Barnard*, 22 How. 437; *Heinemann v. Waterbury*, 5 Bosw. 683; *Renoll v. Harris*, 2 Sandf. 641; S. C. 1 Code R. 125.) It is optional with the successful party to furnish the roll or not. (*Heinemann v. Waterbury*, *supra*.) The provisions regulating the making up and the filing of the judgment roll are not imperative, but directory. (*Stimson v. Huggins*, 9 How. Pr. 86; S. C. 16 Barb. 658.) When the defendant fails to answer, proof of the service of the summons is a part of the judgment roll. (*Macomber v. Mayor, &c. of New York*, 17 Ab. 35; *Thomas v. Tanner*, 14 How. Pr. 426.) The opinion of the court is not the decision, and should not be carried at length into the record. (*Thomas v. Tanner*, *supra*.) Omissions in the judgment roll do not invalidate the judgment, as, for example, the omissions to attach the original summons, (*Hoffaring v. Grove*, 42 Barb. 548; S. C. 18 Ab. 14, 142; *Calkins v. Packer*, 21 Barb. 275,) or an order of reference, (Ib.) or the omission of the summons and complaint. (*Martin v. Kanouse*, 2 Ab. 390, 393.) But a paper containing neither process nor pleadings cannot be deemed a judgment-roll, and such a large omission in the record will prevent the judgment from being a lien on the property of the debtor. (*Townshend v. Wesson*, 4 Duer. 342, 354.) As to signature, it was said by Denio, J., in *Decker v. Judson*, (16 N. Y. 439, 450,) in regard to a judgment-roll, "It was not signed by the clerk, a formality which, by the judiciary act, was essential to constitute a judgment record." (Laws of 1847, ch. 280, § 53.) On the other hand it is said (*Macomber v. Mayor, &c. of New York*, 17 Ab. 35, 45,) that the Code seems to dispense with any signing of the roll. In *The Artisans' Bank v. Treadwell*, (34 Barb. 553,) it was held that signing is not indispensable to the validity of the roll. (But see *Townshend v. Wesson*, 4 Duer. 342; *Van Orman v. Phelps*, 9 Barb. 500; *Manning v. Guyon*, 1 Code Rep. 43; *Williams v. Wheeler*, 1 Barb. 48; 2 R. S. (373) 360, § 11.) A substantial compliance with the requirements of a statute, having reference to the object of the legislature in affording information to all who might be affected by the judgment, is all that is necessary. (*Sears v. Burnham*, 17 N. Y. 445; *Appleby v. Barry*, 2 Rob. 639.)

Docketing of Judgment. Section 252 of the Code provides that upon filing a judgment-roll upon a judgment, directing in whole or in part the payment of money, it may be docketed with the clerk of the county where the judgment-roll was filed, and in any other county upon the filing with the clerk thereof a transcript of the original "docket;" and specifies upon what property it shall become a lien, and from what time, and provides for the discharge of the lien, &c., on an appeal being taken from the judgment.

The test of the right to docket a judgment is the right to issue an execution upon it immediately. (*De Agreda v. Mantel*, 1 Ab. 130.) Where the judgment directs the sale of mortgaged premises and the payment of a deficiency, such deficiency cannot be known until after the sale and report thereon. Hence the docketing of the judgment cannot take place until after that time. (Ibid; *Cobb v. Thornton*, 8 How. Pr. 66.) It seems a substantial compliance with the requirements in regard to docketing judgments is all that is absolutely necessary. (*Appleby v. Barry*, 2 Rob. 689; *Sears v. Burnham*, 17 N. Y. 445; S. C. 2 Bradf. 394; *Stimson v. Huggins*, 9 How. Pr. 86; S. C. 16 Barb. 658.) Where the judgment was against several

therein, it will, on motion, be taken off the files for irregularity, and the bill be taken as confessed. (c)

And although an answer on oath is waived, the answer must be actually signed by the defendant, or it will be taken off the file for irregularity and the bill be taken as confessed, if no valid defence is set up therein. (d)

The complainant, by amending his bill, waives his process of contempt; (e) but he will be allowed, upon motion or petition, and giving personal notice to defendant, to amend his bill without its operating as *a discharge of such contempt, and to commence *de novo*, where [*97] the defendant, upon being brought to the bar of the court for his contempt, refuses to put in his answer. (f)

Where defendant is taken upon an attachment. If an attachment for not answering is served, and the defendant gives security for his appearance at the return day of the attachment, as required by law, if he does not comply with the condition of the bond, the complainant may have a special order that his bill be taken as confessed. Or if the defendant appears personally, or is brought into court by the sheriff, on the return of the attachment, he must put in his answer and pay the costs of his contempt instanter, or within such time as the court shall appoint, or the complainant may have an order that the bill be taken as confessed. (g)

Where the defendant's appearance is entered by the court, under the

(c) *New York Chemical Co. v. Flowers et ux.* 6 id. 654.

(d) *Denison v. Bassford*, 7 id. 370.

(f) *Golds. Doct. of Eq.* 136.

(e) *Gray v. Campbell*, 1 Russ. & My. 323.

(g) *Rules* 27, 28.

defendants, settling the amount which each should contribute, but further adjudging that in case of insolvency of any of the defendants the plaintiff be allowed to collect the deficiency or deficiencies against the other defendant or defendants, not to exceed a certain sum. it was held that the judgment might be docketed for the full amount of the ultimate contingent liability. (*Rankin v. Sacchi*, 16 Ab. 368.) Where a judgment was docketed correctly in all respects, except the initial of the defendant's middle name, and the docket was afterwards corrected, on motion it was held that the judgment took priority as a lien from the original docketing, as against a subsequent judgment obtained before the correction. (*Geller v. Hoyt*, 7 How. Pr. 265.) The omission of the middle letter of a party's name (in an assignment of a judgment) is an immaterial variance, the law recognizing but one christian name. (*Aylesworth v. Brown*, 10 Barb. 167.)

All judgments filed and docketed by a clerk out of office hours, although some may be entered before others, take effect and become liens equally at the next office hour after such docketing. (*France v. Hamilton*, 26 How. 180; *Wardell v. Mason*, 10 Wend. 573; *Laws of 1860*, ch. 276; 5 R. S. Edm. ed. 285, § 25.) The date and the order of the lien is a question of time, depending on the day and the hour of docketing the judgment. (*Blydenburgh v. Northrop*, 13 How. Pr. 289.) Judgments against the estate of a deceased person take precedence in the order of their date, and not in the order of their docketing. (*Hamed's Case*, 4 Ab. 270.) The enactments prescribing a docketing of the judgment with the county clerk, in order to make it a lien on real estate, have not dispensed with the docket by the clerk of the court rendering the judgment, nor modified its legal consequences in relation to the distribution of the estate of a deceased person. (*Ibid.*)

authority of the statute before referred to, (*h*) the complainant may proceed, under the 24th rule, to take the bill as confessed for want of an answer.

The same proceedings, substantially, are to be had to take the bill as confessed for want of an answer, as for want of an appearance.

When the defendant puts in his answer without discharging the costs of his contempt, and the complainant files his replication, he thereby waives the process of contempt. (*i*)

Where the defendant has appeared to the complainant's bill, and proceedings are had under a decree taking the bill as confessed for want of an answer, in a foreclosure suit, the defendant, notwithstanding he be in contempt, ought to be regularly served with process to attend the master. The court punishes the defendant's default in refusing to answer, by giving to the complainant the benefit of a decree upon the bill as confessed; but there the advantage stops. And when the decree is once pronounced, the subsequent duty of the court and its officers is to execute that decree in the ordinary way. Therefore an absolute order in the first instance, to confirm the master's report made under a decree taken *pro confesso* for want of an answer, is irregular. (*k*)

If an answer is put in which is considered *insufficient* by the complainant, he may except to it for that reason. And if the exceptions are submitted to by the defendant, or a part are submitted to and the rest are abandoned, or are disallowed on reference, the complainant may [*98] *have an order of course that the defendant put in a further answer within twenty days, and pay the costs of the exceptions, or that the bill be taken as confessed. (*l*)

Where the complainant *amends his bill*, so as to require an answer to the amendments, as well as to the exceptions, the defendant must put in a further answer and pay the costs within the time required by the rules; or the complainant, upon filing an affidavit of such default, may have an order of course to take the bill as confessed. (*m*)

By the practice in England, if the order to amend the bill requires a further answer to the amendments, the complainant takes out a subpoena for such further answer, and if the defendant does not put in his further answer within the time allowed by the rules of the court for that purpose, the whole bill as amended may be taken as confessed, for want of a full and perfect answer thereto. (*n*)

The practice of this court was settled by the chancellor, as follows, in the case of *The Trust and Fire Ins. Co. v. Jenkins*. (*o*) Upon an

(*h*) 2 R. S. 103, § 79.
(*i*) Rule 58.

(*j*) Golds. Doct. of Eq. 137.
(*m*) Rule 61.

(*k*) King v. Bryant, 3 My. & Craig, 191.
(*n*) 1 Dan. 509.

(*o*) 8 Paige, 594.

amendment of the bill of course after answer, if the complainant does not intend to waive a further answer to the amendments, he may enter the usual order, of course, in conformity with the principles of the 24th rule, that the defendant answer the amendments in forty days after service of a copy thereof, or that the bill as amended be taken as confessed; or that an attachment may issue, as the case may be. But where an amendment is allowed by a special order of the court, if an answer to the amendments is required, the order should contain the usual directions requiring the defendant to answer, or that the bill as amended be taken as confessed. (5)

(5) JUDGMENT BY CONSENT, UPON THE OFFER OF A PARTY.

Section 385 of the Code, provides that the defendant may at any time before the trial or verdict, serve upon the plaintiff an offer in writing, to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and gives notice thereof in writing, within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

In case the defendant sets up a counter-claim in his answer, to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counter-claim to the amount specified with costs. If the defendant accepts the offer and gives notice thereof in writing, within ten days, he may enter judgment as above for the amount specified, if the offer entitles him to judgment, or the amount specified in the offer shall be allowed him on the trial of the action. If notice of acceptance is not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the defendant fails to recover a more favorable judgment, or to establish his counter-claim for a greater amount than is specified in the offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer. (Ibid.)

The offer of judgment under this section, may be made in every class of actions, equitable, as well as legal, and is not confined to actions against a sole defendant. (*Bridenbecker v. Mason*, 10 How. Pr. 203; *Hill v. Northrop*, 9 id. 525.) Like the old decree by consent, it may be made by the attorney, instead of the party; and if the attorney acts without authority, his acts are nevertheless valid, and the party has his remedy against him. (*Blodgett v. Conklin*, 9 How. Pr. 442; *Stern v. Bentley*, 3 id. 331; S. C. 1 Code Rep. 109.) If the defendant has appeared by attorney, the offer should be made and subscribed by the attorney; and if in such a case, the offer is made by the defendant in person, judgment should not be entered upon it without leave of the court. (*Webb v. Dill*, 18 Ab. 264.)

The offer, under this section of the Code, is a substitute in common law actions, for the tender after suit brought, provided by statute. That, however, was confined to actions at law, and had no application to suits in equity. Hence, in an action to foreclose a mortgage, the defendant cannot tender the amount due, and then pay the money into court and plead payment. But he must make it in the form of an offer under the Code, to the plaintiff, to take judgment with costs. (*Thurston v. Marsh*, 5 Ab. 389; *Van Sant. Eq. Pr.* 145.) Nor will such a tender, or even an offer to take judgment, defeat the plaintiff's right to an extra allowance of costs in such cases; the costs in an equity suit being in the discretion of the court. (*The Connecticut River Banking Company v. Voorhies*, 3 Ab. 174; *New York Fire Insurance Company v. Burrell*, 9 How. Pr. 398. See *McQuade v. New York & Erie Railroad Company*, 11 id. 434.)

The offer should be distinct in its terms, and so plain that there can be no doubtful uncertainty, or misunderstanding about it. (*Post v. New York Central Railroad Company*, 12 How. Pr. 552.) It will be of no avail unless it expressly states that

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*CHAPTER VI.

THE DEFENCE TO A SUIT.

Sect. 1. PROCEEDINGS BY DEFENDANT PREVIOUS TO PUTTING IN HIS DEFENCE.

2. THE DIFFERENT SORTS OF DEFENCE.
3. DEMURRER.
4. PLEA.
5. ANSWER.
6. DISCLAIMER.
7. JOINDER OF SEVERAL DEFENCES

SECTION I.

PROCEEDINGS BY DEFENDANT PREVIOUS TO PUTTING IN HIS DEFENCE.

THUS far the attention of the reader has been principally directed to the case on the part of the complainant; the method of bringing

judgment for the sum offered may be taken with costs. (*Ranney v. Russell*, 3 Duer 689.) There must be no condition attached to it, and nothing left to be ascertained or determined before the entry of judgment. (*Pinckney v. Childs*, 7 Bosw. 660; S. C. 15 Ab. 137, (n); *Hanna v. Dexter*, id. 136.) The offer may be for the full sum demanded in the summons and complaint. (*Ross v. Bridge*, 24 How. Pr. 163; S. C. 15 Ab. 150.) Though an offer does not in terms specify the sum for which judgment is to be entered, yet, if it makes the amount easily ascertainable by the clerk, by reference to the pleadings, that is sufficient. (*Burnett v. Westfall*, 15 How. Pr. 420, 425. n. 2.)

One partner cannot, contrary to the known wishes and against the explicit objections of his co-partner, make an offer of judgment, in favor of a partnership creditor, in the name of the firm, which will bind his partner, or the partnership property. (*Everson v. Gehrman*, 10 How. Pr. 301; S. C. 1 Ab. 167; *Binney v. LeGal*, 19 Barb. 592; S. C. 1 Ab. 283.) In *Oswell v. McLaughlin*, (10 Leg. Obs. 316,) however, where judgment was entered upon the offer of one partner of a firm in failing circumstances, in favor of a *bona fide* creditor of the partnership, the court refused to set it aside on motion of the other partner, who was not cognizant of, and did not consent to the making of the offer. Where an attorney appears for both, and there is no contrivance in employing him to appear, his appearance on the record may make the judgment regular. (*Binney v. Le Gal*, *supra*; *Bridenbecker v. Mason*, 16 How. Pr. 203.)

In an action against several defendants on a *joint demand*, a defendant served with process may bind his co-defendants who are not served, by an offer of judgment; and if the plaintiff accept such offer, he may enter judgment against all the defendants, as joint debtors, and enforce it against the joint property of all, and the separate property of the defendant who made the offer. (*Emery v. Emery*, 9 How. Pr. 130; *La Forge v. Chilson*, 3 Sandf. 752; S. C. 1 Code R., N. S. 159.) And if, in such action, some of the defendants make no defence, and the rest serve an offer, the plaintiff

it before the court; and the means for compelling the defendant to submit himself to its jurisdiction, or of enabling the complainant to proceed with the suit, without his appearing therein. We are now to consider the course of proceeding on the part of the defendant who is willing to submit himself to the authority of the court and to abide its decision.

Before proceeding, however, to a consideration of the several kinds of defence which may be resorted to by the defendant, it will be necessary to notice certain preliminary steps which may be taken by him before pleading.

Employing a solicitor.] The first step usually taken by a defendant who intends to defend the suit, if he is not himself a solicitor, is, after he has been served with a subpoena, to employ a solicitor to appear for him. A special authority is not necessary to enable a solicitor to appear in the cause. He may do so under a general authority to act as *solicitor for his client. (a) A solicitor, however, ought not to [*100]

(a) *Wright v. Castle*, 3 Mer. 12.

will be subjected to costs if he proceeds and fails to recover more than the amount offered. (*La Forge v. Chilson*, *supra*.) But in *Blodgett v. Conklin*, (9 How. Pr. 442.) where two defendants were regularly served with the summons, and one of them, without the authority of the other, authorized an attorney to appear for both, who served an offer, which the plaintiff accepted, and took judgment, the other defendant was permitted to come in and defend; the judgment, in the meantime, being allowed to stand as security. (See also *Yates v. Honanson*, 7 Rob. 12.) In an action on a *joint and several obligation*, against several defendants, the plaintiff is not bound, at the peril of being subjected to costs, to accept an offer of judgment from a part of the defendants only. (*Griffiths v. De Forest*, 25 How. 336; S. C. 16 Ab. 292.)

It seems that an offer may be made before service of the complaint; and any amendment the plaintiff may see fit to make cannot deprive the defendant of his offer, if the plaintiff fails to recover a more favorable judgment than that offered. (*Kilts v. Seeber*, 10 How. Pr. 270.) The offer should be served in time to give the plaintiff ten days before the trial to elect whether he will accept or proceed to trial. If it is served so late that the cause is reached and tried before the expiration of the ten days, the offer will not be available. (*Pomeroy v. Hulin*, 7 How. Pr. 161; *Walker v. Johnson*, 8 id. 240.)

The judgment recovered is not "more favorable" when the sum offered, with interest to the date of the judgment, exceeds the amount recovered, in which case the defendant is entitled to costs. (*Tilman v. Keane*, 1 Ab., N. S. 23.) In determining whether a judgment is more favorable to the plaintiff, he is entitled to the benefit of any counter claims which the defendant may interpose subsequent to the offer, and which are extinguished by the judgment. (*Tompkins v. Ives*, 36 N. Y. 75; S. C. 1 Trans. App. 266; 3 Ab., N. S. 267; *Turner v. Horringer*, 31 How. 66; *Ruggles v. Fogg*, 7 How. Pr. 324; *Fieldings v. Mills*, 2 Bosw. 489. And see *Schneider v. Jacobi*, 1 Duer. 694; S. C. 11 Leg. Obs. 220; *Kilts v. Seeber*, 10 How. 270; *Budd v. Jackson*, 26 id. 398.)

Where the plaintiff fails to obtain a more favorable judgment than the offer made by the defendant, he is not entitled to costs, whether disbursements or otherwise, after the offer made by the defendant; but is entitled to costs up to the time the offer was made. The defendant, in such a case, is entitled to costs from the time of his offer. (*Burnett v. Westfall*, 15 How. Pr. 430. See also *Keese v. Wyman*, 8 id. 88.)

A judgment may be entered upon the written offer of the defendant, without the direction of a judge of the court. (*Hill v. Northrop*, 9 How. Pr. 525; *Yates v. Loranston*, 7 Rob. 12.)

take it upon himself to appear for a defendant without some authority; and where one, without any instruction, had caused an appearance to be entered for an infant defendant, the appearance was ordered to be set aside, and the solicitor to pay the costs. (*b*)

The practice upon this point is thus laid down by the chancellor, in a case recently before him where the defendants denied the authority of the solicitor to appear for them: "As a general rule when a suit is commenced or defended, or any proceeding is had therein by a solicitor of the court, it is not the practice to inquire into his authority to appear for his supposed client. But if the party for whom he appears or assumes to act denies his authority, and applies to the court for relief before the adverse party has acquired any right or suffered any prejudice in consequence of the acts of the solicitor, the court may correct the proceeding and compel the solicitor to pay the costs to which the parties have been subjected. If the adverse party has acquired rights or been subjected to costs by proceedings in the name of a party who afterwards denies the authority of the solicitor or attorney, the courts are in the habit of permitting the proceedings to stand, where the solicitor or attorney is a responsible person; leaving the party injured by such unauthorized proceedings in his name, to seek his redress against such solicitor or attorney, by a summary application to the court, or otherwise." (*c*) A defendant may appear in person, however, if he chooses.

Motion to deliver copy of bill.] (1) After the defendant has caused
(*b*) *Richards v. Dudley*, 2 Dan. 1. (*c*) *American Ins. Co. v. Oakley*, 6 Paige, 496.

(1) DEMANDING COPY COMPLAINT. SEE ANTE CHAP. I, SEC. VII, NOTE 24.

Demanding Copy of Account.

The Code (§ 158) provides that it shall not be necessary for a party to set forth, in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true; or be precluded from giving evidence thereof. And the court, or a judge thereof, or a county judge, may order a further account when the one delivered is defective.

It has been held that in an equitable action, an order for a further account should not require more than the original order; and in so far as it does, it will be modified, on appeal. (*Mason v. Ring*, 10 Bosw. 598.) An order for a further account should specify the particulars in reference to which a further specification is necessary. (*Connor v. Hutchinson*, 17 Cal. 280; *Kellogg v. Paine*, 8 How. Pr. 329.) A further account may be enforced by motion, after all the pleadings are put in; and, like the old bill of particulars, may be called for at any time before trial. (*Yates v. Bigelow*, 9 How. Pr. 186; *Connor v. Hutchinson*, 17 Cal. 280.) Where an account is furnished, in pursuance of an order, which account is adjudged to be defective, the second order, requiring a more particular statement of the account, should contain the points in respect to which a further specification is required. This is analogous to the former practice. (*Kellogg v. Paine*, 8 How. Pr. 329.) It seems that it is the better practice for a party who intends to preclude his adversary from proving an account, on the ground that he has not complied with a demand, or an order for the

his appearance to be entered, he may have an order of course that the complainant deliver a copy of the bill in twenty days, or that the suit be dismissed; and if such copy is not delivered within twenty days after service of notice of such order, or within such further time as may be allowed, the defendant, on filing an affidavit of the service of such notice, and that no copy of the bill has been served, may have a decree of course, dismissing the suit, with costs, for want of prosecution. (d)

Motion to take bill from files.] So the defendant may move that the bill be taken off the files of the court if it has been filed in the name of a person in a state of mental imbecility. This motion should be made before answer; as the putting in an answer to it may be considered as admitting the complainant's competency. But it seems that a suit properly instituted and conducted cannot be dismissed on account of imbecility subsequently arising. (e)

**Excepting to bill for scandal or impertinence.*] If the bill [*101] contains any scandalous or impertinent matter, the defendant may,

(d) Rule 29.

(e) *Wartnaby v. Wartnaby*, Jacob, 377.

particulars of such account, to apply for an order to that effect, before the trial, in order that the question may be settled before the trial comes on. (Ib.) A party claiming on an account stated, who refuses to furnish the items of his demand, pursuant to section 158 of the Code, should be precluded from giving evidence of such items, further than may be necessary to prove the settlement of the sum due. (*Goings v. Patten*, 1 Daly, 168; S. C. 17 Abb. 339.) The items of the account furnished must be set forth with as much particularity as the nature of the case admits of. (*Bagley's Pr.* 204; *Connor v. Hutchinson*, 17 Cal. 280; *Kellogg v. Paine*, 8 How. Pr. 329; *Brown v. Williams*, 4 Wend. 368.) But a party is not bound to furnish particulars of set-offs with which he volunteers to credit the opposite party. (*Williams v. Shaw*, 4 Ab. Pr. 209; *Giles v. Betz*, 15 id. 285.)

In *California*, within five days after a demand thereof in writing, a copy of the account must be delivered to the adverse party, or evidence thereof cannot be given; and if too general or defective, a further account may be ordered. (Pr. Act, § 56.)

In *Indiana*, accounts upon which the complaint is founded, or copies thereof must be filed with the complaint. (2 R. S. 44, sec. 78; 13 Ind. 58; 18 id. 411); or the complaint must show an excuse for the omission. (19 Ind. 87.) But, setting forth the account in the complaint *verbatim*, is equivalent to filing a copy thereof with the complaint. (6 Ind. 309.)

In *Ohio*, if the action be founded on an account, a copy thereof must be attached to, and filed with the complaint. If not so attached and filed, the reason thereof must be shown in the pleading. (Seney's Code, p. 155, sec. 117.)

In *Minnesota*, it is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but he must deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account verified by his own oath, or that of his agent or attorney, to the fact that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further or more particular bill. (Civil Code, sec. 78; Pub. Stat. of 1858, p. 542, § 74.)

The Code of *Wisconsin* contains a similar provision. (Code, § 64.) The Code of *Kansas* directs that in an action upon an account, &c., for the unconditional payment of money only, it shall be sufficient for the plaintiff to give a copy of the account with all credits, and to state that there is due to him, on such account, from the defendant, a specified sum, which he claims, with interest. (Code, § 132.)

Bill of Particulars.

The court may, in all cases, order a bill of particulars of the claim of either.

before putting in his defence, take exceptions to the bill; to the end that the scandalous or impertinent matter may be expunged. (2)

(2) The Code makes no provision for excepting to a complaint for scandal or impertinence.

Striking Out Irrelevant or Redundant Matter.

Section 160 of the Code provides that if irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved. The same provision is contained in the Civil Code of *Kentucky*, (sec. 147); in the *California Practice Act*, (§ 57); in the Code of *Nevada*, (§ 57); of *Idaho*, (§ 57); of *Arizona*, (§ 57); of *Oregon*, (§ 84); See also *Larco v. Casanovo*, (30 Cal. 560); *Boles v. Cohen*, 15 id. 150; *Hamp. Manuf. Bank v. Billings*, (17 Pick. 87.)

Irrelevant and redundant matter, as the term is here used, means what was usually understood as *impertinence*, in an equity pleading. (*Carpenter v. West*, 5 How. Pr. 52.)

The terms irrelevant and redundant are by no means equivalent terms. Although matter which is irrelevant is also redundant, yet the converse is by no means true. A needless repetition of material averments is redundancy, although the facts averred, so far from being irrelevant, may constitute the whole cause of action. (Per Duer. J., in *Bowman v. Sheldon*, 5 Sandf. 660, S. C. 10 Leg. Obs. 339.) Any matter in a pleading, is irrelevant, if it have no bearing on the question in dispute, does not affect the subject matter of the controversy, and can in no way assist, or affect the decision of the court. (*Fabricotti v. Launitz*, 3 Sandf. 743; S. C. 1 Code R., N. S. 121; *Stafford v. Mayor, &c.*, of *Albany*, 8 John. 1; *Van Rensselaer v. Brice*, 4 Paige, 177; *Perrine v. Farr*, 2 Zab. R. 356; *Lee Bank v. Kitching*, 7 Bosw. 664; S. C. 11 Ab. 435; *Cahill v. Palmer*, 17 Ab. 196.) It cannot be stricken out as irrelevant, however, if it in any way affects the question of damages, (*Root v. Foster*, 9 How. Pr. 37); or costs. (*Van Rensselaer v. Brice*, 4 Paige, 177; *Desplaces v. Goris*, 1 Edw. 350); or can, in any aspect of the case, be material. (*Cahill v. Palmer*, 17 Ab. 196.) To determine whether averments are material, when they are sought to be struck out as irrelevant, the true test is to inquire whether or not such averments in any way tend to establish, or assist in constituting, a cause of action or defence; and if it can be shown that they do so, in any way, they cannot be stricken out for that cause. (*Ingersoll v. Ingersoll*, 1 Code R. 102; *Averill v. Taylor*, 5 How. Pr. 476; S. C. 1 Code Rep., N. S. 213; *Minor v. Terry*, 6 How. Pr. 208; S. C. 1 Code Rep., N. S. 384.) The best rule to ascertain whether matter be impertinent, or not, is to see whether the subject of the allegation can be put in issue, or be given in evidence between the parties. (*Woods v. Morrell*, 1 John. Ch. 103; *Rensselaer & Wash. Plank Road Co. v. Wetsell*, 6 How. Pr. 68.) Whatever is material is not impertinent. (*Bull v. Williams, McCle. and Young*, 334.) If a fact is stated in a pleading, which, of itself, constitutes a cause of action, or a defence to an action, the intent to rely upon it will be inferred. No allegation to that effect is required in a pleading. (*Bridge v. Payson*, 5 Sandf. 210, 216.)

A judge, on the trial, cannot strike out any part of the pleadings. Every objection to them must be made before trial. (*Smith v. Countryman*, 30 N. Y. 655.) Nor will a pleading be dismissed, on the trial, because it contains matters which might have been stricken out as irrelevant. (*Simmons v. Eldridge*, 29 How. 309; S. C. 19 Ab. 296.)

All matters which pertain to pretence and charge, which prevailed so extensively in chancery pleading, prior to the Code, will be stricken out, on motion, as irrelevant. (*Clark v. Harwood*, 8 How. Pr. 470.)

Tedious and useless recitals, copies of receipts, deeds, &c., and unnecessary prolixity of statement, are redundant matters, and will be struck out. (*Scudder v. Bogert*, 1 Edw. 372.) A variety of counts, in a complaint, upon the same cause of action is no longer allowable. The theory of the present system is, that the party pleading should know, before hand, what are the facts upon which he will rely; and that the pleading shall contain those facts, stated plainly and concisely, without unnecessary repetition. Whatever more a pleading contains, is unauthorized, and may be stricken out. (*Churchill v. Churchill*, 9 How. Pr. 552; *Stockbridge Iron Co. v. Mellen*, 5 id. 439.) But the better practice is said to be a motion to strike out all the objectionable matter not essential to a single cause of action, or to compel the plaintiff to elect which single cause of action he will retain. (*Van Sant. Eq. Pr. 104*; *Stockbridge Iron Co. v. Mellen*, *supra*; *Sipperly v. Troy & Boston R. R. Co.* 9 How. Pr. 83; *Ford v. Matrice*, 14 id. 91; *Molony v. Dows*, 15 id. 261.)

Exceptions to a bill for scandal or impertinence are to be taken in the same manner as exceptions to an answer for insufficiency; and may be submitted to in like manner and within the same time. If

It is no sufficient answer to a motion to strike out irrelevant or redundant matter from a complaint, that such matter was inserted solely for the purpose of enabling the plaintiff to obtain an injunction. (*Putnam v. Putnam*, 2 Code R. 64.)

The rule in striking out redundant matter is, that unless it is clear that no evidence can properly be received under the allegations objected to, they will be retained until the trial. (*Follett v. Jewitt*, 11 Leg. Obs. 193; 2 Liv. Law Mag. 189.)

In an action to restrain the defendant from infringing the common law rights of the plaintiffs in a picture, by the sale of lithographic reproductions thereof, an assertion in the complaint that in another action the plaintiffs had asserted and vindicated claims here set up is not irrelevant or redundant, it being substantially an allegation that they have not acquiesced in any invasion of their rights, and, in that way, dedicated the picture to public use. (*Oertel v. Jacoby*, 42 How. Pr. 218.) So in an action to charge defendants with an individual liability for the debt of a corporation of which they were trustees, an allegation that they were also stockholders is not irrelevant. (*Sterne v. Herman*, 11 Ab., N. S. 376.)

The court will not reform or redraw a pleading defective for redundancy. The matter objected to must be pointed out by the party aggrieved in his notice of motion, in order that the court may at once see what it is. (*Bryant v. Bryant*, 2 Rob. 612; *Benedict v. Duke*, 6 How. Pr. 352; *Blake v. Eldred*, 18 id. 240.)

Motions of this nature are not to be encouraged, unless it is manifest to the court that it would be to the prejudice of the party answering to suffer the objectionable matter to remain. (*Molony v. Dows*, 15 How. Pr. 261; S. C. 2 Hilt. 247.) Unless the opposite party is clearly aggrieved, or the record is manifestly encumbered, the matters will be allowed to remain. (*Clark v. Harwood*, 8 How. Pr. 470; *White v. Kidd*, 4 id. 68; S. C. 2 Code Rep. 47; *Hynds v. Griswold*, 4 How. Pr. 69; S. C. 2 Code R. 47; *Harlow v. Hamilton*, 6 How. Pr. 475; *Brockelman v. Brandt*, 10 Ab. 141. But see to the contrary, *Carpenter v. West*, 5 How. Pr. 53; *Isaac v. Velloman*, 3 Ab. 464; *Rens. & Wash. Plank Road Co. v. Wetzel*, 6 How. Pr. 63; S. C. 1 Code Rep., N. S. 404; *Stewart v. Bouton*, 6 How. 71.)

It is well settled that an entire pleading cannot be stricken out, for the reason that then the parties would be in court without the power of proceeding in the action until special relief should be granted. (*Benedict v. Duke*, 6 How. Pr. 352; *Nichols v. Jones*, id. 355; *Hull v. Smith*, 8 id. 149; S. C. 1 Duer. 649; *Howell v. Knickerbocker Life Ins. Co.* 24 How. 475; *Blake v. Eldred*, 18 id. 240.)

Surplusage is matter altogether superfluous and useless, and which may be rejected by the court, and the pleading stand as if it were stricken out or had never been inserted. (Gould's Pl. 143.) So a false construction in law upon the terms of a contract will be regarded as surplusage, and on motion will be stricken out. (*Stoddard v. Treadwell*, 26 Cal. 294; or superfluous matter, when inserted by itself, (1 Van Sant. 311; *Boles v. Cohen*, 15 Cal. 150); or allegations which are absurd, or the truth of which is impossible. (*Sacramento Co. v. Bird*, 31 Cal. 66.) Any matter which may tend to limit or qualify the degree of certainty is redundant matter or surplusage; for example, matter of mere evidence; legal conclusions; things within judicial notice; matter coming more properly from the other side, or matter necessarily implied. (Steph. Pl. 423.) Though, in its more strict and confined meaning, redundancy imports matter wholly foreign and irrelevant. (Id. 422; *Barstow v. Wright*, Doug. 667; 1 Saund. 233; *Yates v. Carlisle*, 1 Black. Rep. 270; *Lord v. Houston*, 11 East, 62; *Cobbett v. Cochrane*, 8 Bing. 17; *Palmer v. Gooden*, 8 M. & W. 890; *Stevens v. Bigelow*, 12 Mass. 438; *Hampshire Manuf. Bank v. Billings*, 17 Pick. 67.)

A material allegation cannot be stricken out because the pleader also claims relief which cannot be granted, (*Woodgate v. Fleet*, 9 Ab. 222); nor where the information required was obtainable by a demand of particulars. (*Cockcroft v. Atlantic Mut. Ins. Co.* 9 Bosw. 681.) If the immaterial matter constitute part of a material averment, so that the whole cannot be stricken out without destroying the right of action or defence of the party, it cannot be rejected as surplusage, but may be traversed in the pleading, and must be proved as laid, though the averment be more particular than need be. The true rule is, that wherever the whole allegation can be stricken out without affecting the legal right set up by the party, it is impertinent, and may be rejected as surplusage. (*United States v. Burnham*, 1 Mass. 57; *Wyman v. Fowler*, 3 McLean 467.)

they are not submitted to, the defendant must refer them in the same manner, or they will be considered as abandoned. (f)

(f) Rule 53.

The following tests will determine whether particular allegations in a pleading are unnecessary: 1. Can the allegation be stricken from the pleading without leaving it insufficient? (*Whitwell v. Thomas*, 9 Cal. 499. 2. Can it be stricken from the pleading without impairing any portion of the plaintiff's cause of action? (*Green v. Palmer*, 15 Cal. 414.) 3. Can it be stricken from the pleading without injury to the plaintiff or benefit to the defendant, however remote the injury or benefit may be? (*Van Santv. 319*; 1 *Eslee Pr. 138*.)

The motion to strike out matter from a pleading must be made within twenty days from the service of the pleading, and before it has been answered or demurred to. (*New York Ice Co. v. North Western Ins. Co.* 12 Ab. 74; S. C. 21 How. 234.) It must also be made before the cause has been noticed for trial. (*Kellogg v. Baker*, 15 Ab. 287.) A party, by noticing the cause for trial, loses the right of afterwards moving to have redundant matter stricken from his adversary's pleading. (*Esmond v. Van Benschoten*, 5 How. Pr. 44.) If notice of motion is served to strike out parts of the complaint, the defendant will waive his motion if he serves his answer before such motion has been heard. (*Goch v. Marsh*, 8 How. Pr. 439.) Where the time for answering and for the defendant to make such application as he should be advised was extended by stipulation, and notice of a motion to strike out portions of the complaint was served the same day, it was held that such motion was embraced in the terms of the stipulation, and was therefore in season equally as if the original period for answering had terminated on the same day. (*Lackey v. Vanderbilt*, 10 How. Pr. 155.)

It is no objection to a motion to strike out of a pleading irrelevant matter that the moving party does not show affirmatively that he noticed his motion within twenty days from the service of the pleading. If the notice was not served in time, the adverse party, desiring the benefit of that fact, must show it in his defence. (*Barber v. Bennett*, 4 Sandf. 705. *Contra*, per Cady, J., in *Rogers v. Rathbone*, 6 How. Pr. 67; S. C. 1 Code Rep., N. S. 404.)

Indefiniteness, or uncertainty.—The Code (§ 160) provides that when the allegations of a pleading are so *indefinite* or *uncertain* that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

If a pleading is sought to be made more definite and certain, or to strike from it any matter under this section, the remedy is not by demurrer; it should be done by motion. (*Martin v. Kanouse*, 11 How. Pr. 567; S. C. 2 Ab. 327; *Graham v. Cammon*, 5 Duer. 697; S. C. 13 How. Pr. 475; *Nichols v. Jones*, id. 358; *Bement v. Wisner*, 1 Code Rep., N. S. 143; *Howell v. Fraser*, id. 270; S. C. 6 How. Pr. 221; *Seeley v. Engell*, 13 N. Y. 542; *Bank of British North America v. Suydam*, 6 How. Pr. 379; S. C. 1 Code Rep., N. S. 325; *Fry v. Bennett*, id. 238, 247; S. C. 5 Sandf. 54; 9 Leg. Obs. 330; 6 N. Y. 209.) A motion under this section, to make a pleading more definite and certain, is a substitute for a special demurrer. (*Kellogg v. Baker*, 15 Ab. 286.) Where the defendant has a right to be informed by the complaint of particular facts in regard to matters mentioned in it, his remedy is by motion under this section. A demurrer will not reach such a defect, the complaint being good in substance. (*Spies v. Accessory Transit Co.* 5 Duer. 662; *Smith v. Greenin*, 2 Sandf. 702.) So when a special damage is alleged, and the allegations are not sufficiently specific, the defendant cannot raise the question on demurrer, but must proceed under this section by motion. (*Hewit v. Mason*, 24 How. 366; *Linden v. Graham*, 1 Duer. 670; S. C. 11 Leg. Obs. 185; *Lee Bank v. Kitching*, 11 Ab. 435; S. C. 7 Bosw. 664.) The question on demurrer is, whether a cause of action is set forth in the pleadings, and not whether it contains redundant matter. (*Hammond v. Hudson River Iron and Machine Co.* 20 Barb. 386; *Chesbrough v. N. Y. & Erie R. Co.* 26 id. 9; *Meyer v. Van Collem*, 28 id. 230; S. C. 7 Ab. 222.) If the time when an event happened is material to constitute a cause of action, it should undoubtedly be stated. The fact without the time would be insufficient to constitute the cause of action. But if the time is immaterial, a demurrer will not lie for omitting to state it. The proper remedy is to apply to the court to have the pleading made more definite and certain. (*People ex rel. Crane v. Ryder*, 12 N. Y. 433, 439; *Barnes v. Mattison*, 5 id. 378.) In *Blanchard v. Strait*, (8 How. Pr. 83,) a complaint which omitted to state the time when goods were sold and delivered was held to be manifestly indefinite and uncertain.

If the defendant designs to except to the bill, he must do so before putting in his answer, or submitting to answer by obtaining an order

It is sometimes of great importance that the place where an act was done, or was to be done, should be definitely stated in a pleading. Thus, where a contract which, by the laws of this state, was void, was sought to be enforced here, it was held that the plaintiff must aver and prove, first, the place where the contract was made, and second, that by the laws of that place it was authorized and valid. (*Thatcher v. Morris*, 11 N. Y. 437, 440.) And it is a general rule of pleading that if the matters alleged are local in their nature, the allegation of place and proof of it is material, and the substance of the issue. (*Vermilya v. Beatty*, 6 Barb. 430; Steph. Pl. 288; *Beach v. Bay State Steamboat Co.* 18 How. Pr. 335; S. C. 30 Barb. 433; 10 Ab. 71.) The authorities and precedents are to the point that if a contract has been made, by which one party agrees to sell and deliver at a place specified, and the other agrees to receive and pay, it is absolutely indispensable to a good complaint that an averment be made by the purchaser of a readiness and willingness to receive and pay at the specified place, in case he sues for a non-delivery. (*Clarke v. Dales*, 20 Barb. 65.)

If the matters in controversy are better known to the opposite party than to the pleader, less definiteness and certainty will be required. (Steph. Pl. 370.) Thus, where the complaint set forth the whole of an assignment, and the circumstances under which it was made, and then alleged that it was fraudulent and void on its face, it was held to be sufficiently definite and certain, and that no allegation need be added giving a reason why it was fraudulent and void, as the defendants were well aware of all the facts. (*Hastings v. Thurston*, 18 How. Pr. 530; S. C. 10 Ab. 418.) In *Sloman v. Schmidt*, (8 Ab. 5,) the allegations of the complaint were that on a day named the defendants were the agents of the plaintiff; that as such they received from a person named certain sums of money, amounting to a given sum, and that payment had been demanded and refused, it was held sufficiently definite and certain, and that if the defendants wished further information as to the items of account, their remedy was to seek it by bill of particulars.

The omission of the first names of persons, in pleading, (unless excused by averment,) makes the pleading indefinite and uncertain. (*Applemans v. Blanche*, 14 M. & W. 154; *Esdale v. McLean*, 15 id. 277.)

The following allegations in pleadings have been held to be not sufficiently certain: that referees *duly* made their award. (*Everard v. Paterson*, 6 Taunt. 445; 2 Marsh. 304;) that the plaintiff was *duly* appointed administrator, (*Beach v. King*, 17 Wend. 17;) or receiver, (*Gillet v. Fairchild*, 4 Denio, 83; *White v. Joy*, 13 N. Y. 86;) that an act was done in a "suspicious" manner, (*Muir v. Kaye*, 4 Taunt. 34;) or, "according to statute," (*Walker v. Maxwell*, 1 Mass. 104;) or contrary to statute," (*Smith v. Lockwood*, 13 Barb. 209;) that the defendant had made "repeated acknowledgments," (*Bloodygood v. Bruen*, 8 N. Y. 366;) or that, "by virtue of a certain writ or other warrant," (1 Saund. 298 n. 1;) or that an act was done "in due course of law;" (2 John. 437; that the plaintiff was "compelled to pay;" (*Packard v. Hill*, 7 Cow. 442; 1 Wend. 209;) or is indebted "on account of previous transactions;" (*Wiggins v. Gans*, 8 Sandf. 738;) that S. "failed to fulfil his obligations by virtue of said instrument;" (*Van Schuack v. Winne*, 16 Barb. 95;) that A. is a creditor "on several promissory notes of said firm;" (*Gray v. Kendall*, 5 Bosw. 666;) that services were done and materials supplied "at the times and about the matters and at the prices specified in an account already delivered;" (*Farcy v. Lee*, 10 Ab. 143;) that a judgment obtained in the name of another, "belongs to the plaintiff." (*Martin v. Kanouse*, 11 How. Pr. 568; see, also, *Chesbrough v. N. Y. & Erie R. R. Co.* 13 How. Pr. 557; *Garrett v. Crocker*, 10 Ab. 133; *Butler v. Mason*, 5 id. 40.)

When the facts are not really stated with sufficient certainty, the introduction of the words "certain," (13 East, 102, 116; 1 B. & P. 98, 102; 2 id. 120, 265; *Bennett v. Exrs of Puley*, 7 John. 219; 1 Saund. 298, n. 1,) "duly," "lawfully," "sufficient," (*Van Ness v. Hamilton*, 19 John. 349,) will not avail to make the fact certain.

If the pleader alleges he is heir, he must show his pedigree; but if he alleges that his opponent is heir, that is sufficient, without more. (2 Saund. 7 c. note See *St. John v. Northrup*, 23 Barb. 26; *Richards v. Edick*, 17 id. 270.)

for further time; as by answering or submitting to answer the bill, he waives all objections to it.(g)

The practice upon exceptions to bills for scandal or impertinence being, under the 53d rule, the same as that upon exceptions to answers, it will be sufficient to refer the reader to that part of this work where exceptions to answers are spoken of.(h)

Motion for production of papers.] The court only orders the production of books and papers previous to the final hearing of a cause, upon two principles: security pending the litigation, and discovery or inspection for the purposes of the suit.(i) (3) Therefore the court will

(g) Anon. 2 Ves. sen. 631. Woodward v. Astley, Bunb. 304. 5 Ves. jun. 656. 1 Fowl. Ex. Pr. 443.

(h) See post, Book I, Chap. VII, secs. 1 and 2. (i) Watts v. Lawrence, 3 Paige, 159.

In alleging the opposite party to be an assignee, it is not necessary to state how he became assignee. (*Norton v. Fultee*, 1 Hall, 384.) A person claiming as next of kin, should show how he was related to the deceased. An allegation that he is "nearer of kin" to the deceased than any other person residing in the United States, is not sufficient. (*Pub. Adm'r v. Watts*, 1 Paige, 348.) Where a complaint stated the circumstances under which the defendant made an assignment for the benefit of creditors, and set forth the whole assignment, and then alleged that the assignment was fraudulent and void on its face, and was made to hinder, delay and defraud creditors, it was held sufficiently definite and certain, and that it was not necessary to state why it was fraudulent and void on its face. (*Hastings v. Thurston*, 18 How. Pr. 530; 10 Ab. 418.) In *Nellis v. DeForest*, (16 Barb. 67,) a policy of insurance in possession of the opposite party, was held to be described with sufficient certainty where the complaint stated the names of the insurer and the insured; that it was on the furniture in the defendant's tavern in N., and that it was for \$1,000.

A motion to make a pleading more definite and certain by setting forth the contents of a written instrument relied on by the pleader, should not prevail where it appears that the instrument is lost, and the pleading apprises the adverse party of the nature and effect of the instrument. (*Kellogg v. Baker*, 15 Ab. 286.) An order extending the time to answer, supersedes a prior motion noticed to strike out portions of the complaint, where there is no reservation in the order, of the right to make such motion. (*Murry v. James*, 34 How. 238; *Bowman v. Sheldon*, 5 Sandf. 657; S. C. 10 Leg. Obs. 339; *Mih v. Vose*, 4 Sandf. 660.) An order requiring a plea to be made more definite and certain, may be appealed from. (*Arrietta v. Morrissey*, 1 Abb., N. S. 439.) And pending an appeal from an order striking out parts of a pleading as irrelevant or redundant, or that it be made more definite and certain, the party should move for a stay of proceedings, and not for an extension of time to amend. (*Culver v. Hollister*, 17 Ab. 405; S. C. 29 How. 479)

After the trial has commenced, it is too late to object that the pleadings are indefinite or uncertain. (*Farmers' &c. Bank of Long Island v. Sherman*, 6 Bosw. 181; S. C. 33 N. Y. 69; *Kellogg v. Baker*, 15 Ab. 286.)

(3) PRODUCTION, DISCOVERY AND INSPECTION OF BOOKS AND PAPERS.

Prior to the Code, the production and discovery of books and papers, in actions pending in the supreme court, was regulated by the revised statutes and rules of court. The statute gave to that court the power, in such cases, as should be deemed proper, to compel any party to a suit pending therein, to produce and discover books, papers, and documents, in his possession, or power, relating to the merits of any such suit, or of any defence therein. (2 R. S. 199, § 30.) And the court was required, by general rules, to prescribe the cases in which such discovery might be compelled, and the proceedings for that purpose, where the same were not provided for in the statute; and it was directed that therein the court should be governed by the princi-

not, on the motion of the defendant, order a deed mentioned by the complainant's bill as being in his possession, to be produced for the

ples and practice of the court of chancery in compelling discovery; except that costs should be in the discretion of the court. (Ib. § 31.) The application for such order was required by section 32, to be made by petition; and section 33 provided for the vacating of such order in the cases therein specified. Section 26 provided for the case of a party neglecting or refusing to obey an order for such discovery; and, among other things, authorized the court to strike out any plea or notice that might be given.

Rules 18, 19, 20, and 22, of the supreme court, carry out the above provisions of the statute, by prescribing the cases in which applications for the order may be made; the mode of making them; what the order shall specify, and directing that the order for a discovery shall operate as a stay of all other proceedings, until complied with, or vacated.

The Code (§ 388) provides that the court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers, and documents, in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein. And it directs that if compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

This section of the Code, it has been held, is not a substitute for the provisions of the Revised Statutes, relative to compelling the production and discovery of books and papers above referred to, but is auxiliary thereto. (*Gould v. McCarty*, 11 N. Y. 575; *Morrison v. Sturges*, 26 How. 177; *Follett v. Weed*, 3 id. 303; S. C. 1 Code R. 65; *Dale v. Fellows*, 5 How. Pr. 451; S. C. 1 Code Rep., N. S. 146; *Davis v. Dunham*, 13 How. Pr. 425; *Pindar v. Seaman*, 33 Barb. 140.) The section extends only to inspection (which implies production) and not to discovery. (*Brevoort v. Warner*, 8 How. Pr. 321.) But the right to the inspection of books and papers, with a view to the discovery of evidence, is not to be confounded with the production of them, as evidence, upon the trial, or on an examination of a party, as a witness, before the trial. (*Lefferts v. Brampton*, 24 How. 257.) It has become the uniform practice, in the 1st district, to refuse applications to compel the production of books and papers, on the examination of a party before trial; and that practice is held to be the correct one, in *Hauseman v. Sterling*, 61 Barb. 347.) The statute has pointed out the only mode by which a discovery of books and papers can be obtained before trial. To do so, the party must not only show what he wants, but must also prove that he cannot obtain the information elsewhere. (Ib.)

The Code enlarges the remedy for obtaining a discovery of evidence, and if a party satisfactorily establishes the fact that any document is in the possession or under the control of the adverse party relating to the merits of the prosecution or defence, the court may order its inspection. (*Case v. Banta*, 9 Bosw. 595.) But in all cases the party who asks for an order of discovery must show, to the satisfaction of the court or officer, that the books or papers contain evidence relating to the merits of the action, (*Davis v. Dunham*, 13 How. Pr. 425; *Cassard v. Hinman*, 6 Duer. 695; *Keeler v. Dusenbury*, 1 id. 660; S. C. 11 Leg. Obs. 287; *Woods v. De Figanere*, 25 How. 522; S. C. 16 Ab. 5; 1 Rob. 607, 641,) and in what respect, in order that the court may judge for itself. (*Cassard v. Hinman*, *supra*; *Morrison v. Sturges*, 26 How. 177; *Pegram v. Carson*, 10 Ab. 340; S. C. 18 How. 519; *Kaupe v. Isdell*, 3 Rob. 699; *Merguelle v. Continental Bank Note Co.* 7 Rob. 77.) Where it is not shown that the books and papers contain evidence, but only that they contain information by which evidence may be obtained, the order should not be granted. (*Woods v. De Figanere*, 25 How. 522; S. C. 16 Ab. 1; 1 Rob. 607, 641; *Morrison v. Sturges*, 26 How. 177; *Pegram v. Carson*, 10 Ab. 340; S. C. 18 How. Pr. 519. But see *Lefferts v. Brampton*, 24 id. 257.)

The power of the courts, under section 388 of the Code, is confined and limited by the section itself. The court may order a party to give an inspection and copy, or permission to take a copy, of books, papers, &c., and if the order is not complied with may exclude the paper, or furnish the party refusing, or both, but cannot direct a deposit of the paper, and that in default all defence be excluded and the party adjudged guilty of contempt. (*Pindar v. Seaman*, 33 Barb. 140.) All proceedings instituted under section 388 are governed by its provisions, uncontrolled and unaffected by the rules of court. (*Exchange Bank v. Monteth*, 4 How. Pr. 250; S. C. 2 Code Rep. 148.) Although the 22d section of the statute requires that the supreme

defendant's inspection; (k) neither will the court, upon motion by the defendant, in a bill for a partnership account, direct the production of

(k) Anon. 2 Dick. 778. *Micklethwaite v. Moore*, 3 Mer. 292.

court "shall by general rules prescribe the cases in which such discovery may be compelled," the omission to frame rules does not annul the inherent power of the court to compel a discovery, or the power granted by the previous section; but the general rules were designed to regulate its exercise. Jurisdiction does not depend upon the rule, but the rule is a consequence of the jurisdiction. (*Gould v. McCarty*, 11 N. Y. 581.)

A party desiring a discovery of books and papers relating to the merits of a suit, may conform his proceedings to the provisions of the Revised Statutes, or to the provisions of the Code. (*Davis v. Dunham*, 13 How. Pr. 425.) The application may be so framed as to embrace a discovery and the production of papers under the rules. (*Lovell v. Clarke*, 7 How. Pr. 158. See *Morrison v. Sturges*, 26 id. 177.)

An order granting or refusing an application for the production and discovery of books and papers, it seems, rests in the discretion of the court, and is not appealable. (*White v. Munroe*, 33 Barb. 650; S. C. 12 Ab. 357; *Van Zandt v. Cobb*, 12 How. Pr. 544. See *contra*, *Woods v. De Figanieri*, 25 How. 522; S. C. 16 Ab. 1; 1 Rob. 607.) Such an order is not granted as a matter of course, and should not be granted where the party applying does not show some degree of diligence, or where he is chargeable with gross negligence or bad faith. (*Hooker v. Matthews*, 3 How. Pr. 329; S. C. 1 Code Rep. 108.) Or where the production of the books and papers can be obtained by a subpoena *duces tecum*, together with the testimony of the party having them in custody. (*Commercial Bank of Albany v. Dunham*, 13 How. Pr. 541; *Van Zandt v. Cobb*, 12 id. 544; *Brevoort v. Warner*, 8 id. 321; *Stalker v. Gaunt*, 12 Leg. Obs. 124.) A discovery will not be granted to ascertain the names of persons proper to be made parties to an action, but only to enable the plaintiff to prepare his complaint. (*Opdyke v. Marble*, 44 Barb. 64; S. C. 18 Ab. 266.) And strong affidavits, showing that a discovery is necessary, will be required to entitle a plaintiff to an order for inspection, even for this purpose. (*Keeler v. Dusenbury*, 1 Duer. 660; S. C. 11 Leg. Obs. 287.) The court should not compel a production of books and papers where the complaint is not filed, and the nature of the relief sought is not shown by affidavit. (*Keeler v. Dusenbury*, 1 Duer. 660.)

The statute does not require either party to disclose evidence which he intends to produce against the adverse party on the trial. (*Strong v. Strong*, 1 Ab., N. S. 233; S. C. 3 Rob. 675.)

An order will be granted in an action against the defendants as factors of the plaintiff in selling his goods, where such defendants have not rendered an account, but will not be granted to enable the plaintiff to determine whether an account rendered is correct. (*Ruberry v. Binns*, 5 Bosw. 685.) Inspection may be ordered to help the defendant to facts necessary to enable him to frame an answer which will preserve his rights in the action, but not for the purpose merely of preventing him from answering untruthfully. (*Mora v. McCredy*, 2 Bosw. 669.) And where the defendant is in doubt as to the correctness of what purports to be a copy of an instrument set out in the complaint, an inspection of the original will be permitted before answering. (*Wesson v. Judd*, 1 Ab. 254.) But an application for such an order to enable the defendant to answer will not be granted where he does not show how or why an inspection is necessary for that purpose. (*Gelston v. Marshall*, 6 How. Pr. 398; *Stanton v. Delaware Mutual Ins. Co.* 2 Sandf. 662.)

A party in possession of documents to which the other party is equally entitled, will be compelled, as a matter of course, to produce them for the inspection of his adversary. (*Kelly v. Eckford*, 5 Paige, 548. See, also, *Pegram v. Carson*, 10 Ab. 341, n.) As, in the case of partnership books and papers in the hands of one of the partners, (*Ibid.*) or a letter belonging to one partner and in the possession of the other. (*Livermore v. St. John*, 4 Rob. 12.) The order may also be granted to enable a party to frame a proper bill of particulars. (*Prince v. Currie*, 2 How. Pr. 119; *Brevoort v. Warner*, 8 id. 321.) It may also be granted for the production and inspection of the books of a corporation, where the party applying is entitled to use such books as evidence, as their production cannot be compelled by means of a subpoena *duces tecum*. (*La Farge v. La Farge Fire Ins. Co.* 14 How. 26; S. C. 6 Duer. 680.) But agents of a corporation, in their individual capacity, cannot be compelled to discover books of the corporation. (*Opdyke v. Marble*, 44 Barb. 64; S. C. 18 Ab. 266.)

accounts before answer. But it seems that after answer, if he swears to his belief that the books are in the possession of the complainant,

The court has no power to compel a party to submit articles which are the subject of the action, but which are neither books, documents, nor evidence, of themselves, to the inspection of third parties, to enable them to qualify themselves to testify as experts. (*Ansen v. Tuska*, 1 Rob. 663; S. C. 19 Ab. 391.)

The writings sought to be produced must be shown to be indispensably necessary. (*Woods v. De Figaniere*, 25 How. 522; S. C. 16 Ab. 1; 1 Rob. 607, 641; *Low v. Graydon*, 14 Ab. 443; *Pegram v. Carson*, 10 id. 340; S. C. 18 How. Pr. 519.) It is not enough for the applicant to state that he thinks them necessary. (*Wilkie v. Moore*, 17 How. 480;) or that he is so advised by counsel. (*Strong v. Strong*, 3 Rob. 675; S. C. 1 Ab., N. S. 233.) He must set forth the facts and circumstances which show that they are necessary, and that he is entitled to an inspection of them. (*McAllister v. Pond*, 15 How. Pr. 299; *Jackling v. Edmonds*, 3 E. D. Smith, 539; *Speyers v. Torstritch*, 5 Rob. 606; *Marguelle v. Continental Bank Note Co.* 7 id. 77.) And the documents sought to be inspected must be specifically set forth, and described with precision sufficient to enable the party, in whose custody they are, to determine with certainty what documents are required. (*Jackling v. Edmonds*, *supra*; *Low v. Graydon*, 14 Ab. 443; *Walker v. Granite Bank*, 10 id. 111; S. C. 44 Barb. 39; *Marguelle v. Continental Bank Note Co.* *supra*; *People v. Trinity Church*, 6 Ab. 177.)

The application for the discovery or inspection of books and papers should be made upon petition. (*Dale v. Fellows*, 5 How. Pr. 451; S. C. 1 Code Rep., N. S. 146; *Follett v. Weed*, 1 Code R. 65;) but will not be denied, because it is by motion, instead of petition. (*Johnson v. Consolidated Silver Mining Co.* 2 Ab., N. S. 413.) The power to make the order is limited to the court, or a justice thereof; whether it be exercised under the Code, or the Revised Statutes. A referee has no power to make such an order. (*Frazer v. Phelps*, 1 Code Rep., N. S. 44; S. C. 3 Sandf. 741. See *North v. Platt*, 7 Rob. 707.)

As respects the time of making the order for a discovery or inspection, it has been held, that it may be made before, as well as after, issue joined. (*Miller v. Mather*, 5 How. Pr. 160; *Morrison v. Sturges*, 26 id. 177. See *Stanton v. Delaware Mutual Ins. Co.* 2 Sandf. 632; *Powers v. Elmendorf*, 2 Code R. 44; S. C. 4 How. Pr. 59.) After the complaint is served, the plaintiff cannot have a discovery of books and papers, until the answer has been served. (*Thompson v. Erie Railway Co.* 9 Ab., N. S. 230.) Discovery and inspection are allowed for the purpose of preparing pleadings, or, after issue, to prepare for trial. (Ib.) When justice requires, a discovery will be ordered, pending a trial before referees. (*Mechanics' Bank v. James*, 2 Code R. 46.) And the certificate of a referee, pending a trial before him, that the production of books and papers is necessary, will be presumptively sufficient to warrant the making of the order. (*Frazer v. Phelps*, 3 Sandf. 741; S. C. 1 Code Rep., N. S. 214.) A motion for discovery of the defendant's books, to enable the plaintiff to prepare for a trial pending an appeal, by the defendant, from an order overruling his demurrer, is premature. (*Palen v. Johnson*, 18 Ab. 304.)

One of the first facts which should appear on such an application, is that the applicant has not in his possession the same information; or if he has, that he has not the means of establishing, by other available proof, the contents of the books or papers sought to be inspected. (*McAllister v. Pond*, 15 How. Pr. 299; S. C. 6 Duer. 702; *Jackling v. Edmonds*, 3 E. D. Smith, 539.)

The facts need not necessarily be made to appear by the oath of the party himself, but may be shown by the oath of any other person who has knowledge of the facts. (*Exchange Bank v. Monteth*, 4 How. Pr. 280; S. C. 2 Code Rep. 148; *Strong v. Strong*, 3 Rob. 675; S. C. 1 Ab., N. S. 233.) But where the deponent is other than the party, the source and grounds of his knowledge and belief must be set forth. Mere absence of the party will not excuse the want of positive affirmation. (*Walker v. Granite Bank*, 19 Ab. 111; S. C. 44 Barb. 39.)

Where the applicant for an order shows that the document sought, has been delivered to the adverse party, the latter, in order to defeat the application, must swear positively that it is not in his possession, or under his control, or must state facts which, together with his denial, on his knowledge, information, or belief, will amount to a positive denial, on oath. (*Southart v. Dwight*, 2 Sandf. 672; S. C. 2 Code R. 83.) An allegation, under oath, that the deponent has made diligent search therefor, and has been unable to find the books and papers sought, and is unable from any knowledge he has, to produce them without, denying possession or control, is not sufficient. (*Hicks v. Charlick*, 10 Ab. 129.) If the party against whom the application is made

and that he, the defendant, cannot answer fully without them, then the court will restrain all proceedings for want of a sufficient answer,

denies, under oath, that he has in his possession the books or papers sought, the application must be denied. (*Bradstreet v. Bailey*, 4 Ab. 233; *Alroyke v. Wolcott*, id. 41; *Hoyt v. American Exchange Bank*, 8 How. Pr. 89; S. C. 1 Duer. 652. See also *Woods v. De Figanieri*, 25 How. Pr. 522; S. C. 10 Ab. 1; 1 Rob. 607. 641.) And so, when it appears that the petitioner might have access to the books and papers without any order. (*Charlick v. Flushing R. R. Co.* 10 Ab. 130;) or when it appears that the books and papers have been freely offered to the petitioner's attorney for examination and inspection, and that he has not thought proper to avail himself of the privilege. (*McAllister v. Pond*, 15 How. Pr. 299; S. C. 6 Duer. 702.)

Where the party asks for copies of documents, the order may direct that such party pay the expense of making copies of them, unless the other party prefers to permit him to take copies without charge. (*Brevoort v. Warner*, 8 How. Pr. 321.) The order for discovery when made by the court, may direct the production of the documents sought, and that in default of their production, they shall be excluded and the complaint dismissed. But when made by a judge the order should simply direct the production of the documents. (*Broderick v. Shelton*, 18 Ab. 213.) An order directing not only the deposit of certain specified books of entry, extending through a period of five years; but also all other books of the defendant which contain any accounts or entries showing or tending to show the times when certain bonds were sold, &c. is extending the right of a party to examine his adversary's books much beyond what was contemplated by the law, or what has been sanctioned by the courts. (*Walker v. Granite Bank*, 44 Barb. 39; S. C. 19 Ab. 111. See also *Julio v. Ingalls*, 17 Ab. 443, n.) The court has no power to order a reference with power to inspect books, papers, &c. for the purpose of ascertaining whether the former order has been fully complied with. (*Hoyt v. American Exchange Bank*, 8 How. Pr. 89; S. C. 1 Duer. 652.) If the applicant deems the return to the order insufficient, he should apply for an order that the opposite party show cause why the alleged omissions should not be supplied. (Ib.) Where a party is required to produce books for inspection, he may seal up such parts as do not relate to the subject of the examination; and his affidavit that the portions so sealed up do not relate to the matters in issue is sufficient, in the first instance, to protect them from examination. Such affidavit may be rebutted, however. (*Titus v. Cortelyou*, 1 Barb. 444.) Where an order directs the inspection by the plaintiff, his solicitor or agent of certain documents in the custody of one of several defendants, such defendant is justified in refusing the inspection in the presence of a co-defendant, even where he is the agent of the plaintiff. (*Bartley v. Bartley*, 17 Eng. Law & Eq. R. 329.)

The court will grant an order for the production and inspection of books, papers and documents, to enable a defendant to give a bill of particulars of his set off. (*Brevoort v. Warner*, 8 How. Pr. 321.)

In *California*, any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document or paper, in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein. (Cal. Pr. Act, § 446.) As to the form and sufficiency of notice, under this section, see *Burke v. Table Mountain Wa. Co.* (12 Cal. 403.) Literal accuracy cannot be expected in the description of a paper in the possession of the adverse party. Such description as will apprise a man of ordinary intelligence, of the document desired, is enough. (Ibid.) If compliance with the order be refused, the court may exclude the book, document or paper, from being given in evidence; or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing, for a contempt. But this section is not to be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness. (Cal. Pr. Act, § 446.) The *Ohio* Civil Code contains similar provisions. (Seney's Code, p. 305, sec. 360.) Also the *Codes of Kansas*, (sec. 370); *Wisconsin*, (§ 290.)

In *Indiana*, the court, or a judge thereof, may, upon notice, compel, by order, either party to produce, at or before the trial, any book, paper or document in his possession or power. (2 R. S. 97, sec. 306.) This order is obtained on motion, made before the court at term, or a judge in vacation. (Bick. Civ. Prac. 128.)

In *Michigan*, the supreme court has power, in such cases as shall be deemed proper, to compel any party to a suit pending therein, to produce and discover books,

until he has been assisted with the inspection.^(l) And the court will, upon the application of the defendant, before answer, under special circumstances, order that the complainant shall not compel him to answer until within a given time after the production of certain documents set forth in the bill, when it appears that their production is essential to enable the defendant to put in his answer.^(m) And if the complainant suffers *fifteen months to elapse without making [*102] the production, he will be ordered to produce the documents on or before a certain day; and if the production is not then made, the bill will be dismissed with costs.⁽ⁿ⁾

In the case of *Jones v. Lewis*,^(o) the production of an instrument in the complainant's possession was ordered, upon motion, supported by affidavit that the defendant believed the instrument to be forged, and that he could not fully answer the bill before he inspected it.

A defendant is not entitled to a bill of particulars of the complainant's demand previous to putting in his answer; the forms of the court rendering a bill of particulars unnecessary.^(p) (4)

(l) *Spragg v. Corner*, 2 Cox, 109. Sed vide *Pickering v. Rigby*, 18 Ves. 484.

(m) *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 114. 1 Wilson, 113.

(n) *Princess of Wales v. Earl of Liverpool*, 3 Swanst. 567. 2 Wilson, 29.

(o) 2 Sim. & Stu. 242.

(p) *Cornell v. Bostwick*, 3 Paige, 160.

papers and documents in his possession or power, relating to the merits of any such suit, or of any defence therein. And the court is required, by general rules, to prescribe the cases in which such discovery may be compelled. (Comp. Laws of 1857, vol. 2, p. 989, secs. 14, 15.) To entitle a party to any such discovery, he must present a petition to the court, or to any judge in vacation, verified by oath, upon which an order may be granted, for the discovery sought, or that the party against whom the same is sought show cause why the prayer of such petition should not be granted. Every such order may be vacated: 1. Upon satisfactory evidence that the same ought not to have been granted; 2. Upon the discovery sought being made; 3. Upon the party required to make the discovery denying, on oath, the possession or control of the books, papers or documents ordered to be produced. (Id. secs. 16, 17.)

(4) BILL OF PARTICULARS.

Under the present system, the court may, in all cases, order a bill of particulars of the claim of either party to be furnished. (Code, § 158.)

The office of a bill of particulars is to prevent a surprise on the trial, and not to furnish evidence. (*Drake v. Thayer*, 5 Rob. 694.) It is not a right which a defendant is entitled to demand as a matter of course. (*Fullerton v. Gaylord*, 7 id. 551.) It is regarded as an amplification of the pleading to which it relates, and is to be construed as forming a part of it. The proofs are restricted, and the recovery limited, to the matters set forth in it. No proof can be offered at the trial, of a claim not embraced in it. (*Bowman v. Earle*, 3 Duer. 691; *Melin v. Wood*, 3 Keyes, 533.) Although considered, in some respects, an amplification of the pleadings, yet a bill of particulars will be held sufficient if it fairly apprises the opposite party of the nature of the action, so that there can be no surprise. (*Brown v. Williams*, 4 Wend. 364.) It has been held in some cases, that it cannot be regarded as a part of the pleading, in any other sense than that of giving to the pleading more certainty. (*Booth v. Howard*, 2 Dowl. 438; *Farcy v. Lee*, 10 Ab. 143.) The use of a bill of particulars is to apprise a party of the specific demands of his adversary, when the pleadings are general and leave uncertain what is particularly demanded. (*People ex rel. Waring v. Monroe*, 4 Wend. 200.) It must be specific, and must give the date of each item. (*Wetmore v. Jennys*, 1 Barb. 53.) It is sufficiently explicit if the opposite party can gather from it, with reasonable certainty, the evidence which is to be offered. (*Smith v. Hicks*, 5 Wend. 48.) It is sufficient if it points out the items of particulars em-

Security for costs.] In certain cases particularly specified in the statute, the defendant may, after his appearance has been entered, compel the complainant to give security for the costs before he can be allowed to proceed any further with the suit. (g) (5)

(g) See 2 R. S. 620.

braced in the plaintiff's claim; and it need not specify the grounds upon which he claims to recover. (*Seaman v. Low*, 4 Bosw. 338.) In an action upon an indebtedness, the bill of particulars should state the sums claimed, when and how they arose, and the items of the demand. (*Moran v. Morrissey*, 28 How. 100; S. C. 18 Ab. 131.)

Where, from the nature of the action, the defendant has the best knowledge of the facts, he cannot demand a bill of particulars. (*Young v. De Mott*, 1 Barb. 30. See, also, *Blackie v. Neilson*, 6 Bosw. 681.) Nor where the damages sought to be recovered by the plaintiff are not matters of account within the meaning of the Code, but arise from the violation of a special contract. (*Ives v. Shaw*, 31 How. 54.) In an action for an account, brought by an individual entrusted with the settling of the business of a dissolved copartnership against a former partner, a general bill of particulars need not be furnished. (*Depeu v. Lord*, 5 Duer. 663.) But sometimes a special bill will be ordered on application. (Ib.)

Assuming the court to have the power to order a bill of particulars, after the issues in the cause have been referred to a referee to hear and determine, it will not be exercised to interrupt a trial actually pending before him. (*Caldwell v. Grodenough*, 28 How. 479; S. C. 2 Rob. 706; 3 id. 633.)

The party on whom a bill of particulars is served, if not satisfied with it, either from defect in form or substance, or because it is not verified, should immediately return it, or move the court for a further or amended bill. (*Dennison v. Smith*, 1 Cal. 437; *McKinney v. McKinney*, 12 How. Pr. 22.) Failing to do so, he cannot proceed as if no bill had been rendered. (*Providence Tool Company v. Prader*, 32 Cal. 654.) If a complaint, in an action to recover money for legal services, is general in its language, and the defendant demands and receives a bill of particulars, he cannot object to the admission of evidence under it. (*Tompkins v. Mahoney*, 32 Cal. 231.) If the party intends to object to any evidence upon the subject, he should obtain, previous to the trial, an order excluding such evidence. (*Connor v. Hutchinson*, 1 Cal. 437.)

To enable a defendant to give a bill of particulars of his set-off, the court will grant an order for the production and inspection of books, papers, and documents. (*Brevoort v. Warner*, 8 How. Pr. 321.)

(5) SECURITY FOR COSTS.

The provisions of the statute are as follows: When a suit shall be commenced in any court, 1. For a plaintiff not residing within the jurisdiction of such court, or for several plaintiffs who are all non-resident; or, 2. For or in the name of the trustees of any debtor; or, 3. For or in the name of any person being insolvent who shall have been discharged from his debts, or whose person shall have been exonerated from imprisonment, pursuant to any law, for the collection of any debt contracted before the assignment of his estate; or, 4. For or in the name of any person committed in execution for a crime; or, 5. In the name of any infant whose next friend has not given security for costs—the defendant may require such plaintiff to file security for the payment of the costs that may be incurred by the defendant in such suit or proceeding. (2 R. S. 620, § 1.)

The Code (§ 317) provides that in an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, the court may, in its discretion, require the plaintiff to give security for costs.

It has been decided that the Code does not repeal the sections of the Revised Statutes relating to security for costs. (*Gardner v. Kelly*, 2 Sandf. 632; *Blossom v. Adams*, 2 Code R. 59.)

An action brought in the name of an infant by his next friend (guardian) is one of the cases mentioned in the statute, in which security for costs may be required. (2 R. S. 620 § 1, sub. 5.) The chancellor had previously decided that in such a case security might be required when the next friend was insolvent. (*Fullon v. Roserelt*, 1 Paige, 178.) But in case of an infant, he must be sole plaintiff to entitle the defendant to security. (*Hulbert v. Newell*, 2 Code R. 54.)

To obtain an order for this purpose, the defendant presents a petition or affidavit, either in term or on a motion day, stating that his

It is no defence to a motion for security for costs against a plaintiff, non-resident at the time the action was commenced, that the demand in suit was subsequently assigned to a person residing within the jurisdiction. (*Phoenix v. Townsend*, 1 Sandf. 654.) If a surety becomes insolvent, another must be substituted, (*Bridges v. Canfield*, 2 Edw. 208,) and a substituted guardian of an infant must give new security. (*Colden v. Haskins*, 3 Edw. 811.) In case of a non-resident plaintiff, the bond may be executed by the sureties alone, without the plaintiff. (*Tallmadge v. Wallis*, 1 How. Pr. 100.) A single responsible surety is sufficient, and the plaintiff's attorney may be the surety himself. (*Micklethwaite v. Rhodes*, 4 Sanf. Ch. 434.) The bond need not follow the precise words of the statute; and though it does not, it will be sufficient if equally favorable to the defendant. (*Smith v. Norvell*, 2 Cole R. 14.)

An assignee who brings an action to recover possession of property which has been taken on an attachment at the suit of a creditor of the assignor, will not be compelled to file security for costs under § 317 of the Code, on an allegation that the assignment is a fraud upon creditors, and the assignee is a party to the fraud; unless there be such evidence of the truth of the allegation as renders it highly probable that the allegation is true. (*Shepherd v. Burt*, 3 Duer. 645.) Under that section it is entirely in the discretion of the court, in all cases, whether security shall be required or not. (Ib.; *Darby v. Condit*, 1 Duer. 599; S. C. 11 Leg. Obs. 154.) An executor, administrator, trustee or assignee cannot be compelled to give security for costs under this section of the Code, merely on the ground that the estate represented by him is insolvent. (*Darby v. Condit*, *supra*.) An *ex parte* order, giving a receiver leave to commence an action, is no bar to a motion to compel him to give security for costs. (*Bolles v. Duff*, 17 Ab. 418.) An order requiring security in such a case cannot be appealed from; but if it be in any way irregular, that will furnish a ground of objection. (Ib.)

The bond must be filed with the clerk of the court in the county where the action is triable, and notice thereof given to the defendant or his attorney. The defendant may except to the sufficiency of the sureties within twenty days after such notice, in the manner prescribed by statute. (*Van Sant*, Eq. Pr. 32.)

A foreign government, suing in a court of the State, may be required to file security for costs. (*Republic of Mexico v. Arrangois*, 3 Ab. 470.)

The power of staying proceedings until security for costs be filed, is an incidental power, and may be exercised independent of the statute. (*The People ex rel. Fuller v. Oneida Common Pleas*, 18 Wend. 652.) It is not imperative on the court to make an order compelling a non-resident plaintiff to file security for costs. When the application is not made until the action has been referred and notice of hearing, it will be denied as unreasonably delayed. (*Florence v. Bulkley*, 1 Duer. 705.) Security cannot be required of a plaintiff on the ground that his person has been exonerated from imprisonment, where the discharge was granted long since. To entitle a defendant to an order for security, he should show the present inability of the plaintiff to pay costs. (*Gomez v. Garr*, 18 Wend. 577.) The statute (§ 1, sub. 3 and § 2,) applies in terms to cases in which the suit herein the security was required, was brought for the collection of some debt contracted before the assignment of the plaintiff's estate. Accordingly, where a plaintiff commenced an action on the case for negligence, and after issue joined, obtained a discharge as a bankrupt, it was held that he could not be compelled to file security for costs. (*Coryell v. Davis*, 5 Hill, 559.)

In California, security for costs and charges which may be awarded against the plaintiff, may be required by the defendant: 1. When the plaintiff resides out of the State; 2. Where the plaintiff is a foreign corporation. (Cal. Pr. Act, § 512.) After the lapse of thirty days from the service of notice that security is required or of an order for new or additional security, upon proof thereof, and that no undertaking has been filed, the court or judge may order the action to be dismissed. (Ibid. § 514.) The sureties in the undertaking for security for costs, must each justify in double the amount specified in the undertaking. (Ibid. § 113.) When security is required, all proceedings shall be stayed until security by undertaking is given, in a sum not exceeding \$300. (Ibid.) Where the defendant served on the plaintiff, a non-resident, notice to give security for costs, the notice not being accompanied by an order staying proceedings, and on the next day judgment was rendered for the defendant, and the plaintiff appealed to the supreme court, it was held, on motion

appearance has been entered, and that the complainant is a non-resident. He thereupon moves that the complainant file security within a limited time, or that the bill be dismissed with costs; and that in the meantime proceedings be stayed on the part of the complainant, and that the sureties shall justify if objected to.(r)

If the order is granted, and not complied with within the time limited in it, the bill will be dismissed with costs.(s) But to obtain an order dismissing the bill for want of security, a special application should be made to the court, upon an affidavit of service of a copy of the order, and that no security has been given.

Where the defendant is entitled to security for costs at the com-

(r) *Id. ib.* § 3. (s) *Camac v. Grant*, 1 Sim. 348. *Massey v. Gillelan*, 1 Paige, 644.

to dismiss the appeal, that after judgment it was too late to move to dismiss the action; that the undertaking or appeal was sufficient security for costs subsequently incurred; and the motion was denied. (*Comstock v. Clemens*, 19 Cal. 77.)

In *Kentucky*, a plaintiff who is a non-resident of the State, or a corporation other than a bank created by the laws of that State, must, before commencing an action, file a bond of sufficient security, to be approved by the clerk, for costs in the court below, or in any appellate court. (Civil Code, sec. 684.) If such bond is not given, the action may be dismissed on motion. (Ib. sec. 685.) A plaintiff becoming a non-resident must give security. (Ib. sec. 686.) And a guardian, committee, or next friend, suing for an infant or person of unsound mind, and every plaintiff suing as an assignee, except an indorser of a bill of exchange, or a promissory note placed upon the footing of a bill of exchange, when insolvent, may be required to give security, and on failure to do so, the action may be dismissed on motion. (Ib. sec. 687.) The plaintiff's attorney is liable for costs until a bond is given. (Ib. sec. 689.)

In *Ohio*, in all cases in which the plaintiff is a non-resident of the county in which the action is to be brought, he must, before commencing such action, give security for costs. The obligation of the surety shall be complete, simply by indorsing the summons or signing his name on the complaint, as security for costs. And he is bound for the payment of all costs which may be adjudged against the plaintiff, in the court below, or in any appellate court, and for the costs of the plaintiff's witnesses. (Civ. Code, sec. 553; Sen. y's Code, p. 412.) The action may be dismissed unless security is given; and if the plaintiff becomes a non-resident after the commencement of the action, he is bound to give security. (Ibid. secs. 544, 545.)

In *Minnesota*, when a suit shall be commenced in any court, 1. For or in the name of the trustees of any debtor; 2. For, or in the name of any person, being insolvent, who shall have been discharged from his debts pursuant to law, brought for the collection of any debt contracted before the assignment of his estate; or, 3. For, or in the name of any person committed in execution for a crime; or, 4. In the name of any infant, whose next friend has not given security for costs; or, 5. For a plaintiff not residing within the jurisdiction of such court, or for several plaintiffs, who are all non-residents; the defendant may require the plaintiff to file security for costs. (Public Stat. 1859, p. 580, sec. 29.) If, after the commencement of a suit, all the plaintiffs shall become insolvent or non-residents, and be discharged as aforesaid, or imprisoned in the penitentiary, the defendant may also require such security to be filed. (Id. p. 581, sec. 30.) Such security must be a bond in the penalty of at least \$100, with one or more sufficient sureties to the defendant, conditioned to pay all the costs that may be awarded to the defendant. (Id. sec. 32.) The bond is to be filed with the clerk of the court; the sureties may be excepted to; and may justify. (Id. secs. 33, 34, 35.) The plaintiff's attorney is liable for costs to the amount of \$100 until security be given. (Id. secs. 31, 37.)

The Code of *Kansas* contains similar provisions. (Code, secs. 555 to 559.) See, also, Revised Statutes of *Wisconsin*, (1858,) p. 780, §§ 85 to 93; Revised Statutes of *Indiana*, vol. 2, p. 127, sec. 402; id. 234, s. c. 159; Statutes of *Illinois*, (1858,) p. 244; Compiled Laws of *Michigan*, (1857,) vol. 2, p. 1137.)

mencement of the suit, the complainant's solicitor is liable for the costs to an amount not exceeding \$100, unless security is filed as provided by the statute; whether such security has been required by the defendant or not. (t)

But unless *all* the complainants are non-residents, security for costs cannot be required. (u) In case some of the complainants, therefore, are residents of the state, the solicitor is not liable.

*Notwithstanding the liability of the solicitor for costs to [*103] the amount of \$100, the defendant may apply for other security in a larger sum. (v) (6)

The solicitor may relieve himself from his liability for costs, by filing security, and the sureties therein justifying, if excepted to, without being required to do so by the defendant, and by giving notice thereof to the defendant. (w)

By the English practice, if the fact of non-residence appears on the bill, or is known to the defendant, he must apply for security before answer, or time given to answer, and before a demurrer or plea. (x) But our statute is general, authorizing the defendant to require security in the cases specified, without mentioning any time when the application is to be made. It has therefore been decided by the vice-chancellor of the first circuit, that the defendant may require security for costs, at any stage of the suit, from a non-resident complainant who resides out of the jurisdiction at the commencement of the suit, and continues so. (y)

As to the kind of non-residence which will entitle the defendant to require security for costs, it is settled that the complainant must be an actual resident abroad. The mere fact that he has gone abroad is not sufficient. The intention to reside abroad for the present, and removal

(t) 2 R. S. 620, § 7.

(u) *Id. ib.* § 1. See also *Walker v. Easterby*, 6 Ves. 612. *Winthrop v. Ray*, Dick. 282.

(v) *Baldwin v. Williamson*, Hopkins, 117.

(w) 2 R. S. 231, § 8.

(x) *Migliorucci v. Migliorucci*, Dick. 147. S. C. 2 Ves. sen. 24. *Gorden v. Plunket*, 1 Ball & Beat. 567, n. *Prior v. White*, 2 Moll. 361.

(y) *Burgess v. Gregory*, 1 Edw. Rep. 449.

(6.) But where security for costs has been filed pursuant to an order, and twenty days have elapsed without objection to the amount of the bond, the court will not entertain an application for an increase of the amount of the security. (*Castellanos v. Jones*, 4 Sandf. 679)

In *California*, a new or additional undertaking may be ordered upon proof that the original undertaking is insufficient; and proceedings are stayed until such new security be given. (Prac. Act. § 512.)

In *Kentucky*, additional security may be required at any time before judgment, upon notice, if the court is satisfied that the surety has removed from the State, or is not responsible; and it may order the action to be dismissed unless such additional security be given. (Civil Code, sec. 688.) The same rule prevails in *Ohio*. (Civil Code, sec. 546;) in *Kansas*, (Code, sec. 558;) in *Wisconsin*, (Rev. Stat. of 1853, p. 781, § 91;) and in *Michigan*, (Comp. Laws of 1857, vol. 2, p. 1337.)

with his family, if the complainant has one, is requisite. (*z*) But if the complainant has actually removed from the State with his family, and changed his residence, the defendant is entitled to security for costs, although there is a probability that the complainant may return at some future day. (*a*)

Security will not be required of a complainant about to go abroad. (*b*) The second section of the statute, which allows the defendant to require security for costs where the complainant becomes a non-resident after the commencement of the suit, will afford an ample remedy, in such cases. (*c*)

Nor can security be required of an officer in the army or navy, or a consul. (*d*) But where it appears upon the bill that the complainant is an officer of the army out of the jurisdiction, the defendant will be entitled to the usual security for costs, unless it be distinctly stated that the [*104] *complainant is on actual service. It is not sufficient to state that the complainant is an officer of a particular regiment and residing at a particular place out of the jurisdiction, although the regiment may, in fact, be stationed at that place. (*e*)

Upon a bill filed by the wife against her husband for a separation or limited divorce, if the next friend of the wife, who prosecutes the suit, is irresponsible or insolvent, all proceedings may be stayed until security for costs is given, or a responsible person is substituted in his place; and if such security is not given, or substitution made within a reasonable time, the bill will be dismissed. (*f*)

The statute directs that the security for costs shall be in the form of a bond, with one or more sufficient sureties, in a penalty of at least \$250, to the defendant, conditioned to pay, on demand, all costs that may be awarded to the defendant in the suit. (*g*) Under this section the court has the power to require security in a larger sum than \$250, if it thinks proper to do so. But unless special circumstances are shown, this sum is usually fixed upon as the amount of the penalty of the bond.

The court may either fix the amount itself, or refer it to a master. (*h*) In one case (*i*) the amount of the security was fixed by the court at \$250, the bond to be approved by the register.

The bond must be filed with the register, assistant register or clerk, and notice thereof given to the defendant or his solicitor. And within

(*z*) *Green v. Charnock*, 3 Bro. Ch. R. 371. *White v. Greathead*, 15 Ves. 2. *Hoby v. Hitchcock*, 5 id. 659.

(*a*) *Gilbert v. Gilbert*, 2 Paige, 603.

(*b*) *Willis v. Garbutt*, 1 Young & Jer. 511.

(*c*) See 2 R. S. 620, § 2.

(*d*) *Colebrook v. Jones*, Dick. 154. *Stanly v. Hume*, 1 Hogan, 12.

(*e*) *Lillie v. Lillie*, 2 My. & Keene, 401.

(*f*) *Lawrence v. Lawrence*, 3 Paige, 267.

(*g*) 2 R. S. 620, § 4.

(*h*) *Fulton v. Rosevelt*, 1 Paige, 179. *Massey v. Gillelan*, id. 644.

(*i*) *Gilbert v. Gilbert*, 2 Paige, 603.

twenty days after the service of such notice, the defendant may except to the sufficiency of the sureties, by giving notice of such exception to the complainant's solicitor. (*k*)

The manner in which this exception is to be taken is pointed out in the statute, "*by giving notice of such exception,*" &c. Of course no exception need be filed.

Within twenty days after notice of such exception, the sureties in the bond must justify, by an affidavit that they are worth double the penalty of such bond, over and above all debts; of which affidavit a copy must be served on the defendant or his solicitor. This justification will operate to discharge the order to stay proceedings. (*l*)

*SECTION II.

[*105]

THE DIFFERENT SORTS OF DEFENCE.

The defence to a suit in equity may be either by demurrer, by plea, by answer, or by disclaimer. (*7*) By a *demurrer* the defendant demands the judgment of the court whether he shall be compelled to answer the bill, or not. This species of defence is resorted to where it appears upon the face of the bill itself that there is no equity in the case, on the part of the complainant.

By a *plea*, the defendant may show some cause why the suit should be dismissed, delayed, or barred. A plea sets up matter of defence not appearing in the bill.

By *answer*, controverting the case stated by the complainant, the defendant may confess and avoid, or traverse and deny the several parts of the bill; or, admitting the case made by the bill, may submit to the judgment of the court upon it, or upon a new case made by the answer, or both.

By a *disclaimer*, the defendant may at once terminate the suit by disclaiming all right or interest in the matter sought in the bill. (*m*)

And all or any of these modes of defence may be joined; provided each relates to a separate and distinct part of the bill.

A *cross bill* may also be considered a species of defence. (*n*)

(*k*) 2 R. S. 620, § 5.

(*m*) Mitf. Eq. Pl. 106.

(*l*) Id. ib. § 6.

(*n*) See *Galatian v. Erwin*, Hopk. 48, 58.

(*7*) Under the Code of New York, the only pleading on the part of the defendant is either a demurrer or an answer. (Code, § 143.)

The same provision is to be found in the Codes of *Kentucky*, (§ 117;) *Kansas*, (§ 93;) *Wisconsin*, (§ 48;) *Ohio*, (§ 84;) and *Minnesota*, (§ 72.)

SECTION III.

DEMURRER.

Its nature and uses.] Whenever any ground of defence is apparent upon the bill itself, either from the matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of taking advantage of it is by demurrer.^(o) (8)

(o) Mitf. Eq. Pl. 107.

(8) By the Code, the defendant may demur to the complaint when it appears upon the face thereof, either

1. That the court has no jurisdiction of the person of defendant, or the subject of the action, or
2. That the plaintiff has not legal capacity to sue; or
3. That there is another action pending between the same parties for the same cause; or
4. That there is a defect of parties, plaintiff or defendant; or
5. That several causes of action have been improperly united; or
6. That the complaint does not state facts sufficient to constitute a cause of action.

(Code, § 144.)

However defective the complaint may be, a defendant can avail himself only of the causes of demurrer specified in the above section of the Code. (Van Sant. Eq. Pr. 18; *Beale v. Hayes*, 5 Sandf. 640, 643; *Haire v. Baker*, 5 N. Y. 363; *Swift v. DeWitt*, 3 How. Pr. 280; S. C. 1 Code R. 25.) Hence a demurrer on the ground of mere uncertainty, or indefiniteness is irregular. (*Richards v. Edick*, 17 Barb. 260; *Graham v. Camman*, 5 Duer. 697; *Spies v. Accessory Transit Co.*, id. 662; *Roeder v. Ormsby*, 13 Ab. 334; *Seeley v. Engell*, 13 N. Y. 542; *Village of Warren v. Phillips*, 30 Barb. 646.) So, also, as to redundancy, (ib.: *Roeder v. Ormsby*, *Supra*; *Ward v. Ward*, 5 Ab., N. S. 145;) or irrelevancy, (*Smith v. Greenin*, 2 Sandf. 702; *Watson v. Husson*, 1 Duer. 242; S. C. 14 N. Y. 60;) or argumentativeness (*Brown v. Richardson*, 20 N. Y. 472; *Zabriskie v. Smith*, 13 id. 322; *Prindle v. Caruthers*, 15 id. 425; *Judah v. Vincennes University*, 23 Ind. 273). Nor will a demurrer lie because the causes of action are not separately stated and numbered. (*Fickett v. Brice*, 22 How. Pr. 195; *Hartford Township v. Bennett*, 9 Ohio State Rep. 100.)

If the facts stated in a complaint constitute a valid and sufficient cause of action, a demurrer will not lie, though other and unnecessary immaterial or redundant statements be contained in it. (*Loomis v. Soule*, 1 Minn. 177; *Bishop v. Edmiston*, 16 Ab. Pr. 466; *School Dist. v. Pratt*, 17 Iowa, 16.) Defects of that nature are remedied by motion. (*Byington v. Robertson*, 17 Iowa, 562; *Morse v. Gilman*, 19 Wis., 504; *Chesbrough v. N. Y. and Erie R. R. Co.* 13 How. Pr. 557; *Graham v. Camman*, id. 360; *People ex rel. Crane v. Ryder*, 21 N. Y. 433.)

A demurrer cannot now be taken to the frame of the complaint; that is, to its form. (Van Sant. Eq. Pr. 183.) Where the defect is one merely of form, a demurrer is not the proper remedy. (*Howell v. Fraser*, 1 Code Rep., N. S. 270.) Nor where it appears on the face of the complaint that the statute of limitations is a bar to the action. (*Sands v. St. John*, 23 How. Pr. 140; S. C. 36 Barb. 628.) Nor where an excessive amount of damages is claimed. (*Hecker v. DeGroot*, 15 How. Pr. 315; *Andrews v. Shaffer*, 12 id. 443; *Beale v. Hayes*, 5 Sandf. 640; S. C. 10 N. Y. Leg. Obs. 165.) If the complaint shows that the plaintiff has a cause of action, and that he is entitled to some relief, the question as to what kind, or how much relief shall be granted to him, cannot be raised by demurrer. (*Poett v. Stearns*, 22 Cal. 226.) On demurrer, the court should not pay any attention to forms, if it can find, in the complaint, any allegations which, under any view of them, may give the plaintiff a right to recover. (*Wilder v. McCormick*, 2 Blatch. 31; *Butterworth v. O'Brien*, 30 Barb. 192; S. C. 24 How. Pr. 438.)

A demurrer is proper only when the ground therefor appears on the face of the complaint. (*Carroll v. Carroll*, 11 Barb. 293; *Getty v. Hudson River Railroad Co.*

*A demurrer is so termed because the party demurring, *demo-* [*106]

8 How. Pr. 177; *Wilson v. Mayor, &c., of New York*, 15 id. 500; S. C. 6 Ab. 6; 4 E. D. Smith, 675; 1 Ab. 4; *Coe v. Beckwith*, 31 Barb. 339; S. C. 19 How. Pr. 398; 1 Ab. 296; *Union Min. Ins. Co. v. Osgood*, 1 Duer, 707; *Watson v. Husson*, id. 243; *Mayberry v. Kelly*, 1 Kansas, 116; *Aurora v. Cobb*, 21 Ind. 492; *Kenworthy v. Williams*, 5 id. 375; *Dury v. Betts*, 23 How. Pr. 396; 16 Ab. Pr. 466; *Dillaye v. Wilson*, 43 Barb. 261; *Amory v. McGregor*, 12 John. 287; *Bell v. Mayor of Vicksburg*, 23 How. U. S. 443; *Powers v. Ames*, 9 Min. R. 178; *Dorman v. Ames*, id. 180. *Hentsch v. Porter*, 10 Cal. 555.)

It is not a remedy for indefiniteness. If a party desires that a pleading be made more definite and certain, he must seek that relief by motion. (*Richards v. Edick*, 17 Barb. 260; *Graham v. Camman*, 5 Duer. 697; S. C. 13 How. Pr. 362; *Chesbrough v. New York & Erie Railroad Co.* 26 Barb. 9; S. C. 13 How. Pr. 557; *Lee Bank v. Kitching*, 11 Ab. 435; S. C. 7 Bosw. 664; *Village of Warren v. Phillips*, 30 Barb. 647; *Meyer v. Van Collem*, 28 id. 230; S. C. 7 Ab. 222; *Howell v. Frazer*, 1 Code Rep., N. S. 270.) So where the complaint contains in form, but one cause of action, but sets forth facts constituting two or more causes of action, the remedy is not by demurrer, but by a motion either to strike out all but one cause of action, or to compel the plaintiff to elect, on which he will proceed. (*Cheney v. Fisk*, 22 How. Pr. 236; *Fickert v. Brice*, id. 194; *Dorman v. Kellam*, 4 Ab. 202; *Lord v. Freeland*, 13 id. 195; 24 How. 316.) In such a case, if one of the causes of action cannot be sustained, for want of proper parties defendant, it should be treated as irrelevant or immaterial. (*Lord v. Freeland*, 24 How. 316; S. C. 15 Ab. 122; 13 id. 195.) Where the complaint prays for relief beyond what the facts alleged therein authorize, the remedy is not by a demurrer, but by a motion to strike out such parts of the prayer as are not thus authorized. (*Lord v. Freeland*, 13 Ab. 195; *Roeder v. Ormsby*, id. 334; S. C. 22 How. Pr. 270; *Cheney v. Fisk*, id. 236; *Andrews v. Shaffer*, 12 id. 443; *Rollins v. Forbes*, 10 Cal. 299; *Beale v. Hayes*, 5 Sandf. 640; *Bishop v. Edmiston*, 16 Ab. 466; *Emery v. Pease*, 20 N. Y. 62; *Hecker v. De Groot*, 15 How. Pr. 316; *Moran v. Anderson*, 1 Ab. 288; *Meyer v. Van Collem*, 28 Barb. 230; *St. John v. Pierce*, 22 Barb. 371; *Moses v. Walker*, 2 Hilt. 536; *Woodgate v. Fleet*, 9 Ab. 222; *Hess v. Buffalo & Niagara Falls Railroad Co.* 29 Barb. 391.)

And where damages of a special character should have been alleged more specifically, the remedy is by motion, and not by demurrer. (*Hewitt v. Mason*, 24 How. Pr. 366.) Where a complaint against partners shows a cause of action on contract, and demands judgment therefor, it is not rendered demurrable by subsequent allegations of the defendants' insolvency, of their confession of judgment to defraud creditors, and by asking for an injunction and receiver, although such subsequent matter might be stricken out on motion. (*Meyer v. Van Collem*, 7 Ab. 222; S. C. 28 Barb. 230. See *Durant v. Gardner*, 19 How. Pr. 94; S. C. 10 Ab. 445.)

So a demurrer will not lie for duplicity; the remedy being by motion to strike out, or to compel the party to elect. (*Gooding v. McAllister*, 9 How. Pr. 123; *Welles v. Webster*, id. 251.) Where a complaint prays for a divorce, without alleging the facts relied on, with that certainty which the statute requires, it is a matter regulated by statute, not the Code, and the complaint is bad on demurrer. (*Watson v. Watson*, 32 Barb. 203; S. C. 20 How. Pr. 347.) In an action for a debt contracted by partners, where a surviving partner and the personal representatives of a deceased partner are joined as defendants, and that fact appears on the face of the complaint, the objection to such joinder must be raised by demurrer. (*Higgins v. Freeman*, 2 Duer. 650.)

If the complaint does not state a case upon which, if uncontradicted, the plaintiff has a right to recover, a demurrer is proper, and not a motion to strike out as irrelevant. (*Fabricotti v. Lunitz*, 1 Code Rep., N. S. 121.) The province of a demurrer is to point out the defect in the pleading demurred to, so that it may be amended. (*Cook v. Crawford*, 1 Texas Rep. 9.) A demurrer is in law an answer. (*State of New Jersey v. State of New York*, 6 Peters, 323.) But it has been held that a demurrer is not an answer within the meaning of section 275 of the Code, which specifies the relief to be granted to the plaintiff if there be "no answer." (*Kelly v. Downing*, 12 N. Y. 71.) An answer and a demurrer, are distinct pleadings. Connecting them in form, and in the same paper, does not change their distinctness. (*Howard v. Michigan Southern Railroad Company*, 5 How. Pr. 206; S. C. 3 Code R. 213.) An objection, set up in the answer, that the complaint is insufficient, is improper, and is a demurrer. (*Slack v. Heath*, 1 Ab. 331, 337; S. C. 4 E. D. Smith, 96.) So where an answer contained an objection of want of parties, it was held to be a demurrer, and the defendant was compelled to elect whether to abide by the answer,

ratur, or will go no further; (*p*) the other party not having shown

(*p*) 3 Black. Com. 314.

or the demurrer. (*Struver v. Ocean Insurance Company*, 16 How. Pr. 422.) To determine whether a defence is a demurrer or an answer, it is only necessary to ascertain whether it requires that any facts should be proved or not. (*Ib.*)

A defendant cannot answer and demur to the same matter. (*Ib.*; *Munn v. Barnum*, 12 How. Pr. 563; S. C. 1 Ab. 281; *Spellman v. Weider*, 5 How. Pr. 5; *Slack v. Heath*, 4 E. D. Smith, 96; S. C. 1 Ab. 331, 337.)

In *Kentucky*, it is not a good ground of demurrer to an amended petition [complaint] in a suit by ordinary petition, that it departs from the cause of action set out in the original petition. (*Hord v. Chandler*, 13 B. Monroe, 403.) A demurrer "to the whole case," though inartificial, puts in issue the sufficiency of the facts alleged in the original and amended petitions to constitute a cause of action; and if the plaintiff's petition shows that his action is founded upon a contract champertous, by statute, or at common law, and void, the demurrer should be sustained. (*Miles v. Collins*, 1 Metc. 308.)

In *Massachusetts*, the defendant, instead of filing a formal demurrer, may insist on any special matter in his answer, and have the same benefit thereof as if he had demurred to the bill. (Rule 23 of the Rules of Practice in Chancery.) A demurrer must be accompanied with a certificate that it is not intended for delay. (Gen. Stat. ch. 113, § 5.)

In the Equity courts of the *United States*, no demurrer will be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay. (Rule 31 of Rules of Practice.)

Section 144. Subd. 1. For want of jurisdiction. Under the former practice it was necessary the bill should show a state of facts from which it would be apparent that the court had jurisdiction. (Mitf. Eq. Pl. 35.) Under the Code, it seems this is not essential. It is only where it appears on the face of the complaint that the court has no jurisdiction of the person of the defendant, or the subject of the action, that a demurrer on this ground is allowed. (*Van Sant. Eq. Pr.* 185, 186.) This has been expressly held, under the Code; and further, that on a demurrer specifying for cause that the complaint does not state facts sufficient to constitute a cause of action, the question, that the court has not jurisdiction of the subject of the action, cannot be raised. (*Wilson v. Mayor, &c., of New York*, 6 Ab. 6.)

The want of jurisdiction for which a demurrer will lie, is either jurisdiction of the subject matter, or jurisdiction of the person of the defendant. (*Van Sant. Eq. Pr.* 186.)

"That the court has no jurisdiction of the person," means that the person is not subject to the jurisdiction of the court; not that the suit has been irregularly commenced. (*Nones v. Hope Mu. Life Insurance Company*, 5 How. Pr. 96; S. C. 3 Code Rep. 161; 8 Barb. 541.) An objection of this description can only be taken by demurrer when the defect appears on the face of the complaint. (*Wilson v. Mayor, &c., of New York*, 6 Ab. 6; S. C. 15 How. Pr. 500; *Koenig v. Nott*, 8 Ab. 354; S. C. 2 Hilt. 323; *Doll v. Feller*, 16 Cal. 432.) The objection must be fully made out; and no presumption will be indulged against the jurisdiction of an inferior tribunal, where enough is shown to bring the case within the general language of the statute conferring jurisdiction. (*Foster v. Hazen*, 12 Barb. 547. If the objection be not raised, either by demurrer or answer, yet whenever want of jurisdiction appears in any subsequent stage of the suit, the objection may be raised and judgment, if entered, will be set aside. (*Valarino v. Thompson*, 7 N. Y. 576.)

The court whose jurisdiction is impeached, has power to determine the question whether it possess it or not. (*King v. Poole*, 36 Barb. 242.)

Where there are several causes of action, but of one of them the court has no jurisdiction, the demurrer must be to that one, and in this form; and not to the whole complaint as for a misjoinder of actions. (*Cook v. Chase*, 3 Duer, 643.)

In *California*, a demurrer on the ground "that the court has no jurisdiction either of the person of the defendants or of the subject of the action," is sufficiently explicit, under the rule of construction adopted by the courts of that state. (*Elissen v. Hallock*, 6 Cal. 356.) When a bill sets forth various claims, and the defendant files a general demurrer, the demurrer will be overruled if any of the claims be proper for the jurisdiction of a court of equity. (*Castleman v. Veitch*, 3 Rand. 598; *Kimberly v. Sells*, 3 John. Ch. 467; *Graves v. Downey*, 3 Monroe, 356; *Blount v. Garan*, 3 Hayw. 88; *Mortone v. Granada Academics*, 8 Sine. and Mar. 773.) A demurrer to

sufficient matter against him. It is an allegation by a defendant which,

the whole of a bill containing some matters relievable and others not, is bad, unless the bill is multifarious. (*Dimmock v. Birby*, 20 Pick. 368.) In order to sustain a demurrer to the whole of a bill for want of jurisdiction, it must appear that no substantial and essential part of the complaint is within the jurisdiction of the court. (*Boston Water Power Company v. Boston & Worcester Railroad Company*, 16 Pick. 512.)

In the equity courts of the *United States*, the citizenship of the parties should appear on the face of the bill to entitle the court to take jurisdiction; otherwise the cause will be dismissed. (*Dodge v. Perkins*, 4 Mason, 435; Story Eq. Pl. § 492.) The want of such an averment may be taken advantage of by demurrer. (Story Eq. Pl. § 492.) And where the want of jurisdiction is apparent on the face of the proceedings, from a defective statement of the citizenship of the different parties, it is fatal at all times, and may be insisted on by way of motion, or otherwise, in any stage of the cause, and even upon appeal. (*Dodge v. Perkins*, 4 Mason, 437. See also Story Eq. Pl. § 26, note, § 10, 34, 492; *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 3 Peters, 148; *Hughes v. Jones*, 2 Maryl. Ch. Decis. 178; *Niles v. Williams*, 24 Conn. R. 279; *Ketchum v. Driggs*, 6 McLean, 13.)

As to the amount in controversy, it has been already stated (ante. p. 59, note 6), that as the constitution of 1846 and the Code have abolished every limitation on that subject in equitable actions, the court will now take jurisdiction of an action where the amount involved is less than \$100. Consequently, a demurrer on the ground that the amount in dispute is less than \$100, will no longer lie.

Subd. 2. Plaintiff's want of capacity to sue. A demurrer will lie under this subdivision when it appears from the complaint that the plaintiff has no title to the character in which he sues. As when it is stated therein that the plaintiff sues as administrator under void letters of administration, or in virtue of a grant of letters in a foreign country, the objection may be taken by demurrer for the reason that the plaintiff has no right or legal capacity, under such letters, to sue in our courts. (Mitf. Eq. Pl. 155; Coop. Eq. Pl. 169, 170; Van Sant. Eq. Pr. 187.) This was the rule prior to the Code. Since the Code, it has been decided that a plaintiff suing as administrator, &c., must show his appointment as administrator in the complaint, and that he is entitled to recover in that capacity. A mere description of himself in the complaint, as administrator, &c., is not sufficient on demurrer. (*Sheldon v. Hoy*, 11 How. Pr. 11.) So as to a receiver suing in his representative capacity. A demurrer will lie unless he set forth the time, place and manner of his appointment. (*White v. Joy*, 11 How. Pr. 36; S. C. 13 N. Y. 86; *Chautauque County Bank v. White*, 6 N. Y. 236.) Where a complaint by a receiver alleges that he was duly appointed receiver, but does not state facts from which the court can see that he was so appointed, the proper remedy is by motion, to make more definite and certain. (*Cheney v. Fiske*, 22 How. Pr. 236.)

In *Smith v. Levinus*, (8 N. Y. 472), it was held, on demurrer to a complaint in an action by the supervisor of a town, which in its commencement simply recited, "the complaint of the plaintiff above named, as supervisor," &c., that it was sufficient.

The capacity of the plaintiff to sue is independent of the facts constituting the cause of action. Hence that question cannot be raised by demurrer under the 6th subdivision of § 144. (*Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Vibert v. Frost*, 3 Ab. 120; *Myers v. Machado*, 6 id. 198; S. C. 14 How. Pr. 149; *Hobart v. Frost*, 5 Duer. 672.) Where it appears from the complaint, on a promissory note, that the plaintiff holds it as a collateral security, under a trust instrument expressly authorizing him to sell, but not expressly authorizing him to sue upon it, a demurrer for want of capacity to sue, will be sustained. (*Nelson v. Eaton*, 7 Ab. 305.) Where a complaint by a corporation omits to allege facts showing the plaintiff's capacity to sue, and the defendant demurs, for the sole cause that the complaint does not state facts sufficient to constitute a cause of action, he cannot avail himself of the objection that the plaintiff has not capacity to sue. (*Fulton Fire Insurance Company v. Baldwin*, 27 N. Y. 648; S. C. 5 Trans. App. 180.)

When the plaintiff sues by a name representing no person, natural or artificial, the objection is not to be raised by demurrer, but by motion. (*Bank of Havana v. Magee*, 20 N. Y. 355; S. C. 7 Ab. 134; 16 How. Pr. 97.)

If the defendant wishes to raise the question of the legal capacity of the plaintiff to sue, he must raise it specifically in his demurrer. It cannot be raised on a demurrer stating that the complaint does not contain facts sufficient to constitute a cause of action. (*Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Vibert v. Frost*, 3 Ab.

admitting the matters of fact stated in the bill to be true, shows that

120.) If not taken by demurrer or answer, it will in all subsequent proceedings, be held to be waived. (Code, § 148; *Hastings v. McKinley*, 1 E. D. Smith, 273.) The plaintiff's incapacity to sue may be waived by pleading over. The general denial pleaded admits the plaintiff's capacity to sue. (18 Ind. Rep. 92.)

When a corporation sues, it must show how it was created. Without this, there is a fatal omission of one of the material elements of a good cause of action. (*Johnson v. Kemp*, 11 How. Pr. 186.) But the omission, on the part of a corporation, to show its incorporation, cannot be reached by a general demurrer stating that the complaint does not state facts sufficient to constitute a cause of action. That the plaintiff has not legal capacity to sue, is made a ground for special demurrer, and must therefore, be specially assigned. (*Bank of Louisville v. Edwards*, 11 How. Pr. 216.) A corporation, suing as such, need not allege in the complaint, that it is a corporation and has legal capacity to sue; and the want of such an allegation affords no ground of demurrer. (*Phoenix Bank v. Donnell*, 41 Barb. 571; S. C. 40 N. Y. 410.) In such a case, there is an implied averment that the plaintiff is a corporation. *Aliter* in a suit by a corporation incorporated by the name of an individual. (Per Sutherland, J. 1b.) The want of capacity must appear before it can become a ground of demurrer; not from the omission of facts that would expose such want. (*Union Mutual Insurance Company v. Osgood*, 1 Duer. 707.)

When an infant sues by guardian, as provided by the Code, the complaint must allege the due appointment of the guardian; otherwise it will be demurrable on the ground that it appears "the plaintiff has not the legal capacity to sue." (*Grantman v. Thrall*, 44 Barb. 173; *Hulbert v. Young*, 13 How. Pr. 413.)

In the *United States of America v. Wagner*, (Law Rep. 3 Eq. 724), a demurrer was allowed to a bill brought by "the United States of America," on the ground that a foreign state is not allowed to sue in a court of equity, without putting forward some public officer on whom process may be served, and who can be called upon to give discovery on a cross bill.

The objection that the plaintiff has not legal capacity to sue is waived, if not taken by demurrer or answer. (*Palmer v. Davis*, 23 N. Y. 242; *Belshaw v. Colie*, 1 E. D. Smith, 213; *Hastings v. McKinley*, id. 273.) So held where the objection was that the plaintiff was a married woman, suing without a next friend, prior to the act of 1857. (*Palmer v. Davis*, *supra*.) Or that the plaintiff was a foreign executor. (*Robbins v. Welles*, 26 How. 15. See also *Van Amringe v. Barnett*, 8 Bosw. 357.)

If, of several plaintiffs, some have an interest in the matter of a suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. (*King of Spain v. Machado*, 4 Russ. 224. And see *Cuff v. Plattet*, id. 242; *Clarkson v. De Peyster*, 3 Paige, 339; *Dus v. Bouchard*, 10 id. 445.)

Subd. 3. Another action pending between the same parties. This ground of objection does not usually appear on the face of the complaint. The defendant, in most cases, will be obliged to set it up in his answer. If the objection is not taken in one way or the other, it will be deemed waived; for a second proceeding or action cannot be set aside on motion, because a prior one has been commenced and is pending. (Van Sant. Eq. Pr. 188; *Hornfager v. Hornfager*, 6 How. Pr. 279.)

Where an action for a partnership accounting was commenced by one of two partners, by the service of a complaint, and the other partner subsequently commenced a second action, with special averments in his complaint, and a prayer for more extended relief, without changing the nature of the action, it was held that the latter could not be sustained. (*Ward v. Gore*, 37 How. 119.)

The defence of another action pending, when available, as established by law, before the Code, may be set up by demurrer whenever it appears on the face of the complaint, and by answer when it does not so appear. (*Burrows v. Miller*, 5 How. Pr. 51; Code of Kentucky, § 120; *Moore's Adm'r. v. Sheppard*, 1 Met. 97.) This applies to suits for partition. (*Hornfager v. Hornfager*, 1 Code Rep., N. S. 412; S. C. 6 How. Pr. 279.) The second action, thus pleaded, should in general, be between the same parties, and for the same cause of action. It is said, however, that there are exceptions to the rule, especially in actions of an equitable nature. (Van Sant. Eq. Pr. 188.) But to sustain a demurrer under this subdivision, it must appear that both actions are for the same identical cause of action. (*Paige v. Wilson*, 8 Bosw. 294; *Kelsey v. Ward*, 16 Ab. 98.)

A demurrer lies, under this subdivision, when there is an action between the same parties, in any proceeding in which the rights of the plaintiff in the last suit would

they are insufficient for the complainant to proceed upon, or to oblige

be fully protected; whether it be strictly an action, attachment, citation before the surrogate, or a proceeding in court founded on a petition. (*Groshon v. Lyon*, 16 Barb. 461.) So, the pendency of another action, brought by the defendant, would come under the rule. (*Hornfager v. Hornfager*, 6 How. Pr. 279.) But not if the other action is for relief, which could not be granted in the action in which the demurrer is interposed. (*Haire v. Baker*, 5 N. Y. 357.) Nor where the other action is pending in a court of another state, or in court of the United States. (*Burrows v. Miller*, 5 How. Pr. 51; *Cook v. Litchfield*, 5 Sandt. 330; *Strong v. Stevens*, 4 Duer. 658; *McMickan v. Hammond*. (Cited Myers' Code (Ky.) 356.)

This objection cannot be raised under subdivision six, assigning for cause the want of sufficient facts. (*Aikens v. Bruen*, 21 Ind. R. 137.)

In *O'Connor v. Blake*, (29 Cal. 322,) it was held that a plaintiff cannot, after plea in abatement of the pendency of a prior suit, avoid the effect of a previous plea by discontinuing the first action which was pending at the time of the plea.

In *Kentucky*, a defendant may demur to the complaint when it appears on its face that there is another action pending between the same parties, for the same cause. (Civ. Code, sec. 120.) The plaintiff filed his petition stating that he had previously sued the defendant in the same court, for the recovery of slaves, &c.: that the suit was then pending in another county, by change of venue; and alleged grounds of attachment and obtained the same. Held, that under the above section of the Civil Code, a demurrer to the petition was properly sustained. (*Moor's adm'r v. Sheppard*, 1 Mete. 97.) A ground for a provisional remedy is not a cause of action. A provisional remedy is merely ancillary and incidental to the action in which it is used, and can only be obtained in the court in which the action is brought. (*Ibid.*)

Subdivision 4. Defect of Parties. A defect of parties plaintiff is a good ground of demurrer by all the defendants. (*Brownson v. Gifford*, 8 How. Pr. 389; *Johnson's heirs v. Chandler's heirs*, 15 B. Monroe, 589; *Carpenter v. Miles*, 17 id. 602; *Dean v. English*, 48 id. 136; *Walrath v. Handy*, 24 How. Pr. 353.) By this defect is meant too few, not too many, parties. (17 Ind. R. 291.) But the fact that the party whose non-joinder is alleged as ground of demurrer is *living*, must appear affirmatively on the face of the complaint. (*Strong v. Wheaton*, 58 Barb. 616; *Taylor v. Richards*, 9 Bosw. 679; *Burgess v. Abbot*, 6 Hill, 135, 141; S. C. 1 id. 476; *Brainard v. Jones*, 11 How. Pr. 569; *State of Indiana v. Woram*, 6 Hill, 33; *Scofield v. Van Syckle*, 23 How. Pr. 97.)

For defects arising from the non-joinder of plaintiffs, advantage can only be taken, under the Code, by answer or demurrer. (*Donnell v. Walsh*, 33 N. Y. 43; *Hosley v. Black*, 28 id. 438; *Merritt v. Walsh*, 32 id. 635; *Creed v. Hartman*, 29 id. 591; *Crouch v. Parker*, 40 Barb. 94; *Lee v. Wielks*, 27 How. Pr. 336; S. C. 19 Ab. 355; *Loeschigk v. Addison*, id. 169; *Lewis v. Graham*, 4 Ab. 106; *Jacks v. Cooke*, 6 Cal. 164; *Rowe v. Baccigalluppi*, 21 id. 633.) If a defect of parties appears on the face of the complaint, the objection must be taken advantage of by demurrer; otherwise it will be deemed on the trial, to have been waived. (*Dillaye v. Parks*, 31 Barb. 132; *Higgins v. Freeman*, 2 Duer. 650; *Wright v. Storrs*, 6 Bosw. 600; S. C. 32 N. Y. 691; *Abbe v. Clark*, 31 Barb. 238; *Wright v. Bennett*, 3 id. 451; *Conklin v. Barton*, 42 id. 435; *Cowing v. Greene*, 45 id. 585; *Dillaye v. Wilson*, 43 id. 261; *Tremper v. Conklin*, 44 id. 436; *McFean v. Scott*, 46 id. 379; *Lewis v. Graham*, 4 Ab. Pr. 106; *Scofield v. Van Syckle*, 23 How. Pr. 97; *Donnell v. Walsh*, 33 N. Y. 43; *Hosley v. Black*, 28 id. 438; *Lee v. Wickes*, 27 How. Pr. 336; *Soeding v. Bartlett*, 35 Mo. R. 90; *Sampson v. Shapper*, 3 Cal. 202; *Warner v. Wilson*, 4 id. 313; *Beard v. Knox*, 5 id. 257; *McKune v. McGarvey*, id. 498; *Oliver v. Walsh*, 6 Cal. 456; *Tissot v. Throckmorton*, id. 473; *Andrews v. Mokolunne Hill Co.* 7 id. 334; *Alvarez v. Brannan*, id. 510; *Dunn v. Tozer*, 10 id. 170; *Heutsch v. Porter*, id. 555; *Matt v. Smith*, 16 id. 557; *Sands v. Pfeiffer*, 10 Cal. 258; *Burroughs v. Lott*, 19 id. 125; *Barber v. Reynolds*, 33 id. 497; *Robinson v. Smith*, 3 Paige, 222.) If a defect does not appear affirmatively, the objection must be taken by answer. (*Brainard v. Jones*, 11 How. Pr. 569; *Scofield v. Van Syckle*, 23 id. 97; *State of Indiana v. Woram*, 6 Hill, 33.) The fact that all of several partners do not join as plaintiffs is no objection to a recovery by those who do sue, where the defect appears on the face of the complaint, and the defendant fails to demur. (*Donnell v. Walsh*, 6 Bosw. 625.) But the non-joinder of a co-partner as plaintiff which is not apparent upon the face of the complaint, can only be objected to by answer. And if not thus raised, the objection is waived. (*Conklin v. Barton*, 43 Barb. 435; *Serantom v. The Farmers' and Mechanics' Bank of Rochester*, 33 id. 527; *Abbe v. Clark*, 31 id. 238; *Zabriskie v.*

the defendant to answer; or that, for some reason apparent on the face

Smith, 13 N. Y. 336.) An allegation, in an answer, that the debt sued for, if due at all, is due to the plaintiff and another as partners, cannot be treated as a demurrer. (*Andrew v. Mokelumne Hill Co.*, 7 Cal. 330.)

It is not within the office of a demurrer to state objections not apparent on the face of the complaint, e. g., to name parties who should have been joined; and no conclusion is to be drawn from such statements adverse to the plaintiff. (*Coe v. Beckwith*, 10 Ab. Pr. 296.)

An improper joinder of parties plaintiff is not a subject of demurrer. (*Allen v. City of Buffalo*, 38 N. Y. 280.)

Although a demurrer to the answer reaches back to the complaint, a defect of parties cannot be taken advantage of in that way. A demurrer to the complaint must be filed. (*McEwen v. Hussey*, 23 Ind. R. 395.) Section 17 of the California Practice Act, corresponding with section 144 of the New York Code, is to control in determining whether a demurrer for defect of parties is well taken. (*Wallace v. Eaton*, 5 How. Pr. 99.)

Where some of the part owners of a vessel sued to recover freight, and the complaint showed that the plaintiffs owned three-eighths only, of the vessel, and claimed to recover only their proportion of the freight money averred to be due, it was held that although all the owners should have joined in the action, yet the defendant had waived the objection by omitting to demur to the complaint. (*Merritt v. Walsh*, 32 N. Y. 685; *Donnell v. Walsh*, 33 id. 43. See also *The General Mutual Insurance Company v. Benson*, 5 Duer. 168.)

If there be a non-joinder of parties, who are mere formal parties, and the cause can be disposed of without bringing them in, the court will not listen to an objection after answer, at the hearing. (2 Story Eq. Pl. § 542.) But there are cases in which the court, even at the hearing, and though no objection has been raised by demurrer or answer, will order the cause to stand over, and parties to be brought in, whose presence is necessary to a complete determination of the controversy. (*Van Sant. Eq. Pr.* 189.)

Where husband and wife sue together to recover debts due the husband alone, a demurrer for the improper joinder of parties will be sustained. (*Dunderdale v. Grymes*, 16 How. Pr. 195; *Avogadro v. Bull*, 4 E. D. Smith, 384; *Bartow v. Draper*, 6 Duer. 130.) But where a creditor commences an action in his own behalf against a judgment debtor, the fact that there are other creditors who are not joined as plaintiffs, is not a ground of demurrer. (*Hammond v. Hudson River Iron and Machine Company*, 20 Barb. 378.)

As to parties defendant, the former equity practice prevails under the Code, that a party who is properly a defendant cannot demur because another is improperly joined. (*Brownson v. Gifford*, 8 How. Pr. 389; *Churchill v. Trapp*, 3 Ab. 306.) The defect of parties defendant for which a demurrer is allowed is, that there are too few, not that there are too many. (*Richtmyer v. Richtmyer*, 56 Barb. 50; *Peabody v. Wash. Co. Mu. Ins. Co.* 20 id. 339; *Gregory v. Oaksmith*, 12 How. Pr. 134; *Pinkney v. Wallace*, 1 Ab. 82; *Voorhis v. Baxter*, 18 Barb. 592; S. C. 1 Ab. 44; 17 N. Y. 364; *Crosby v. Berger*, 4 Edw. 210; *Churchill v. Trapp*, 3 Ab. 306; *Davy v. Betts*, 23 How. 396; S. C. 16 Ab. 466, n; *Bank of Havana v. Magee*, 20 N. Y. 355.) The joinder of too many defendants, where there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the complaint sets forth a cause of action. (*New York & New Haven R. R. Co. v. Schuyler*, 7 Ab. 41; S. C. 17 N. Y. 592; *Manning v. State of Nicaragua*, 14 How. Pr. 517; *Kolls v. DeLeyer*, 41 Barb. 208; S. C. 17 Ab. 312; 26 How. 463.) It is said this rule is generally applied to allow any defendant, against whom no cause of action is stated in the complaint, to interpose a demurrer on that ground. (*Van Sant. Eq. Pr.* 189.) And if the complaint states a cause of action against one or more of several defendants, a joint demurrer by all, for defect of parties, cannot be sustained. (17 Ind. Rep. 291; *Bick. Civ. Pr.* 103. But see *Hess v. Buffalo, &c. R. R. Co.* 29 Barb. 391, *contra.*)

To sustain a demurrer on the ground of the non-joinder of a defendant, it must appear that the party demurring has an interest in joining such other party. (*Hillman v. Hillman*, 14 How. Pr. 456; *Newbould v. Warrin*, 14 Ab. 80.) Or that he is prejudiced by the non-joinder. (*Stockwell v. Wager*, 30 How. 271.) As that the party not joined is jointly liable with the one sued. (*Wooster v. Chamberlin*, 28 Barb. 602.) So, where there is a non-joinder of parties defendant, it must appear from the complaint that such parties were living when the action was commenced; otherwise the objection must be taken by answer, and not by demurrer. (*Scotfield v. Van Syckle*, 23 How. 97; but see 33 id. 80.)

of the bill, or because of the omission of some matter which ought to

The 144th section of the Code is the controlling section in determining whether a demurrer for defect of parties is well taken. (*Wallace v. Eaton*, 5 How. Pr. 99; S. C. 3 Code Rep. 161.) If the court cannot determine the controversy before it without prejudice to the rights of others, or by saving their rights, then a demurrer for non-joinder is well taken. (*Id.*) A joint demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that there is a defect of parties, will be overruled, where the complaint shows a cause of action in favor of the plaintiffs, or some of them, against some of the defendants. (*People v. Mayor, &c., of N. Y.* 28 Barb. 240; S. C. 17 How. Pr. 56; 8 Ab. 7; rev'd. 10 id. 111.) In *Mess v. The Buffalo & Niagara Falls R. R. Co.* (29 Barb. 391,) where the complaint showed a separate cause of action against each defendant, but not a joint one, a joint demurrer was sustained.

Where the complaint, in an equity suit, shows a cause of action against a part of the defendants, and not as to the others, the latter may demur. (*Eldridge v. Bell*, 12 How. Pr. 547; *Phillips v. Hogerton*, id. 17.) A joint demurrer will lie for the misjoinder of parties plaintiff, for the non-joinder of the proper parties defendant, but not for the mis-joinder of parties defendant. (*Brownson v. Gifford*, 8 How. Pr. 359, 396, 397; *Woodbury v. Sackrider*, 2 Ab. 402.)

If the facts appear on the face of the complaint, the objection of non-joinder of defendants can only be taken by demurrer. (*Baggot v. Boulger*, 2 Duer, 160.) And when it appears, on the face of the complaint, that the action is to recover a debt contracted by partners, and that it is brought against a surviving partner and the personal representatives of a deceased partner, the objection that the defendants have been improperly joined can only be taken by demurrer. (*Higgins v. Freeman*, 2 Duer, 650.)

A demurrer under this subdivision, following the words of the Code, that there is a defect of parties defendant, is insufficient, for not specifying the particular defect. (*Skinner v. Stuart*, 13 Ab. 442.) It must show who are the proper parties, from the facts stated in the bill; not indeed by name; for that might be impossible, but in such a manner as to point out to the plaintiff the objection to his bill, and to enable him to amend by making proper parties. (Story Eq. Pl. § 543; *Dias v. Bouchaud*, 10 Paige, 445; *Robinson v. Smith*, 3 id. 222.)

When an action is duly commenced against commissioners for loaning certain moneys of the United States, under the Act of April 4, 1837, it is in effect brought against the state, and not against the commissioners personally. It is therefore absolutely necessary to bring the state before the court as a party, to enable it to give any relief to the plaintiff, and if the state is not made a party, the objection may be raised by demurrer. (*Plumtree v. Drutt*, 41 Barb. 333.) In an action by stockholders, against the directors of a corporation, to recover the plaintiff's share of the damage done to the corporation by an embezzlement of its assets, the corporation is a necessary party; and if omitted, the defendant may demur. (*Gardiner v. Pollard*, 10 Bosw. 674.)

If the misjoinder of defendants be not objected to in the court below, the objection cannot be raised on appeal. (*Tibbets v. Percy*, 24 Barb. 39.)

If too many persons are joined as defendants, in a bill in equity there being no misjoinder of subjects, one against whom a good cause of action is stated cannot demur on this ground. (*New York & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 592.)

Subd. 5. That several causes of action have been improperly united. This is the defect which, under the old practice, was styled *multifariousness*. It consisted first: In a misjoinder of causes of action; that is, where the claims set up in the complaint are of so different a character that the court will not permit them to be litigated in one action. 2d. Where a party is brought in as defendant upon a record, with a large portion of which, and the case made by which, he has no connection. (Story Eq. Pl. § 530; *Brady v. McCosker*, 1 N. Y. 214.)

The subject of multifariousness has already been fully considered. (*Ante* p. 83, note (11).)

A demurrer for multifariousness goes to the whole bill, and it is not necessary to specify the particular parts of the bill which are multifarious. (1 Dau. Ch. Pr. 584; *East India Co. v. Coles*, 3 Swaust. 142, n; *Boyd v. Hoyt*, 5 Paige, 65; *McIntosh v. Alexander*, 16 Ala. 87; *White v. White*, 5 Gill. 359. See *Gibbs v. Clugett*, 2 Gill. and John. 14; *Dimmock v. Bixby*, 20 Pick. 368.)

Where it appears from the complaint that two distinct causes of action are misjoined, omitting to demur for that cause waives the objection, and the party cannot

be contained in it, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to

raise it upon the trial. (*Blossom v. Barrett*, 37 N. Y. 434; *Youngs v. Seely*, 12 How. Pr. 395; *Winterson v. Eighth Ave. R. R. Co.* 2 Hilt. 389; *Wright v. Storrs*, 6 Bosw. 600; S. C. 32 N. Y. 691; *Fuhn v. Webber*, cited 2 Estree's Pr. 630.) The objection must be taken by demurrer. *Anderson v. Hill*, 53 Barb. 238; *Youngs v. Seely*, *supra*; *Winterson v. Eighth Ave. R. R. Co.* 2 Hilt. 339.) But if in fact the complaint contains but a single cause of action, although it be stated in different courts, a demurrer on the ground that several causes of action are improperly united, is bad. (*Hillman v. Hillman* 14 How. Pr. 456.)

If two causes of action of a class that admits of their being united, but of one of which the court has no jurisdiction be joined, a demurrer to the entire complaint, on the ground that several causes of action are improperly united, will not be sustained. The demurrer must be confined to the cause of action of which the court has no jurisdiction, and must specify the ground of the want of jurisdiction in the court. (*Cook v. Chase*, 3 Duer, 643.)

Allegations of fraud, made in support of a cause of action on contract, but not of themselves constituting a cause of action, do not make an improper joinder. (*Campbell v. Wright*, 21 How. Pr. 9.) And where a complaint against partners shows a cause of action on contract, and demands judgment therefor, it is not rendered demurrable by subsequent allegations of the defendant's insolvency, of their confession of judgment to defraud creditors, and by asking for an injunction and a receiver; although such subsequent matter might be stricken out, on motion. (*Meyer v. Van Collem*, 7 Ab. 222; S. C. 23 Barb. 230. See *Durant v. Gardner*, 19 How. Pr. 94; S. C. 10 Ab. 445.)

Where several causes of action, of the same nature, are united in the same complaint, a demurrer on the ground that they are not separately stated, or plainly numbered, will be overruled. The remedy is by motion. (*Bass v. Comstock*, 38 N. Y. 21; S. C. 36 How. 332; *Anderson v. Hill*, 53 Barb. 238; *Fickett v. Brice*, 22 How. Pr. 195; *Dorman v. Kellam*, 14 id. 184; S. C. 4 Ab. 202; *Moore v. Smith*, 10 How. 361; *Peckham v. Smith*, 9 id. 436; *Robinson v. Judd*, id. 378; *Gooding v. McAlister*, id. 123; *Forsyth v. Edmiston*, 11 id. 408; *Waller v. Raskan*, 12 id. 28; *Woodbury v. Sackrider*, 2 Ab. 402; *Badger v. Benedict*, 4 id. 176; *Harsen v. Bayaud*, 5 Duer. 656; *Hess v. Buffalo & Niagara Falls R. R. Co.*, 29 Barb. 395.) There are some decisions to the contrary, however. (*Getty v. Hudson River R. R. Co.* 8 How. Pr. 177; *Van Namee v. People*, 9 id. 193; *Durkee v. Saratoga & Wash. R. R. Co.* 4 id. 226; *Pike v. Wormer*, 5 id. 171; *Colwell v. N. Y. & Erie R. R. Co.* 9 id. 311.) In *Acome v. American Mineral Co.*, (11 How. Pr. 24,) where a demurrer was interposed for this cause, the court refused to order a judgment for frivolousness.

Where the parties joined as plaintiffs are all interested in the principal question raised in the bill, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained. (*People v. Hurvill*, 26 Cal. 360; *Garner v. Wright*, 28 How. Pr. 92.)

Where a complaint alleged that the defendant had become possessed of a chattel, the property of the plaintiff, and wrongfully converted it to his, the defendant's, use, and then demanded damages for such taking and detention, and a restitution of the chattel, it was held demurrable for an improper joinder of causes of action. (*Maxwell v. Farnham*, 7 How. Pr. 236.)

If a demurrer be interposed because two causes of action are joined in the complaint, and either of the causes of action is well pleaded, the demurrer will be overruled. (*Butler v. Wood*, 10 How. Pr. 222; *Martin v. Mattison*, 8 Ab. 3.)

Courts for detaining the plaintiff's property, and for wrongfully and negligently injuring it while in the defendant's possession as sheriff, may be joined in the same complaint, where they arise out of the same transaction. If they do not, the defendant's remedy is to demur; otherwise he will waive the objection. (*Smith v. Orser*, 43 Barb. 187.)

When there is a misjoinder of causes of action, any defendant may demur. (*Ashby v. Winson*, 26 Mo. 210.) But a joint demurrer, under this subdivision, by several defendants, will be overruled if the complaint shows a cause of action by the plaintiffs, or a portion of them, against some of the defendants. (*The People v. Mayor, &c. of New York*, 28 Barb. 240; S. C. 19 How. Pr. 289.) But if the complaint discloses a separate cause of action against each defendant, a joint demurrer for misjoinder of causes of action will lie. (*Hess v. Buffalo & Niagara Falls R. R. Co.* 29 Barb. 391; *El-*

answer. It therefore demands the judgment of the court, whether the defendant shall be compelled to answer the complainant's bill, or some certain part thereof.(g)

(g) Mitf. 107, 8.

Edridge v. Bell, 12 How. Pr. 549; *Phillips v. Northrup*, id. 17; *Brownson v. Gifford*, 8 id. 392; *Woodbury v. Sackrider*, 2 Ab. 402.)

In *Indiana*, duplicity, that is the joinder of several causes of action or defence in one paragraph is not cause of demurrer, but may be objected to by motion to reject the paragraph, or to strike out all the causes of action or defence, except the first. (Bick. Civ. Pr. 100; 10 Ind. Rep. 485; 11 id. 280.)

Subd. 6. That the complaint does not state facts sufficient to constitute a cause of action.

The complaint, to be overthrown by demurrer on this ground, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action. This subdivision applies only to such defects as would render the cause of action bad on general demurrer, at law, or bad for want of equity, in chancery. (Van Sant. Eq. Pr. 191; *Graham v. Camman*, 13 How. Pr. 360; *Richards v. Edick*, 17 Barb. 260; *Cudlipp v. Whipple*, 1 Ab. 106; *Bank of Louisville v. Edwards*, 11 How. Pr. 216; *Prindle v. Caruthers*, 15 N. Y. 425; *People v. Mayor, &c., of New York*, 23 Barb. 240; S. C. 8 Ab. 7; *Summers v. Parish*, 10 Cal. 347; *Allen v. Paterson*, 7 N. Y. 496; *Richards v. Beairs*, 25 Eng. Law and Eq. R. 157; *Sinclair v. Fitch*, 3 E. D. Smith, 677; *Swift v. DeWitt*, 3 How. Pr. 280; S. C. 1 Code R. 25; *Thompson v. O'Sullivan*, 6 Allen, 303.)

A demurrer stating, in the words of the statute, "that the complaint does not state facts sufficiently to constitute a cause of action," is sufficiently definite to raise the question whether the complaint shows a cause of action. (*White v. Brown*, 14 How. Pr. 282; *Haire v. Baker*, 5 N. Y. 357; *Durkee v. Saratoga & Wash. R. R. Co.* 4 How. Pr. 226; *Paine v. Smith*, 2 Duer, 298; *Hyde v. Conrad*, 5 How. Pr. 112; S. C. 3 Code R. 162; *Johnson v. Wetmore*, 12 Barb. 433.) It is sufficient if the pleader follows the words of the statute, without, pointing out in what the insufficiency consists. (11 Ind. R. 324; 12 id. 533; Bick. Civ. Pr. 103; *Kent v. Snyder*, 30 Cal. 666.) The allegation that "the complaint does not state a sufficient cause of action," is equivalent to the language of the Code. (*Swift v. DeWitt*, 3 How. Pr. 280; S. C. 1 Code R. 25; 6 N. Y. Leg. Obs. 314;) and is sufficient. (*Hoogland v. Hudson*, 8 How. Pr. 353.)

Upon a demurrer under the 6th subdivision, a defendant cannot avail himself of the objection that the plaintiff has not the legal capacity to sue; (*Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 651; S. C. 5 Trans. Ap. 180; *Viburt v. Frost*, 3 Ab. 120; 5 Duer, 672;) or that there is an improper joinder of parties; (*Edridge v. Bell*, 12 How. Pr. 547;) or that the court, as a court of equity, has no jurisdiction; (*Wilson v. Mayor, &c., of New York*, 6 Ab. 6; S. C. 15 How. Pr. 500; 4 E. D. Smith, 706;) or that it appears from the complaint that a third person, not a party to the action, has a right to sue; (*Myers v. Machado*, 6 Ab. 198; S. C. 14 How. Pr. 149;) or that the capacity of a corporation plaintiff to sue does not appear on the face of the complaint; (*Bank of Louisville v. Edwards*, 11 How. Pr. 216; *Bank of Havana v. Wickham*, 16 id. 97; S. C. 7 Ab. 134; 20 N. Y. 355;) or that the relief demanded is too extensive. (*People v. Mayor, &c., of New York*, 8 Ab. 19; S. C. 23 Barb. 240; 17 How. Pr. 56; 10 Ab. 111; *Lord v. Vreeland*, 13 Ab. 195; S. C. 15 id. 122; 24 How. 313; Wait's Code, p. 238.) A defect in the prayer for relief is not a ground of demurrer, but of a motion to make the prayer more specific. (17 Ind. Rep. 291.) A demurrer for this cause will be overruled if, on the facts stated, the plaintiff is entitled to any relief whatever, although not to that demanded. (Ibid.) But the principle that where the complaint contains averments sufficient to authorize a judgment, the court may grant any remedy warranted by the facts, although differing from the relief demanded, does not apply to actions under the Mechanics' Lien Law. (*Sinclair v. Fitch*, 3 E. D. Smith, 677. See *Lewis v. Varnum*, id. 690, note.)

The only question raised by a demurrer under this subdivision, is, does the complaint, on its face, entitle the plaintiff to the relief claimed? It is not material whether that relief be legal or equitable. If equitable, but not allowable, for the want of proper parties, the objection cannot be raised at the trial, or on appeal. (*General Mu. Ins. Co. v. Benson*, 5 Duer, 168. See *Foster v. Watson*, 16 B. Monroe,

The principal ends of a demurrer are, to avoid a discovery which may be prejudicial to the defendant, to cover a defective title, or to prevent unnecessary expense.^(r)

(r) Id. 108.

377.) If the complaint does not state facts sufficient to constitute a cause of action, the defendant does not waive his right to raise that objection by omitting to demur. It may be taken advantage of on the trial; (*Gould v. Glass*, 19 Barb. 179, 186; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Higgins v. Freeman*, 2 Duer, 650; *Budd v. Bingham*, 18 Barb. 494;) or at any stage of the cause. (*Gould v. Glass*, *supra*.) So where two or more defendants are joined, and the complaint does not show a cause of action against some of them, the defendants may avail themselves of that objection on the trial. (*Montgomery County Bank v. Albany City Bank*, *supra*.) If a complaint states a cause of action against one only of several defendants, a joint demurrer by all under this subdivision cannot be sustained; but the defendants against whom no cause of action is stated may demur on that ground, separately (17 Ind. Rep. 291; Bick. Civ. Code, 103.)

If the complaint does not state a case upon which, if uncontradicted, the plaintiff has a right to recover, a demurrer is proper. (*Fabricotti v. Launitz*, 1 Code Rep., N. S. 121.) Substantial and radical defects in the complaint may be reached by a demurrer under this subdivision. (*Spear v. Downing*, 34 Barb. 533; S. C. 22 How. Pr. 30; 12 Ab. 437; *Struver v. Ocean Ins. Co.* 2 Hilt. 475.) In an action to remove a cloud from the plaintiff's title, the objection that the complaint does not state facts sufficient to authorize the court to exercise its power, may be raised by demurrer under this subdivision. (*White v. Brown*, 14 How. Pr. 282; *Spear v. Downing*, 12 Ab. 437; S. C. 34 Barb. 522; 22 How. 30; *Hotchkiss v. Elting*, 36 Barb. 39.)

Where a misjoinder of parties plaintiff appears on the face of the complaint, in an action by husband and wife, a demurrer under subdivision 6 may be sustained. (*Mann v. Marsh*, 21 How. 372; S. C. 35 Barb. 68; *Walrath v. Handy*, 24 How. 353.) If any one of several causes of action set forth in the complaint fails in itself to show any connection between the facts therein alleged and a defendant, such defendant may demur. (*Sinclair v. Fitch*, 3 E. D. Smith, 677.) A fatal defect in one cause of action separately stated, cannot be remedied by allegations constituting another cause of action, contained in the same complaint. (Ib.) Want of interest in the defendant is a matter of substance, and a good ground of demurrer, if it appear on the face of the complaint. Thus: Where the complaint, in an action against husband and wife, to change the wife's separate estate, does not state facts sufficient to show the liability of such estate, the defendants may demur jointly. (*Goodall v. McAdam*, 14 How. 385; *Goelet v. Gori*, 31 Barb. 314.)

A demurrer admitting facts sufficient to constitute a cause of action cannot be sustained. (*Richard v. Edick*, 17 Barb. 260; *Graham v. Cumman*, 13 How. Pr. 360; S. C. 5 Duer, 697; *Hammond v. Hudson River Iron & Machine Co.*, 20 Barb. 378; *Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Hillman v. Hillman*, 14 id. 456.)

By a demurrer under the 6th subdivision, the question as to the want of parties, or as to the form of action, cannot be raised; (*Loomis v. Tift*, 16 Barb. 541;) nor the question as to the want of jurisdiction. (*Wilson v. Mayor, &c., of New York*, 4 E. D. Smith, 706, n.)

In general, if the case stated in the complaint is such that, admitting the whole complaint to be true, the court ought not to give the plaintiff the relief or assistance he requires, in whole or in part, against all or any of the defendants, it is not only a sufficient, but an appropriate, ground of demurrer by the defendants against whom no such cause of action is stated. (Van Sant. Eq. Pl. 695; Eq. Pr. 192.)

Want of interest in the subject matter of the suit, in the case of a sole plaintiff, is not only a good cause of demurrer, but if the suit is joint, want of interest in either of the plaintiffs renders the bill equally defective. (2 Story Eq. Pl. § 509; *Palmer v. Davis*, 28 N. Y. 242; *Walrath v. Handy*, 24 How. Pr. 353.) Or the facts that the plaintiff is not the real party in interest. (*Westervelt v. Alecock*, 3 E. D. Smith, 243; *Jackson v. Weedon*, 1 id. 142; *Savage v. Corn Exchange Ins. Co.* 4 Bosw. 2.)

But the want of that interest in the plaintiff which authorises a demurrer, it is said, is to be understood with reference to the principle of representation which prevailed in the doctrine of parties in chancery; and as a general rule, if the defendant will be perfectly protected by responding to the plaintiff, and if there is no necessity, or substantial equity, in protecting the fund against the party himself, if recovered,

A demurrer to a bill must be founded upon a point of law which goes to the absolute denial of the relief sought.(s) It must express the

(s) *Verplank v. Caines*, 1 John. Ch. 57.

the plaintiff may be regarded, within the meaning of the Code, as the real party in interest. (*Myers v. Machado*, 6 Ab. 198; *Van Sant. Eq. Pr.* 192.)

In *New York*, under the Code, the objection that the action, whether it be legal or equitable, was not commenced within the time limited by statute, can only be taken by answer. The defendant cannot demur on that ground; even where it appears on the face of the complaint, that the cause of action is barred by the statute of limitations. (*Sands v. St. John*, 35 Barb. 628; *S. C.* 23 How. Pr. 140; *Code*, § 74.)

In *Ohio*, where the cause of action appears, on the face of the petition, to be barred by the statute of limitations, there is, in law, no cause of action alleged; and the defendant may either demur, or put in an answer setting up the statute of limitations. (*Sturges v. Burton*, 8 Ohio State R. 215.) If the petition does not, on its face, show that the cause of action arose at a period remote enough to create a bar, then the statute must be set up by answer. (Ib.)

In *California*, if it appears on the face of the complaint that the demand is barred by the statute of limitations, a demurrer will be sustained. (2 *Estee Pr.* 638.) But the bar of the statute must clearly appear on the face of the complaint. (*Sublette v. Tinney*, 9 Cal. 423; *Barringer v. Warden*, 12 id. 311; *Smith v. Hull*, 19 id. 85; *Smith v. Richmond*, id. 476; *Ord v. De La Guerra*, 18 id. 67; *Maxwell v. Kennedy*, 8 How. U. S. 210; see also, *Wisher v. Burnett*, 4 Wash., C. C. 631.) It should be distinctly stated in the demurrer. (*Brown v. Martin*, 25 Cal. 89; *Farwell v. Jackson*, 23 id. 106.)

In *Missouri*, also, it is held that where the statute creates an absolute bar by mere lapse of time, without exception, the defence may be made by demurrer, if the necessary facts appear in the complaint. (*State v. Bird*, 22 Mo. Rep. 470.) But a demurrer should be resorted to only where it clearly appears that if the plaintiff's case has been fairly stated, no recovery can be had. (*McHair v. Lott*, 25 Mo. Rep. 182.)

In *Massachusetts*, the statute of limitations operates, in cases where it applies, *ex proprio vigore*, in equity as well as at law. (*Furnam v. Brooks*, 9 Pick. 243; *Johnson v. Ames*, 11 id. 182; *Bowman v. Waltham*, 1 How. U. S. 189.)

In *Kentucky*, the statute of limitations is a bar, in equity. (*McDowell v. Heath*, 3 A. K. Marsh. 323; *Beckenbridge v. Churchill*, 3 J. J. Marsh. 15.) It seems, however, that it does not apply in *tolidem verbis*, but has been adopted as reasonable and consistent. (*Crain v. Pratner*, 4 J. J. Marsh. 77.)

In *Connecticut*, where the delay has been such as to be a bar at law, it will be so in equity. (*Banks v. Judah*, 8 Conn. 145.)

The same principle exists in the courts of the *United States*. (*Elmendorf v. Taylor*, 10 Wheat. 152; *Milner v. McIntyre*, 6 Peters, 61.)

In *Maine*, the statute of limitations operates on suits in equity, as well as actions at law. (*Denny v. Gilman*, 26 Maine, 149, 154; *Chapman v. Butler*, 22 id. 191.)

When the complaint shows the cause of action to be within the statute of frauds, a demurrer will lie. (*Graf v. Worthwine*, 1 Handy (Ohio) 19; *Randall v. Howard*, 2 Black. U. S. 585.)

When one of several defendants demurs on the ground that the petition does not state facts sufficient to constitute a cause of action, the true inquiry is, does the petition show a cause of action against the defendant who demurs? If so, the demurrer should be overruled. (*Slevin v. Reynolds*, 1 Handy, 37.) Where the petition shows that at the time of making the contract, the defendant was a married woman, and there is no statement showing that it was a contract obligatory in any respect, or on any account, upon her, no cause of action is shown, and the objection is well taken by demurrer. (*Graf v. Worthwine*, 1 Handy, 19.)

A demurrer is not the mode of raising the objection that the cause of action had not accrued when the action was commenced. (*Smith v. Holmes*, 19 N. Y. 291.) Thus in action on a bond dated May 10, 1853, conditioned for the payment of a sum "in two years from the first day of April last, with annual interest," where a demurrer on the ground that no cause of action was stated, was tried in June, 1854, it was held that as interest was due before the time of trial, the plaintiff was entitled to judgment upon the demurrer. (Ibid.) The court will not presume, in support of a demurrer, that the debt was not due when the action was commenced. (*Maynard v. Talcott*, 11 Barb. 569.)

Where a demurrer to the complaint states the objection to it under the 6th subdi-

grounds upon which it is founded; and in doing this it must be positive, explicit, and certain, leaving nothing to supposition or inference. (t) (9)

(t) Barton, 108. 2 Ves. 83. Edsell v. Buchanan.

vision of section 144, "that it does not present facts sufficient to constitute a cause of action, in that, 1st," &c., stating as the specific objection, a want of capacity in the plaintiff to sue, the inadvertence will be disregarded. (*Connecticut Bank v. Smith*, 17 How. Pr. 487.) A demurrer under the 6th subdivision will not raise the question of a defect of parties defendant. (*Bishop v. Milwaukee*, 18 Wis. 431.)

A demurrer under this subdivision puts in issue the entire complaint. (*White v. Brown*, 14 How. Pr. 282; *Spear v. Downing*, 12 Ab. 442; S. C. 34 Barb. 523.) A statement that certain parts of the complaint are immaterial and redundant does not vitiate the demurrer. (*Smith v. Brown*, 6 How. Pr. 383.)

An objection to the pleading of a written instrument by stating its legal effect, instead of setting forth its contents can be taken only by demurrer. (*Kellogg v. Baker*, 15 Ab. 286.)

A demurrer under the 6th subdivision admits the validity of the statute authorizing the plaintiff to sue. (*Litchfield v. McComber*, 42 Barb. 288.)

In *Kentucky*, the grounds of demurrer to the petition [complaint] are the same as the first five causes specified in section 144 of our Code. (Myers' Code, § 120 p. 37.)

In *Ohio*, they are precisely same as those specified in our Code. (Seney's Code, § 87, p. 113.) So, also, in *Wisconsin*, (Code, § 49;) *Kansas*, (Code, § 96;) *Indiana*, (Code of 1852; Bick. Civ. Prac. 101;) and *Minnesota*, (Code, § LXI; Pub. Stat. 1859, p. 540.)

(9) A demurrer must distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. (Code of N. Y. § 145; Code of Wisconsin, § 50; California Prac. Act, sec. 41; Stat. of Oregon, § 67.) Unless it state the specific objection relied on, it will be overruled. (*Vibart v. Frost*, 3 Ab. 140; S. C. sub. nom. *Hobart v. Frost*, 5 Duer. 672.) Thus, in an action by the receiver of a judgment debtor, the defendant cannot, under a demurrer under the sixth subdivision, avail himself of the objection that the appointment of the plaintiff appears to be invalid. That objection can only be raised upon a demurrer specifying as its ground, that the plaintiff has not the legal capacity to sue. (Ib.) Yet, in *Connecticut Bank v. Smith*, (9 Ab. 168; S. C. 17 How. Pr. 487,) where the demurrer specified that the complaint did not state facts sufficient to constitute a cause of action; that it did not show the plaintiff's capacity to sue; it was held that although the latter objection was not contained in the former, yet it was sufficiently stated in the demurrer to allow the defendant to avail himself of it on the argument.

If a demurrer does distinctly specify the cause of action to which it is intended to apply, although it purport, in its commencement, to be a demurrer to the whole pleading, it will be regarded as a demurrer only to the parts specified, and not to the whole preceding pleading. (*Matthewson v. Beach*, 4 Seld. 173.)

Whenever any of the objections enumerated under section 144 of the Code, appear on the face of the complaint, a demurrer therefor must specifically state the particular objection relied on. All objections not so stated are waived, except those arising under subdivisions 1st and 6th. (*Fulton Fire Ins. Co. v. Baldwin*, 7 N. Y. 648; S. C. 5 Trans. App. 180; *Kent v. Snyder*, 30 Cal. 666; *Malone v. Stilwell*, 15 Ab. 421.) Thus if a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action specifies the particulars in which the complaint is defective, the defendant thereby excludes all other grounds of objection than those particularly set forth, and cannot insist on any others, on the argument of the demurrer. (*Nellis v. DeForest*, 16 Barb. 65.) So when a defendant demurs to the complaint, without objecting to the want of proper parties, or to the form of the action, he waives the right to insist upon those objections; and for all the purposes of the demurrer the complaint will be deemed unobjectionable by reason of any defects of that nature. (*Loomis v. Tift*, 16 Barb. 541.)

Except in reference to the alleged want of jurisdiction (whether of the person or the subject matter), or a defect of parties (plaintiff or defendant), all of the grounds of demurrer may be properly stated in the very words of the statute. (*Getty v. Hudson River R. R. Co.* 8 How. Pr. 177; *Durkee v. Saratoga & Wash. R. R. Co.*, 4 id. 171; *Swift v. DeWitt*, 3 id. 280; *Hyde v. Conrad*, 5 id. 361; *Johnson v. Wetmore*, 12 Barb. 433; *Haire v. Baker*, 5 N. Y. 357; *Hulbert v. Young*, 13 How. Pr. 413; *Paine v. Smith*, 2 Duer. 298; *White v. Brown*, 14 How. Pr. 282; *Hoogland v. Hud-*

As a demurrer, relies merely upon matter apparent on the face of the bill, so much of the bill as the demurrer extends to is taken for true.
(10) Thus, if a demurrer is to the whole bill, the whole bill is taken

son, 8 id. 343; *Spear v. Downing*, 34 Barb. 522; *Ellison v. Halleck*, 6 Cal. 386.) The demurrer need not point out the defects, or show why the facts stated do not constitute a cause of action. (*Johnson v. Wetmore*, 12 Barb. 433.) A demurrer in the language of the Code "that the plaintiff has not the legal capacity to sue," is sufficient to raise the objection. (*Hulbert v. Young*, 13 How. Pr. 413.) But a demurrer following the words of the Code (§ 144 sub. 4) "that there is a defect of parties defendant," is defective in not specifying the particular defect. (*Skinner v. Stuart*, 13 Ab. 442.) So, a demurrer stating that "it does not appear that the plaintiff had any title to the note when the suit was commenced," is insufficient to raise the question as to the plaintiff's right to sue. (*White v. Low*, 7 Barb. 204.)

When a demurrer is taken for want of parties, the former practice in equity was that it must show who are the proper parties, from the facts stated in the complaint; not indeed, in all cases, by name, but in such a manner as to point out to the plaintiff the objection to the complaint, and to enable him to amend by making proper parties. (*Van Sant. Eq. Pr.* 193; *Story Eq. Pl.* § 543.) And the same rule is recognized under the Code. (*DeWitt v. Swift*, 3 How. Pr. 280; *Getty v. Hudson River R. R. Co.* 8 How. Pr. 177, and other cases, *supra*.)

Where the ground of demurrer stated is that "the complaint does not state facts sufficient to constitute a cause of action," the question as to the want of parties, or as to the form of action cannot be raised. (*Loomis v. Tift*, 16 Barb. 541.) Nor the question as to the want of jurisdiction. (*Wilson v. Mayor, &c., of New York*, 4 E. D. Smith, 706, n.)

A demurrer will not be sustained on a ground different from that stated; as if the defect be a want of jurisdiction, and the demurrer be on the ground that the complaint does not state facts sufficient to constitute a cause of action. (*Wilson v. The Mayor, &c., of New York*, 6 Ab. 6; S. C. 15 How. Pr. 500.) Nor will it be sustained on a ground not raised on the argument. (*Doughty v. Develin*, 2 Duer, 627.)

In *Kentucky*, the demurrer must distinctly specify the grounds of objection to the petition [complaint.] Unless it does so, it will be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action. (*Myers' Code*, § 121, p. 38.) The Code of *Ohio* contains the same provision. (*Seney's Code*, § 88, p. 120.) Also the Code of *Kansas*. (Sec. 97.)

If the plaintiff, in his petition in equity, fails to show that he is entitled to the specific relief asked for, and shows a right to any relief, even in a court of law, a demurrer to the whole petition will not be sustained as to the whole claim. (*Foster v. Watson*, 16 B. Monroe, 387.)

In *Minnesota*, unless the demurrer distinctly specifies the grounds upon which any of the objections to the complaint are taken, it may be disregarded and treated as a nullity. (Civ. Code, Sec. LXII.)

In *California*, a demurrer on the ground "that the court has no jurisdiction either of the person of the defendants, or of the subject of the action," and that "the complaint does not state facts sufficient to constitute a cause of action," is sufficiently explicit under the rule of construction adopted by the courts of that state. (*Elissen v. Halleck*, 6 Cal. 386; *Willis v. Farley*, 24 id. 491; *Kent v. Snyder*, 30 id. 666.)

(10) A demurrer admits, for the purposes of the argument, the facts stated in the complaint to be true. (*Hall v. Bartlett*, 9 Barb. 297; *Clark v. Van Duzen*, 3 Code Rep. 219; *Van Sant. Eq. Pr.* 183; *East India Co. v. Hinchman*, 1 Ves. Jun. 289; *Story Eq. Pl.* § 452; *Mills v. Brown*, 2 Scam. 549; *Goble v. Andras*, 1 Green Ch. 66; *Niles v. Anderson*, 5 How. [Miss.] 365; *Green v. Robinson*, id. 80; *Smith v. Allen*, 1 Saxton, 43; 1 Dan. Ch. Pr. 565; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.) But only such facts as are issuable, and well pleaded. (*Story's Eq. Pl.* § 452; *Hall v. Bartlett*, 9 Barb. 297; *Cutler v. Wright*, 21 N. Y. 472; *Sun Mu. Ins. Co. v. Davis*, 19 Ab. 214; *Bennion v. Davidson*, 3 Mees. & Wels. 179; *Branham v. Mayor of San Jose*, 24 Cal. 602; *Clark v. Van Duzen*, 3 Code Rep. 214; *Acome v. American Min. Co.* 11 How. Pr. 26; *Freeman v. Frank*, 19 Ab. 370; *Commercial Bank of Manchester v. Buchner*, 20 How. U. S. 108; *United States v. Arnold*, 1 Gall. 338; *Foot v. Linck*, 5 McLean, 616; *Griffin v. Gibb*, 2 Black, U. S. 519.) It admits the allegations of the bill for the purposes of a motion on the bill. (*Bayergue v. Cohen*, 1 McAll. 110.) But it does not admit the truth of any new facts not appearing in the original pleading. (*Van Doran v. Tjader*, 1 Nev. 380.) And it never admits the

to be true; if it is to any particular discovery, the matter sought to be discovered, and to which the demurrer extends, is taken to be as stated in the bill; and if the defendant demurs to relief only, the whole case made by the bill to ground the relief prayed, is considered as true. A demurrer is therefore always preceded by protestation against the truth of the matter contained in the bill—a practice borrowed from the common law and probably intended to avoid conclusion in another suit.^(u)

If the demurrer does not go to the whole bill, it must express to what particular parts it is meant to extend; otherwise the court cannot determine on the validity of the demurrer without reading the whole bill.^(v) (11) And the court is not to be put to the trouble of looking into the bill or answer to see what is covered by the demurrer; but it ought to be expressed in clear and precise terms what part the defendant [*107] *refuses to answer; so that the master, upon a reference to him, upon exceptions, may ascertain precisely how far the demurrer goes, and what is to be answered. It is not a proper way of demurring, therefore, to say that the defendant answers to such a particular fact and demurs to all the rest of the bill.^(w)

Demurrer to discovery must be special.] Where a defendant, to a

(u) Mitf. 211. (v) Barton, 108. Ward v. Duke of Northumberland, 2 Anstr. 469.
(w) Devonsher v. Newenham, 2 Sch. & Lef. 199, 205.

law arising on those facts. (*United States v. Arnold*, 1 Gall. 348; *Hobson v. McArthur*, 3 McLean, 241; *Bedell v. Stickels*, 4 How. Pr. 432; *Griggs v. St. Paul*, 9 Min. 246; *Acome v. American Min. Co.* 11 How. Pr. 26.) And an admission of facts by a demurrer in one cause is not evidence of those facts in another cause, although it be between the same parties. (*Auld v. Hepburn*, 1 Cranch, 122, 166.) When the allegations in a pleading are contradictory, a demurrer only admits those which the law adjudges to be true. (*Freeman v. Frank*, 10 Ab. 570.) A demurrer continuing upon the record is an admission of the facts stated in the pleading, not only for the purpose of the argument, but as evidence upon the trial. (*Cutler v. Wright*, 22 N. Y. 472.)

A demurrer by pointing out certain defects in the complaint, admits that in all other particulars it is correct. Therefore, all objections to the pleading, except those specified, will be deemed waived. (*Malone v. Stilwell*, 15 Ab. 421; *Nellis v. DeForest*, 16 Barb. 61.) But a demurrer cannot supply defects in substance, or cure a defective statement of title. (*Mills v. Brown*, 2 Scam. 549; *Goble v. Andras*, 1 Green Ch. 66.)

(11) *Jarvis v. Palmer*, 11 Paige, 650; *Stuyvesant v. Mayor, &c., of New York*, id. 415; *Kuyfers v. Reformed Dutch Church*, 6 id. 570. Where a demurrer purported in its commencement, to be a demurrer to the whole answer, but afterwards distinctly set forth that part of the answer to which it was to apply, it was held that, in effect, it was a demurrer only to the part specified, and not to the whole pleading. (*Matthews v. Beach*, 8 N. Y. 173.) If, on a general demurrer to the whole complaint, the plaintiff is entitled to any relief whatever, although not to that demanded, the demurrer will be overruled. (*Stuyvesant v. Mayor, &c., of New York*, 11 Paige, 445; S. C. 1 N. Y. Leg. Obs. 101. See *Emery v. Pease*, 20 N. Y. 62.) So a demurrer to a whole complaint is bad if one of the plaintiffs may have judgment separately. (*Peabody v. Wash. Co. Mu. Ins. Co.* 20 Barb. 339.) The question as to what kind, or how much relief shall be granted to the plaintiff cannot be raised by demurrer. (*Poett v. Stearns*, 25 Cal. 226.)

bill praying relief, demurs to the discovery only, he cannot do so under a general demurrer for want of equity, but must make it the subject of special demurrer.(x)

Speaking demurrers.] Care must be taken, in framing a demurrer that it be made to rely only upon the facts stated in the bill; otherwise it will be what is termed a speaking demurrer, and will be overruled.(y) A speaking demurrer is one which introduces some new fact or averment which is necessary to support the demurrer, and which does not distinctly appear upon the face of the bill.(z) (12)

Several causes of demurrer.] A defendant is not limited to show one cause of demurrer only. He may assign as many causes of demurrer as he pleases, either to the whole bill, or to each part of the bill demurred to; and if any one of the causes assigned hold good, the demurrer will be allowed.(a) (13)

(x) *Whittingham v. Burgoyne*, 3 Anst. 300. (y) *Brownsword v. Edwards*, 2 Ves. 245.
(z) *Brooks v. Gibbons*, 4 Paige, 374. *Davies v. Williams*, 1 Sim. 5. *Cawthorn v. Charlie*, 2 Sim. & Stu. 127.

(a) *Harrison v. Hogg*, 2 Ves. jun. 323. *Jones v. Frost*, 3 Mad. 1.

(12) A "speaking demurrer," *i. e.* one which states objections not apparent on the face of the pleading demurred to, is irregular; *e. g.* one which names parties who should be joined. (Anonymous, 11 Ab. 231; *Coe v. Beckwith*, 10 id. 296; S. C. 19 How. Pr. 399; 31 Barb. 339.) If it requires the slightest statement of facts to make the defect in the complaint apparent, a demurrer will not lie. (*Davy v. Betts*, 23 How. Pr. 396; *Dillaye v. Wilson*, 43 Barb. 261; 2 Estee Pr. 599.) The only office of a demurrer is to raise issues of law upon the pleading demurred to. (*Cook v. De La Guerre*, 24 Cal. 239; *Brooks v. Gibbons*, 4 Paige, 374.) The test of a demurrer is, does it require any facts to sustain it? (*Struver v. Ocean Ins. Co.* 16 How. Pr. 422.)

(13) By the present practice, a demurrer will lie only when an entire pleading, that is, an entire cause of action, or ground of defence, is insufficient. If a part only of a pleading is irrelevant, the proper mode of raising the objection is by motion to strike out; if the whole be irrelevant by demurrer. (*Van Sant. Eq. Pr.* 184; 1 Whit. Pr. 456; 2 Estee Pr. 602; *Lord v. Vreeland*, 13 Ab. 195; S. C. 15 id. 122; *Wait v. Ferguson*, 14 Ab. 379; *Mattoon v. Baker*, 24 How. 329; *Hayden v. Anderson*, 17 Iowa, 158.) If a demurrer is interposed to an entire complaint, containing several causes of action, and one of them is good, the demurrer will be overruled. (*Van Sant. Eq. Pr.* 184; *Peabody v. Wash. Co. Mu. Ins. Co.* 20 Barb. 342; *Butler v. Wood*, 10 How. Pr. 222; *Cooper v. Classon*, 1 Code Rep., N. S. 347; *Martin v. Mattison*, 8 Ab. 3; *Atwill v. Ferrit*, 2 Blatch. 39; *Newbery v. Garland*, 31 Barb. 121; *Jacques v. Morris*, 2 E. D. Smith, 639; *Marshall v. Bouldin*, 8 Mo. 244; *Souza v. Belcher*, 3 Edw. Ch. 117; *Livingston v. Story*, 9 Peters, 632; *Livingston v. Livingston*, 4 John. 294; *Higinbotham v. Burnett*, 5 id. 184; *Parsons v. Browne*, 7 Paige, 351; *LeRoy v. Feeder*, 1 John. Ch. 417; *Griggs v. Thompson*, 1 Geo. Decis. 146; *Hollsdam v. Johnston*, 2 id. 146; *Townsend v. Jemison*, 7 How. U. S. 706; *Wright v. Dane*, 1 Mete. 241; 1 Har. Ch. Pr., 7th ed. 414; *Conant v. Warren*, 6 Gray, 562; *Brockway v. Copp*, 3 Paige, 539; *Sikes v. Truitt*, 4 Jones' Eq. 361; *Atwill v. Ferrett*, 2 Blatch. 39.) But where a bill seeks general and special relief, and also discovery, and relief is the principal object, and discovery is sought merely as incidental to the relief, if the plaintiff shows no title to the relief sought, a demurrer lies to the whole bill. (*Poole v. Lloyd*, 2 Mete. 525.)

When a demurrer is too general, it will be overruled. (*Young v. Pearson*, 1 Cal. 448; *People v. Morrill*, 26 id. 361; *Whiting v. Heslep*, 4 id. 327; *Weaver v. Conger*, 10 id. 233; *Stoddard v. Treadwell*, 26 id. 294.)

But a demurrer may be taken to the whole complaint, or to any of the alleged causes of action stated therein. (Code of New York, § 145; Code of Minnesota, § 66; Code of Wisconsin, § 6; Rev. Stat. of 1858, p. 721.)

Separate demurrers.] A defendant may also put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes; (b) for the same grounds of demurrer, frequently, will not apply to different parts of a bill, though the whole may be liable to demurrer; and in such a case one demurrer may be overruled, upon argument, and another allowed.(c) (14)

Demurrer cannot be good in part and bad in part.] It has been repeatedly determined that a demurrer cannot be good in part and bad in part.(d) If it is general to the whole bill, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, the demurrer, being entire, must be overruled.(e) (15)

(b) Mitf. Eq. Pl. 174. North v. Earl of Strafford, 3 P. Wms. 148. Roberdean v. Rous, 1 Atk. 544.

(c) 3 Peere Wms. 148.

(d) Sherl v. Garfield, 5 Verm. Rep. 39. Verplanck v. Caines, 1 John. Ch. 27, 5 id. 186. In this respect there is a difference between a plea and a demurrer. Mayor, &c., of London v. Levy, 8 Ves. 403. Baker v. Mellish, 11 id. 70.

(e) Per Ld. Hardwicke, in Metcalfe v. Hervey, 1 Ves. 248. 1 Atk. 450. 17 Ves. 273. 1 Swanst. 304.

In the Equity courts of the *United States*, a defendant may demur or plead to the whole bill, or to a part of it; and he may demur to part, plead to part, and answer as to the residue. (Rule 32, Equity Rules.)

(14) A demurrer to part of a cause of action is not allowable. (*Lord v. Free-land*, 24 How. Pr. 316; S. C. 15 Ab. 122; 13 id. 195.) It will lie only when an entire pleading, that is, an entire cause of action, or ground of defence, is insufficient. If a part only of the pleading is irrelevant, the proper mode of raising the objection is by motion to strike out; if the whole be irrelevant, by demurrer. (*Van Sant*, Eq. Pr. 184; 1 Whit. Pr. 456, and cases cited.)

But where the complaint contains several causes of action, separate demurrers may be interposed to the several causes of action. (*Ogdensburgh Bank v. Paige*, 2 Code Rep. 75.) So held where the complaint, after setting forth certain matters of inducement, averred in succession several distinct acts done and committed by the defendants, whereby and by *each* of which acts, the defendant became liable to the plaintiff, the complaint being regarded as analogous to a declaration containing several counts. (Ib.)

(15) *People v. Morrill*, 26 Cal. 360; *Le Fort v. Delafield*, 3 Edw. 32; *Thompson v. Newbin*, 3 Ired. Ch. 338; *Russell v. Lanier*, 4 Hey. 289; *Kimberly v. Scells*, 3 John. Ch. 467; *Treadwell v. Brown*, 44 N. Hamp. 551; *Kuypers v. Reformed Dutch Church*, 6 Paige, 571; *Forbes v. Whitlock*, 3 Edw. Ch. 446; *Pay v. Jones*, 1 Head, [Tenn.] 442; *Lube* Eq. Pl. [Am. ed.] 255; *Castleman v. Weitch*, 3 Rand. 598; *Graves v. Downey*, 3 Monroe, 356; *Chase's Case*, 1 Bland, 217; *Blount v. Garen*, 3 Hayw. 88; *Story* Eq. Pl. § 443; *Higginbotham v. Burnet*, 5 John. Ch. 184; *Burns v. Hobdt*, 29 Maine. 272, 277. A demurrer must be sustained to the whole extent to which it is applied, or fail. (*Peabody v. Wash. Co. Mu. Ins. Co.* 20 Barb. 339; *Cooper v. Clason*, 1 Code Rep., N. S. 347; *People v. Mayor, &c., of New York*, 17 How. Pr. 57; S. C. 28 Barb. 240; 8 Ab. 7; *Wait v. Ferguson*, 14 id. 379.) Thus, where a complaint contains two causes of action of a nature that permits their being joined, but as to one of them, the court has no jurisdiction, a demurrer to the whole complaint on the ground that several causes of action are improperly joined, is not available. It should be for want of jurisdiction, and limited to the proper cause of action. (*Cook v. Chase*, 3 Duer. 643.) Where a complaint alleges two distinct causes of action, only one of which is sufficient, and a general demurrer to the whole of the complaint is interposed, it will be overruled. (*Butler v. Wood*, 10 How. Pr. 222; *Martin v. Mattison*, 8 Ab. 3.) A joint demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that there is a defect of parties, will be overruled, where the complaint shows a cause of action in favor of the plaintiffs, or some of them, against some of

*But a demurrer may be good as to one of the defendants de- [*108] murring, and bad as to others. (f)

Where coupled with an answer.] (16) When a demurrer is to part of the bill only, the answer to the remainder usually follows the statement of the causes of demurrer and the demand of judgment whether the defendant ought to be held to make further or other answer. But as a demurrer asks the judgment of the court whether the defendant shall make further or other answer to the bill, or to that part which he has demurred to, it would be inconsistent if the defendant, after making such submission, were to be permitted to answer the bill or

(f) *Mayor, &c., of London v. Levy*, 8 Ves. 403. *Barstow v. Smith*, Walk. Ch. 394. *Story Eq. Pl. § 445*; 1 *Smith Ch. Pr.* (2d Am. ed.) 206.

the defendants. (*People v. Mayor, &c., of New York*, 23 Barb. 240; S. C. 17 How. Pr. 56; 10 Ab. 111.) If, on a general demurrer to the whole complaint, the complainant is entitled to any relief whatever, although not to that demanded, the demurrer will be overruled. (*Stuyvesant v. Mayor, &c., of New York*, 11 Paige, 415; 1 N. Y. Leg. Obs. 101. See *Emery v. Pease*, 20 N. Y. 62.) Unless the complaint is multifarious. (*Dimmock v. Bixby*, 20 Pick. 368; *Beach v. Beach*, 11 Paige, 161; *McLaren v. Steapp*, 1 Kelly, 376; *Robinson v. Guild*, 12 Mete. 323.)

At common law the rule is that on a general demurrer (unless for misjoinder of actions,) judgment must be given for the plaintiff, if there is one good count in the declaration. (*Judin v. Samuel*, 4 Bos. & Pui. 43; *Whitney v. Crosby*, 86, 89; *Gidney v. Blake*, 11 John. 54; *Martin v. Williams*, 13 id. 264; *Morrell v. Calden*, id. 395; *Mumford v. Fitzhugh*, 18 id. 457; *People v. Barton*, 6 Cowen, 290; *Freeland v. McCullough*, 1 Denio, 414; *Wolfe v. Luyster*, 1 Hall, 146; *French v. Tunstall*, Hempt. 204; *McCue v. Corp. of Wash.* 3 Cranch, 639; *Stoddard v. Treadwell*, 26 Cal. 294; *Vermont v. Society for Prop. of Gospel*, 2 Paine, C. C. 545; *Brown v. Ducherne*, 2 Curtis, C. C. Rep. 97.)

(16) If there be more than one cause of action in the complaint, the defendant may demur to one or more of them, and answer the residue. (Code of New York, § 151; Code of Ohio, § 91; of Kansas, § 100; of Kentucky, § 124; Van Sant. Eq. Pr. 184.) But he cannot answer and demur both, to the whole bill, or to the same part of a bill. (*Clark v. Phelps*, 6 John. Ch. 214; *Beauchamp v. Gibbs*, 1 Bibb. 481; *Robertson v. Bingly*, 1 McCord Ch. 352.)

The answer and demurrer are different pleadings, and do not lose their distinctive character by being on one paper, and in form connected. (*Howard v. The Michigan Southern R. R. Co.* 5 How. Pr. 207; S. C. 3 Code Rep. 213.) The defendant cannot demur to a part, and answer another part, of a complaint which contains but one cause of action. In other words, a defendant cannot demur to a part of a cause of action. (*Ingraham v. Baldwin*, 12 Barb. 9.) Where the defendant both answers, and demurs to the same pleading, the plaintiff can treat neither the answer nor the demurrer as a nullity; but he should move to strike out the demurrer or the answer, or for an order that the defendant elect by which he will abide. (*Spellman v. Weider*, 5 How. Pr. 5; *Howard v. Michigan Southern R. R. Co.*, id. 206; S. C. 3 Code Rep. 213. See also *Clarkson v. Mitchell*, 3 E. D. Smith, 269; *Bolton v. Gardner*, 3 Paige, 273; *Clark v. Phelps*, 6 John. Ch. 214.)

A defendant, after having put in an answer, will not be allowed to withdraw it and put in a demurrer, unless special reasons are shown. (*Finch v. Pindon*, 19 Ab. 96.) When a demurrer and an answer are on the same paper, and served together, the answer cannot be amended by omitting the demurrer. (*Howard v. The Michigan Southern R. R. Co.* 5 How. Pr. 206.)

It has been decided in *Kentucky*, that where an answer is filed at the same time with a demurrer to the complaint, the fact that the parties have proceeded to trial without objection, and without noticing the demurrer, authorizes the inference that the demurrer was waived or overruled. (*Danville, &c., Turnpike Co. v. Stewart*, 1 Mete. 119, cited *Myers' Code*, p. 355.)

In the Equity courts of the *United States*, a defendant may demur to part, plead to part, and answer as to the residue of a bill. (Rule 32 of the Equity Rules.)

that part of it which is intended to be covered by the demurrer. (g) (17) It is, for this reason, well settled that an answer to any part of a bill demurred to will overrule the demurrer; (h) even though the part answered be immaterial. (i) But a demurrer for multifariousness is not overruled by an answer denying confederacy. (k) Nor is a demurrer to relief only overruled by an answer as to the discovery. (l)

When a demurrer is put in to part only of the bill, and is accompanied by an answer, it should be entitled "The demurrer of C. D., &c., to part of the bill of complaint of A. B., and the answer of the said C. D. to the remainder of the said bill of complaint." (m)

Where a demurrer and answer are put in, they are filed as one record, and the demurrer is set down for argument, as if it stood alone, and not incorporated with the answer. (n)

By married women.] In a suit against husband and wife, she cannot demur separately from her husband, without a previous order of the court to warrant it. (o) (18)

Demurrer ore tenus.] A defendant may, at the hearing of his demurrer, orally assign another cause of demurrer, different from, or in addition to, those assigned upon the record, which, if valid, will support the demurrer, although the causes of demurrer stated in the demurrer itself are held to be invalid. This oral statement of a cause of demurrer at the bar, is called demurring *ore tenus*.

A defendant cannot demur *ore tenus*, however, unless there is a de-
[*109] *murrer on the record. Upon this ground, where a defendant

(g) Jones v. Earl of Strafford, 3 P. Wms. 81.

(h) Tidd v. Clare, 2 Dick. 81. Hester v. Weston, 1 Vern. 463. Roberts v. Clayton, 3 Anst. 715.

(i) Mitf. 172. Savage v. Smalebroke, 1 Vern. 90.

(k) 1 Vern. 463. 1 Eq. Ca. Abr. 40.

(l) 2 Dun. 76.

(m) Tomlinson v. Swinneston, 1 Keen, 913.

(n) 1 Fow. Ex. Pr. 359.

(o) Barron v. Grillard, 3 Ves. & B. 165.

(17) A defendant cannot answer and demur to the same matter. (*Munn v. Barnum*, 12 How. Pr. 563; S. C. 1 Ab. 281; *Spellman v. Weider*, 5 How. Pr. 5; *Howard v. The Michigan Southern R. R. Co.*, id. 207; *Struver v. Ocean Ins. Co.* 16 id. 422.) When the defendant both answers and demurs to the same pleading, the plaintiff cannot treat either the answer or the demurrer as a nullity, but should move to strike out the demurrer or the answer, or for an order that the defendant elect by which he will abide. (*Spellman v. Weider*, 5 How. Pr. 5; *Howard v. Michigan Southern R. R. Co.*, id. 206; S. C. 3 Code Rep. 213. See also *Clarkson v. Mitchell*, 3 E. D. Smith, 269; *Bolton v. Gardner*, 3 Paige, 273; *Clark v. Phelps*, 6 John. Ch. 214.) In *Struver v. Ocean Ins. Co.* (16 How. Pr. 422) where the answer contained an objection of want of parties, it was held to be a demurrer, and the defendant was compelled to elect whether to abide by the answer or the demurrer.

(18) Where a married woman is joined as a defendant, with her husband, in respect to her separate estate, she may put in a separate demurrer. (*Arnold v. Ringold*, 16 How. Pr. 158; *Hasley v. Litter*, 18 id. 147; S. C. 9 Ab. 400.) If the complaint, in such a case, does not state facts sufficient to show the liability of the wife's separate estate, a joint demurrer by them will lie. (*Goodall v. McAdam*, 14 How. Pr. 385; *Goclet v. Gori*, 31 Barb. 314.)

had pleaded, and upon the plea being overruled, offered to demur *ore tenus* for want of parties, he was not permitted to do so. (*p*)

Although a defendant may, either upon the record or *ore tenus*, assign as many causes of demurrer as he pleases, such causes of demurrer must be *co-extensive* with the demurrer upon the record. Therefore causes of demurrer which apply to part of the bill only, cannot be joined with causes of demurrer which go to the whole bill. (*q*)

On the argument of a demurrer, the complainant is bound by the case stated in the bill in relation to the discovery sought, and will not be allowed to maintain his right to discovery, upon a suggestion *ore tenus* at the bar, not consistent with the case made in the bill. (*r*)

Under the general demurrer for want of equity, a demurrer for want of parties may be made *ore tenus*. (*s*)

A demurrer *ore tenus* must extend to the whole bill, and cannot be made to a part only. (*t*) But it seems that after a demurrer to part of the bill has been overruled, the defendant may demur *ore tenus* to the same part. (*u*)

Where a general demurrer to the whole bill is overruled for want of equity, the defendant may demur *ore tenus*, upon the ground that the suit is brought by a *feme covert* in her own name, when she should have prosecuted by her next friend. (*v*) A defendant who has pleaded to a bill cannot demur *ore tenus* to it, on his plea being overruled; because there is no demurrer on the record. (*w*)

This kind of demurrer is only allowed upon new grounds; not where a written demurrer on the same point has already been overruled. (*x*)

Demurrer how signed.] A demurrer must be signed by counsel; but is put in without oath, as it asserts no fact, and relies merely upon matters apparent on the face of the bill. (*y*) It need not be signed by the defendant; though it is customary for his solicitor to sign it, as well as the counsel.

When to be filed.] A demurrer may be filed at any time within the forty days allowed the defendant to put in his answer. (19) And it

(*p*) Durdant v. Redman, 1 Vern. 78. Hook v. Dorman, 1 Sim. & Stu. 227.

(*q*) Pitts v. Short, 17 Ves. 213, 215. Metcalfe v. Brown, 5 Price, 560.

(*r*) Little v. Archer, 1 Hogan, 55.

(*s*) Robinson v. Smith, 3 Paige, 231. 6 John. Ch. 143.

(*t*) Shepherd v. Lloyd, 2 Young & Jer. 490.

(*u*) Crouch v. Hicken, 1 Keen, 385.

(*v*) Garlick v. Strong, 3 Paige, 452.

(*w*) Hook v. Dorman, 1 Sim. & Stu. 227.

(*x*) Bowman v. Lygon, 1 Anstr. 1.

(*y*) Mtif. Eq. Pl. 263.

(19) A demurrer must be filed with the clerk within ten days after the service thereof; or the adverse party, on proof of the omission, will be entitled, without

seems that it may be filed at any time afterwards, until the defendant [*110] is affected* with process of contempt by the return of an attachment with proclamations, or the entry of an order to take the bill as confessed. (z)

In certain special cases, such as surprise, the court will allow a defendant to put in a demurrer, even after he has obtained an order for time.(a) But the general rule is that the defendant, after having obtained time to answer, cannot demur. (b)

It is always made the special condition of an order giving the defendant time to demur, plead, or answer the complainant's bill, that he shall not demur alone. Whenever, therefore, the defendant has obtained an order for time, and is afterwards advised to demur, he must also plead to, or answer, some part of the bill. (c) It has been held that answering to some fact immaterial to the cause, and denying combination, do not amount to a compliance with the terms of such an order. (d) But in another case, (e) which was a bill for a discovery, the answer gave no information, but simply stated the death of a person, and denied combination. Lord Eldon said that according to the practice of the court, if the defendant had been under the order not to demur alone, the addition of this short answer would have saved the terms of that order. But though an answer as to a single fact will be a sufficient compliance with the condition, such fact must not be one which is covered by the demurrer; otherwise the demurrer will be overruled by the answer. (f)

If the defendant omits to put in his demurrer, or to answer within the time limited by the order, and an attachment is in consequence issued against him for want of an answer, a demurrer, even though

(z) *East India Co. v. Hinchman*, 3 Bro. Ch. Rep. 372. *Lowesby v. Warder*, 2 Cox's Ca. 268. 1 Sim. & Sta. 2.5. 4 Hen. & Munf. 504.

(a) *Bruce v. Allen*, 1 Mad. Rep. 556.

(b) *Dyson v. Benson*, Coop. Ca. 110; *Burrall v. Rainetaux*, 2 Paige, 331. 2 Bro. C. R. 214. 10 Ves. 444.

(c) *Milf. Eq. Pl.* 208.

(e) *Tompkin v. Lethbridge*, 9 Ves. 169.

(d) *Id. ib.* 2 P. Wms. 286.

(f) 2 Dan. 81.

notice, to an order from a judge, that the same be filed within a time to be specified in the order, or be deemed abandoned. (Code, § 416.) It may be filed with the clerk of the county where the action is triable. But it is not necessary to file it, unless the defendant is compelled by an order of the court. (Van Sant. Eq. Pr. 194.)

Where a party files a pleading in obedience to an order under the above section, he is not bound to notify the party obtaining the order that the pleading is filed. (*Duoy v. Hart*, 1 Code Rep., N. S. 286.)

In *Ohio*, a demurrer by the defendant must be filed on or before the third Saturday, and a demurrer by the plaintiff on or before the fifth Saturday, after the return day of the summons or service by publication. (Code, § 103.)

In the Equity courts of the *United States*, a defendant may, at any time before the bill is taken as confessed, or afterwards with the leave of the court, demur to the bill. (Rule 32 of Equity Rules.)

coupled with an answer, will be irregular; and in such a case the proper course is to move that the demurrer and answer be taken off the file, and not that the demurrer be overruled. (g)

Service of.] The demurrer having been filed in the proper office, a copy is to be served upon the complainant or his solicitor. (20)

(g) *Curzon v. De la Zouch*, 1 Swanst. 193. 2 Dan. Pr. 81.

(20) A copy of the demurrer must be served within twenty days after the service of a copy of the complaint, (unless the time to demur has been extended,) if there has been personal service of the complaint, or forty days if service has been by mail. (Code, §§ 143, 412.)

When a demurrer is regularly served, in proper time, so that the only question is one of sufficiency, it cannot although defective, be treated as a nullity. (*Strout v. Curran*, 7 How. Pr. 36; *Hartness v. Bennett*, 3 id. 289; *Bergman v. Howell*, 3 Ab. 329; *Spencer v. Tooker*, 12 id. 353; *Ross v. Longmuir*, 15 id. 328; *Chadwick v. Snediker*, 26 How. 60.)

The time specified in section 143 of the Code, for demurring, may be extended. But the only methods of procuring an extension are by consent, or by an order of the court, founded on an affidavit of merits. (*Platt v. Townsend*, 3 Ab. 9; S. C. 2 Duer, 608; *McGowan v. Leavenworth*, 2 E. D. Smith, 24; Wait's Code, 232.)

Under section 405 of the Code, the time may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court, or a county judge. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

Rule 30 of the Supreme Court provides that no order extending the time to answer or demur to a complaint shall be granted, unless the party applying for such order shall present to the justice or judge an affidavit of merits, or proof that it has been filed, or an affidavit of the attorney or counsel retained to defend the action, that from the statement of the case in the action, made to him by the defendant, he verily believes that the defendant has a good and substantial defence, upon the merits, to the cause of action set forth in the complaint, or to some part thereof, and the affidavit must state whether any extension of time to answer or demur has been granted by stipulation or order.

Rule 31 directs that if any application for an order be made to any judge or justice, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other judge or justice; and if, upon such subsequent application, any order be made, it shall be revoked.

An order extending the time to answer, also extends the time to demur. (*Broadhead v. Broadhead*, 4 How. Pr. 308; S. C. 3 Code Rep. 8; *contra*, *Davenport v. Sniffen*, 1 Barb. 223.) But an order extending the time to answer or demur, unsupported by an affidavit of merits, or an affidavit of the attorney or counsel retained to defend, that from the statement of the case, in the action, made to him by the defendant he verily believes that the defendant has a good and substantial defence on the merits, &c., may be disregarded. (*Ellis v. Van Nes*, 14 How. Pr. 313.) And if an extension of the time has been obtained, by order or by consent of parties, that fact must be stated in the affidavit on which application is made. Rule 30 and section 405 of the Code operate together, and full effect must be given to both. (Ib.)

An order extending the time to answer supersedes a prior motion noticed to strike out portions of the complaint, where there is no reservation in the order of the right to make such motion. (*Marry v. James*, 34 How. 238.) Such an order operates as a waiver of all objections to the complaint, by the party obtaining it, and as a bar to a future motion for any alteration of the complaint; unless the right to make such motion is reserved. So where the extension is granted by the adverse party. (*Bowman v. Sheldon*, 5 Sandf. 657; S. C. 10 N. Y. Leg. Obs. 339.)

When proceedings are stayed until the decision of an appeal, such stay does not extend the time to answer beyond the time when the appeal is decided. (*Petrie v. Fitzgerald*, 2 Ab., N. S. 354.) After the decision on the appeal, it is irregular for the defendant to apply *ex parte* for an order to extend his time to answer, it having already expired. His proper course is to apply, on notice, to be relieved from his default, and for leave to answer. (Ib.) In general, a stay of proceedings does not extend the time to answer. (*McGowan v. Leavenworth*, 2 E. D. Smith, 24.)

Noticing for argument.] The complainant has ten days after the service of a copy of the demurrer to amend his bill; and if he fails to do so, either party may notice the demurrer for argument, at the next or any subsequent term. (*h*) (21) The party noticing the demurrer must then furnish the register or clerk with a note of issue, four days previous [*111] to the commencement of the term, to the end that the cause may be put upon the calendar for hearing. (*i*)

Either party has a right to notice the demurrer for argument. And although it is usually noticed by the complainant, the defendant may give the notice if he pleases; and in some cases it becomes necessary for him to do so, in case of the complainant's neglect; as otherwise he will not be in a situation to have the bill dismissed for want of prosecution until the demurrer has been disposed of. (*k*)

Withdrawing demurrer.] Where the demurrer is defective in form, the court will grant the defendant permission to withdraw and file a new one, on payment of costs. (*l*) So after it has been noticed for ar-

(*h*) Rule 47.

(*i*) Rule 92.

(*k*) *Dove v. Allen*, 1 Dick. 55. *Anon.* 2 Ves. Jun. 287.

(*l*) *Devonsher v. Newenham*, 2 Sch. & Lef. 199.

Nor does an order for a bill of particulars, accompanied by a stay of proceedings, enlarge the time to plead. (*Platt v. Townsend*, 3 Ab. 9; S. C. 5 Duer, 668.) Where a stipulation, enlarging the time to answer, also gives to the defendant the right to make such application as he shall be advised, it reserves the right to move to strike out portions of the complaint. (*Lackey v. Vanderbilt*, 10 How. Pr. 155.) Where an order overruling a demurrer requires the defendant to put in his answer in a specified time, and pay the costs, or that the bill be taken as confessed against him, a subsequent *ex parte* order extending the time to answer, is irregular. (*Hurd v. Haynes*, 9 Paige, 604.)

In a case where service may be made by mail, an order extending the time to answer, mailed on the last day, is sufficient to prevent the plaintiff from entering a regular judgment as upon failure to answer; and though no excuse for the delay be shown, and there is some reason to suspect intentional delay, yet such service of the order is strictly regular. (*Schuhardt v. Roth*, 10 Ab. 203.)

An affidavit of merits will be disregarded, where further time to answer is asked on the part of a defendant who has been guilty of gross laches. (*Hayes v. Berryman*, 6 Bosw. 679.)

The 31st rule of the court does not apply to motions made to the court, on notice. It relates exclusively to *ex parte* applications, made out of court to a judge or justice, upon affidavits. (*Belmont v. Erie Railway Co.* 52 Barb. 637.)

In *California*, a demurrer may be put in within the time prescribed by statute for answering the complaint, viz. 1. If the service of summons is made in the county where the action is brought, within ten days after such service. 2. If the defendant is served out of the county in which the action is brought, but in the district, twenty days. 3. If served anywhere else in the state, forty days. (2 Estee Pr. 599; sec. 25, Pr. Act.) If service is made by publication, the defendant has forty days to answer or demur, after the period for publication expires. (Cal. Pr. Act, §§ 30, 31.)

(21) If no valid objection to the complaint has been raised by the demurrer, the plaintiff may proceed as if no demurrer or answer had been received, viz. after returning to the defendant's attorney the demurrer, he may give notice of an application to the court for the relief demanded in the complaint. If he considers the demurrer, though good in form, not well taken, he may at once notice it for trial, and place the cause on the calendar of the special term, or circuit court, of the county where the action is triable. (Van Sant. Eq. Pr. 195.)

gument, the defendant may, by motion, obtain an order to withdraw it, on payment of costs to be taxed. (m) (22)

Hearing.] In hearing a demurrer, the argument is strictly confined to the case appearing upon the record; and for the purposes of the argument, the matters of fact stated in the bill are admitted to be true. (n) (23)

(m) *Downes v. East India Co.* 6 Ves. 586. (n) *East India Co. v. Hinchman*, 1 Ves. jun. 289.

(22) If a party interposes a demurrer, which he could not have supposed would dispose of the case on the merits, it will not be deemed to have been put in in good faith. In such a case, leave will not be given to withdraw the demurrer and put in an answer. (*Osgood v. Whittlesey*, 20 How. 72; S. C. 10 Ab. 134. See *Patten v. Harris*, 10 Wend. 623; *Lowry v. Inman*, 6 Ab., N. S. 394; S. C. 37 How. 286.)

In *Indiana*, a demurrer may be withdrawn at any time before judgment upon it is recorded. (Bick. Civ. Pr. 100; 7 Bld. 371.) And, by leave of the court, a demurrer may be withdrawn, and the pleading demurred to may be answered at any time before entering upon the trial. (Ib.; 7 Ind. Rep. 490; 9 id. 189; 10 id. 199.)

(23) Issues both of law and fact may arise upon different parts of the proceedings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct (Code, § 251.) An issue of law must be tried by the court, unless it be referred, as provided in sections 270 and 271 of the Code. (Code, § 253.)

The argument of a demurrer may be brought on at any special term in the district, or at a special term in a county adjoining that in which it is triable, though in another district; except that when the action is triable in the 1st judicial district, the motion must be made there. (*Robb v. Jewell*, 6 How. Pr. 276.) Issues of law must be tried at a circuit court, or special term, and shall, unless the court shall otherwise direct, have preference on the calendar. (Code, § 255.)

In a case where there are issues both of law and fact, and the cause is brought on for trial of the issues of fact, the court will then determine whether it shall be tried before the issue of law is disposed of. If no objection is made, it will be deemed to have been tried first by the order of the court. (*Warner v. Wigers*, 2 Sandf. 635. See also, *Fry v. Bennett*, 9 Ab. 45; S. C. 2 Bosw. 200; 28 N. Y. 324.)

When there are issues both of law and fact, no judgment for costs can be entered in favor of the party who prevails upon the issue of law, until the issue of fact is disposed of. Such a judgment, if rendered, would be irregular, and would be set aside on motion. (*Masters v. Barnard*, 6 How. Pr. 114; S. C. 1 Code Rep., N. S. 407.) The plaintiff on demurring to part of an answer, may put the cause on the calendar for trial of issues of fact, without waiting for the decision upon the issues of law. (*Palmer v. Smedley*, 13 Ab. 185.)

By rule 49 of the Supreme Court, enumerated motions must be noticed for the first day of the term, by either party. The papers to be furnished on such motions shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, or of such part only as relate to the question raised by the demurrer. In cases of demurrer, the papers shall be furnished by the party demurring. (Ib.) In case of his neglect to furnish the papers, the opposite party may move, on affidavit and notice, that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor. (Ib.) Each party must prefix to his points a concise statement of the facts of the case, with reference to the folios; otherwise no discussion of the facts by him will be permitted. (Ib.) Rule 42 (new rule 49,) does not require the party demurring to serve on the opposite party any copy of the pleadings or other papers, when the question to be decided arises on demurrer. The party demurring is required to furnish them to the court, but not to serve them on the opposite party. (*Gallt v. Finch*, 24 How. Pr. 193.)

In *Indiana*, a plaintiff cannot have final judgment until the issues of law and fact are both determined in his favor. (Bick. Civ. Pr. 101; 4 Bld. 505; 5 id. 443; 5 id. 469.) The Supreme Court has decided that the issues of law must always be disposed of first. (Ib.; 5 Ind. Rep. 506; 17 id. 223.) Also, that where a cause is submitted to the court for trial, it will be presumed that a general finding included a determination of an issue of law undisposed of. (Ib.: 14 Ind. 523.)

In *California*, when a demurrer is filed to the answer, it is irregular for the plaintiff to take judgment before some disposition is made of the demurrer, (*Huse v.*

Amending demurrer.] Where it has appeared, upon the hearing of a demurrer to the whole bill, that the defendant is entitled to demur to some part only, the court has permitted the demurrer to be amended, so as to confine it to the parts to which the defendant has a right to demur. (*o*) In such cases, however, the most usual course is to overrule the demurrer and to give the defendant leave to put in a new demurrer to such part of the bill as he may be advised. (*p*)

Effect of allowing demurrer.] On a demurrer to the whole bill being allowed, the cause is out of court, and no subsequent proceedings can be taken therein. (*q*) But the allowance of a partial demurrer is not attended with such a consequence. The bill, or that part of it, which was not covered by the demurrer, still remains in court, and the complainant may obtain an order to amend, or to refer the answer upon exceptions, or adopt any other proceedings in the cause, in the same manner that he might have done had there been no demurrer. (*r*) (24)

A demurrer being frequently on matter of form, is not, in general, a bar to a new bill; but if the court, on demurrer, has clearly decided [*112] *upon the merits of the question between the parties, the decision may be pleaded in another suit. (*s*)

Effect of overruling a demurrer.] If the demurrer is overruled as frivolous, the complainant may have an order to take the bill as confessed, or he may compel the defendant to answer the bill, at his election. (*t*)

A frivolous demurrer or plea to a bill for the foreclosure of a mort-

(*o*) *Glegg v. Legh*, 4 Mad. 193.

(*q*) *Smith v. Barnes*, 1 Dick. 67. *Watkins v. Bush*, 2 id. 701.

(*r*) *Mitt. Eq. Pl.* 214.

(*s*) *Mitt. Eq. Pl.* 214.

(*p*) 2 Dan. 87.

(*t*) *Rule* 49

Moore, 20 Cal. 15; *Calderwood v. Tevis*, 23 id. 335;) as the demurrer must be disposed of before the issue of fact is tried, (*Ellis v. Loumier*, 1 Mo. 260.) and before judgment on the merits can be rendered. (*Manifec v. D'Lashmut*, id. 258.) But if no objection is made at the time of trial, it is not such an irregularity as entitles the plaintiff to a new trial. (*Calderwood v. Tevis*, *supra*.)

(24) After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over, upon such terms as may be just. (Code of New York, § 172; Code of Ohio, § 136.)

If the demurrer be allowed for the reason that several causes of action have been improperly united, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned. (Ib.; Code of Ohio, § 90; Code of Kansas, § 99.)

The last paragraph of sec. 172 of the Code applies to actions specified, sec. 167; that is to say, if the plaintiff has united in his complaint a cause of action in one class, with a cause of action in another class, the court may, in its discretion, order the action to be divided into as many actions as may be necessary. (*Robinson v. Judd*, 9 How. Pr. 378, 383. See *Alger v. Scoville*, 6 id. 131; S. C. 1 Code Rep., N. S. 303; *Lord v. Vreeland*, 13 Ab. 195; S. C. 15 id. 122; 24 How. 316.)

gage may be noticed for argument as frivolous, by the complainant, on any motion day as well as in term; and the complainant may thereupon move for a final decree in the cause as upon a bill taken as confessed. (u) But to entitle the complainant to such a decree, he must give special notice to the defendant that he intends to move for an order to overrule the plea or demurrer as frivolous, and to take the bill as confessed, and for a final decree thereon. (v) (25)

(u) *Bowman v. Marshall*, 9 Paige, 78.

(v) *Id.* *Ib.*

(25) *Frivolous demurrer.* If a demurrer, answer or reply be frivolous, the party prejudiced thereby may, upon a previous notice of five days, apply to a judge of the court, either in or out of the court, for judgment thereon; and judgment may be given accordingly. (Code, § 247.)

A frivolous pleading is one which, if true, does not contain any defence to any part of the plaintiff's cause of action; and its insufficiency as a defence must be so glaring that the court can determine it upon bare inspection, without argument. (*Nichols v. Jones*, 6 How. Pr. 655, 658.)

The rule is that the court will not strike out a demurrer as frivolous, unless it clearly appears to be taken for the mere purpose of delay, or unless the grounds taken in it are clearly untenable. The court must be able to determine the fact upon a bare inspection. (*Sixpenny Savings Bank v. Sloan*, 12 How. Pr. 544; *Hecker v. Mitchell*, 5 Ab. 453, 455. See also *Lefferts v. Snediker*, 1 Ab. 41; *Leach v. Boynton*, 3 id. 3; *Brown v. Jenison*, 3 Sandf. 732; *Struver v. Ocean Ins. Co.* 2 Hilt. 475; S. C. 9 Ab. 23; *Smith v. Mead*, 14 id. 262. A decision in point, adverse to the sufficiency of a pleading, is good ground for treating it as frivolous. (*People v. McCumber*, 15 How. Pr. 186, 192; S. C. 27 Barb. 632; 18 N. Y. 315; *Bank of Wilmington v. Barnes*, 4 Ab. 227; *Strong v. Stevens*, 4 Duer, 668.)

The court will not give judgment on a demurrer as frivolous, unless it appears to have been taken for delay merely, or unless the grounds of demurrer, as set forth, are clearly untenable. (*Van Sant. Eq. Pr.* 196; 1 Monell Pr. 2d ed. 554; *Acome v. Am. Min. Co.* 11 How. Pr. 27; *Sixpenny Savings Bank v. Sloan*, 12 id. 543; S. C. 2 Ab. 214.)

When a demurrer legitimately comes within section 144 of the Code, the plaintiff cannot treat it as a nullity, and enter judgment for want of an answer, upon the ground that the demurrer is clearly frivolous. That question the defendant has a right to submit to the court for its judgment. (*Swift v. DeWitt*, 3 How. Pr. 280.)

It is generally considered that where the question raised by the demurrer fairly admits of argument, it will not be adjudged to be frivolous, but the plaintiff will be left to the usual course of bringing on the demurrer for trial as an issue. Though it has been held that when there is a decision directly in point against the demurrer, it is untenable, and will be adjudged to be frivolous. (*Ib.*)

It is not necessary to serve an affidavit on the opposite party, with notice of motion for judgment under this section of the Code. (*Darrow v. Miller*, 5 How. Pr. 250; S. C. 3 Code Rep. 241.) Where the notice of motion is, to strike out the answer on the ground of the frivolousness thereof, "or for such other or further order as the said justice shall deem proper to grant," judgment cannot be given under section 247. In no case do the words "rule or order," as used in the Code, mean a judgment. (*Darrow v. Miller*, *supra*. See also *Rae v. Wash. Mu. Ins. Co.* 1 Code Rep., N. S. 185.)

A judge at chambers has the same power as at special term, and may make either an absolute or a conditional order for judgment on account of the frivolousness of a pleading. (*Witherspoon v. Van Dolar*, 15 How. Pr. 266; *Witherhead v. Allen*, 28 Barb. 661; S. C. rev'd. 33 How. 620, n. *sub nom.* *Weatherhead v. Allen*.)

Where judgment is ordered for the plaintiff on a frivolous answer or demurrer, he takes judgment in the same manner as if no answer or demurrer had been put in, where there is no other issue. (*King v. Stafford*, 5 How. Pr. 30; *Saltus v. Kipp*, 5 Duer, 646; S. C. 2 Ab. 382; 12 How. Pr. 342; *Aymar v. Chase*, 1 Code Rep., N. S. 141.) The defendant is entitled to notice of such application for judgment. (*Saltus v. Kipp*, *supra*.)

Where it appears, on demurrer that the complaint is so defective that it cannot be amended so as to enable the plaintiff to recover, the defendant is entitled to judg-

Whenever a demurrer is overruled for any other cause than as being frivolous, (*e. g.* upon the merits,) no other demurrer will be received (26) and the defendant must answer the bill and pay the costs of the

ment absolute, on his demurrer. (*Snow v. Fourth National Bank of New York*, 7 Rob. 480.)

The decision of a motion granting a judgment on the ground of the frivolousness of a demurrer under section 247 of the Code, and allowing the defendant time to answer, is not an order, but a judgment; and must be appealed from as a judgment, and not as an order. (*King v. Stafford*, 5 How. Pr. 30; *Bentley v. Jones*, 4 id. 335; S. C. 3 Code Rep. 37; *Roberts v. Morrison*, 7 How. Pr. 396; S. C. 11 N. Y. Leg. Obs. 61; *Bruce v. Pinckney*, 8 How. Pr. 397; *Lewis v. Acker*, id. 414; *Bauman v. N. Y. Cen. R. R. Co.* 10 id. 218; *Weatherhead v. Allen*, 28 Barb. 663. See also, *Harris v. Hammond*, 18 How. 123; *Lee v. Ainslee*, 1 Hilt. 277.)

The court will sometimes, upon overruling a demurrer as frivolous—especially where it appears to have been put in in good faith, permit the defendant to answer the complaint upon payment of costs. But the good faith of the demurrer must be manifest; for if it was put in for delay, no such indulgence will be granted. (Monell Pr. 2d ed. 555. Van Sant. Eq. Pr. 197.) Leave will not be granted without an affidavit of merits (*Appleby v. Elkins*, 2 Sandf. 673; S. C. 3 Code Rep. 206.)

An order rendering judgment on a demurrer as frivolous will not be reversed unless the court is of the opinion that the demurrer would be sustained on argument. It will not be reversed merely because the court may think it is not frivolous. (*Wesley v. Bennett*, 6 Duer. 688; S. C. 5 Ab. 498; *Griswold v. Loverty*, 1 N. Y. Leg. Obs. 316; *Wetherhead v. Allen*, 28 Barb. 661, 668; *Martin v. Knouse*, 2 Ab. 327; S. C. 11 How. Pr. 567.) In *The East River Bank v. Rogers*, (7 Bosw. 494.) however, it was held that on appeal from a judgment rendered against a defendant on account of the frivolousness of his answer, the question is, whether the judgment is right on the merits of the case made by the pleadings, and not whether the answer is frivolous. And in *Aitken v. Clark*, (15 Ab. 319.) it was held that it is not sufficient to sustain a judgment on an answer as frivolous, that such answer would probably be held bad on demurrer.

In *Indiana*, it is provided by statute that all frivolous demurrers shall be overruled. (2 Rev. Stat. 44, sec. 77.)

In *Wisconsin*, if a demurrer be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly. (Rev. Stat. of 1858, p. 757, § 28.)

(26) Where some of the defendants demur, and the demurrer is overruled, with liberty to answer in twenty days, on payment of costs, and on appeal such decision is affirmed by the general term, then, admitting that such defendants have the same time to answer after the general term decision, which was given them by the order overruling the demurrer, the answer must be tendered within twenty days after the judgment of affirmance, although the costs of the demurrer have not been adjusted, or the right to answer is lost. (*Ford v. David*, 1 Bosw. 569. But see 2 Wend. 293.)

When an order overruling a demurrer requires the defendant to put in his answer in a specified time, and pay the costs, or that the bill be taken as confessed against him, a subsequent *ex parte* order extending the time to answer is irregular. (*Hurd v. Hayes*, 9 Paige, 604.)

Notwithstanding a defendant demurs, and his demurrer is overruled, he may afterwards insist upon the same thing by his answer. (See *Crawford v. The William Penn*, 3 Wash. C. C. Rep. 484.) And under the civil law the party who demurred was not prevented from contesting the facts confessed in the demurrer, and compelling the opposite party to prove them. (Ib.) This is the modern practice. (2 Estee's Pr. 600.)

Where a demurrer is overruled and the pleading sustained, and leave is given to answer the pleading, the demurrant is put to his election to answer over or submit to judgment. If he submit to judgment, the judgment is final. If such judgment is appealed from to the highest court, such appeal comes there on the question of affirmance or reversal only; and no leave to the demurrant to answer or plead anew can be given. (*Whiting v. The Mayor, &c., of New York*, 37 N. Y. 600; S. C. 6 Trans. Ap. 193. See *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 658.)

In *Indiana*, when a demurrer is overruled, the judgment shall be that the party demurring shall plead over. (2 Rev. St. 123, sec. 384; 17 Ind. Rep. 272.) Error in

hearing within twenty days after notice of the order overruling the demurrer, or such other time as may be prescribed by the court, in the order. If he fails to put in his answer and pay the costs within the time prescribed, the bill may be taken as confessed; or the complainant may have an attachment to compel an answer. (*w*)

After a demurrer has been overruled, the defendant cannot have an *ex parte* order for further time to answer, beyond the time allowed by the order overruling the demurrer. (*x*)

The 49th rule is not applicable to the case of a demurrer to a part of the bill only, and an answer to the residue. In such a case, if the demurrer to a part of the bill is overruled, the complainant must except to the answer already put in, for insufficiency, when he wishes to obtain a further answer to the part of the bill which was attempted to be covered by the demurrer. (*y*) But it is to be observed that the complainant should not except to the answer before the demurrer has been argued; otherwise he will admit the demurrer to be good. (*z*) It is said, however, that if the demurrer is to the relief only, and not to any part *of the discovery, the complainant may take exceptions to the [*113] answer before the demurrer is argued. (*a*)

A demurrer, being a mute thing, cannot, like a plea, be ordered to stand for an answer. (*b*)

(*w*) Rule 49.

(*x*) *Trim. v. Baker*, Tur. & Russ. 253.

(*y*) *Kuypers v. Reformed Dutch Ch.* 6 Paige, 570. *Cotes v. Turner*. Bunb. 123.

(*z*) *London Assurance Co. v. East India Co.* 3 P. Wms. 326. Mitf. Pl. 317. 13 Ves. 35.

(*a*) *Midl. Eq. Pl.* 317. 3 P. Wms. 325.

(*b*) *Anon* 3 Atk. 530.

overruling a demurrer will not cause a reversal of the judgment on appeal, if it appears from the whole record that the merits of the cause have been fairly determined. (2 Rev. Stat. 123, sec. 382.)

If the complaint contains the elements of a cause of action, however inartificially it may be stated, and if, on analyzing the facts disclosed, the whole, or any part of them, can be resolved into a cause of action, the demurrer should be overruled. (*People v. Mayor of New York*, 28 Barb. 240; S. C. 8 Ab. Pr. 7; *Buzzard v. Knapp*, 12 How. Pr. 504.)

In *Kentucky*, upon a demurrer being overruled, the party demurring may answer or reply. (Code, § 160.)

In the *United States* Equity courts, if, upon the hearing, any demurrer or plea is overruled, the plaintiff is entitled to his costs in the cause up to that period; unless the court shall be satisfied that the defendant had good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously, or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, &c. (Rule 34 of Equity Rules.) No demurrer shall be held bad, and overruled, upon argument, merely because the answer of the defendant may extend to some part of the same matter as may be covered by the demurrer. (Rule 37.)

If any part of the bill is good, and entitles the plaintiff either to relief or to discovery, a demurrer to the whole bill cannot be sustained. A defendant may meet the plaintiff's bill by several modes of defence. He may demur, answer and plead to different parts of the bill; so that if a bill for discovery and relief contains proper matter for the one and not for the other, the defendant should answer the proper, and demur to the improper matter. But if he demurs to the whole bill, the demurrer must be overruled. (Per *Thompson J. Livingston v. Story*, 9 Peters, 632; *Wright v. Dame*, 1 Metc. 241.)

Taking demurrer off the files.] If the defendant omits to put in his demurrer, or to answer within the time limited by the order, and an attachment is in consequence issued against him for want of an answer, a demurrer, even though coupled with an answer, will be irregular; and in such a case the proper course is to move that the demurrer and answer be both taken off the files, and not that the demurrer be overruled. (*c*) The distinction between taking a demurrer off the files, and simply overruling it, is, that the former course is adopted in all cases where there has been an irregularity in the filing of the demurrer, and the latter, wherever it has been properly filed, but the court is of opinion that it is insufficient, or that it has been overruled by the answer. (*d*)

Where a demurrer has been taken off the files for irregularity, it ceases to be a record of the court, and the defendant may, therefore, put in a plea or another demurrer, (if his time for demurring has not expired,) as if no demurrer had been filed. (*e*) The demurrer is not taken off the files, however, by the mere pronouncing of the order, but it must be actually withdrawn from the files. To effect this, the order, when drawn up, should be carried to the register or clerk, who will withdraw the demurrer—annexing the order to it. (*f*)

Amending bill after demurrer.] After a demurrer has been put in, and before it is set down for hearing, the complainant may apply for leave to amend his bill, and by the English practice, such leave will be given as a matter of course, on condition only of the complainant's paying to the defendant twenty shillings costs. (*g*) But after the order for setting it down for argument, the court requires that it should be upon payment of five pounds, for the costs of the demurrer, in addition to the twenty shillings costs for the amendment. (*h*) If a complainant wishes to amend his bill after a demurrer has been set down, he must obtain leave to do so before it is *called on for argument*; otherwise he will not be permitted to do so—unless in a clear case of omission by oversight. (*i*) (27)

(*c*) *Curzon v. De la Zouch*, 1 Swanst. 185.

(*e*) *Cus. v. Boode*, 1 Sim. & Sta. 21.

(*g*) *Parker v. Aloch*, 1 Young & Jer. 194. 1 Har. Pr. 61.

(*h*) 1 Dan. 524.

(*d*) *Id. ib.* 2 Dan 81.

(*f*) *Id. ib.*

(*i*) *Holmes v. Waring*, 8 Price, 604.

(27) If the plaintiff on being served with a demurrer, considers it well taken, he may amend his complaint, of course, and without prejudice, within twenty days, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after service of the demurrer, unless it be made to appear to the court that it was done for the purposes of delay. If it appears to the court that the amendment was made for that purpose, the same may be stricken out, &c. (Code, § 172.)

This section is only applicable to cases where the first pleadings put in are regular. If the opposite party wishes to move to set aside the first pleading for irregu-

*When a demurrer for want of parties is allowed, the court [*114] generally gives the complainant leave to amend his bill by adding parties as he may be advised. (*k*) Thus, in the case of *McElwain v. Willis*, (*l*) where it appeared that the complainant's counsel acted under a *mistake*, the court, upon the allowance of a demurrer for a mere formal defect of parties, allowed the complainant to amend his bill upon terms. But this rule of practice is not obligatory upon the courts; and will be departed from where it is clear that the complainant cannot obtain relief against the defendant demurring, even after an amendment of his bill. (*m*) Where the demurrer has been *ore tenus*, leave will be granted to the complainant to amend, without his paying the costs of the demurrer; though if he seeks, under such circumstances, to amend more extensively than by merely adding parties, he must pay the defendant the costs of the demurrer. (*n*) (28) (29) (30) (31)

(*k*) 2 Dan. 89.(*m*) *Tyler v. Bell*, 2 My. & Craig. 89.(*l*) 3 Paige, 505.(*n*) *Newton v. Lord Egmont*, 4 Sim. 585.

larity, and has served the proper papers, notwithstanding the irregularity has been corrected by the amendment, still the party amending, although his amendment is in time under this section, must pay the costs of the motion. (*Prudden v. City of Lockport*, 40 How. 46; *Williams v. Wilkinson*, 5 id. 357; S. C. 1 Code Rep., N. S. 20.) The section is not to be construed as allowing amendments which the court is prohibited from allowing upon special application. The only difference between the present rule and the rule as it has stood since 1796, is that more time is now given for the exercise of this privilege. (*Spalding v. Spalding*, 3 How. Pr. 300; S. C. 1 Code R. 64.)

If the complaint be amended, a copy thereof must be served on the defendant, who must answer or demur to it within twenty days, or the plaintiff upon filing with the clerk due proof of the service and of the defendant's omission, may proceed to obtain judgment, as provided by section 246 of the Code; but if an application to the court for judgment is necessary, eight days' notice thereof must be given to the defendant. (Code, § 146.) The amended complaint must be served on the attorney, and not on the defendant personally. If served on the latter only, a judgment entered as upon a failure to answer is irregular. (*Mercier v. Pearlstone*, 7 Ab. 325.)

In the Equity courts of the *United States*, after an answer, plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next rule day, upon payment of costs, or without such payment, as the court or a judge may direct. But after replication filed, the bill cannot be amended without leave of the court obtained upon notice, and an affidavit of no design to delay; and upon terms. (Rule 29 of Equity Rules)

(28) *Consequences of omitting to demur.* If no objection to the complaint is taken either by demurrer or answer, the defendant will be deemed to have waived the same; excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. (Code of *New York*, § 148; Code of *Ohio*, § 89; of *Kansas*, § 98; of *Kentucky*, § 123; of *Wisconsin*, § 53; of *Minnesota*, § LXV.) This means that if the objection be not taken by demurrer, when that mode is proper, or by answer when that is the appropriate method, it is waived. (*Zabriskie v. Smith*, 13 N. Y. 322.)

When the objection appears on the face of the complaint, it must be taken by demurrer. When it does not so appear, it must be taken by answer. If not taken by either method, it will be waived. (*Tremper v. Conklin*, 44 Barb. 456; *Loeschigk v. Addison*, 19 Ab. 169; S. C. 3 Bob. 331; *Palmer v. Davis*, 28 N. Y. 242; *Hosley v. Black*, id. 438; S. C. 26 How. 97; *Merritt v. Walsh*, 32 N. Y. 685; *Donnell v. Walsh*, 33 id. 43; 6 Bosw. 621; *Lee v. Wilkes*, 27 How. 336; S. C. 19 Ab. 355; *Blossom v. Barrett*, 37 N. Y. 434; *Zabriskie v. Smith*, 13 N. Y. 336; Wait's Code, 240.)

The objection of defect of parties must be taken by demurrer or by answer, or it will be waived. (*Palmer v. Davis*, 28 N. Y. 242; *DePuy v. Strong*, 37 id. 372; S. C. 3 Keyes, 603; 4 Ab., N. S. 340; *Fosgate v. Herkimer Manuf. & Hydraulic Co.* 12 N. Y. 580; *Zabriskie v. Smith*, 13 id. 322; *Penman v. Slocum*, 41 id. 53; *Fisher v. Hall*, id. 416; *Wright v. Storrs*, 32 N. Y. 691; S. C. 6 Bosw. 600; *Dillaye v. Parks*, 31 Barb. 132; *Wright v. Bennett*, 3 id. 451; *Abbe v. Clarke*, 31 id. 238; *Benson v. Paine*, 2 Hilt. 552; S. C. 9 Ab. 28; 17 How. 407; *Hosley v. Black*, 26 id. 97; S. C. 28 N. Y. 438; *Girard v. Beach*, 3 E. D. Smith, 337; *Byzbie v. Wood*, 24 N. Y. 607.) And it cannot be raised on the trial, (*Van Deusen v. Young*, 29 Barb. 19; *Abbe v. Clark*, 31 id. 238; *Bury v. City of St. Louis*, 12 Mo. 298; *Mullen v. Pryor*, id. 307;) or on appeal from a judgment, (*Bidwell v. Astor Mu. Ins. Co.* 16 N. Y. 263; *Purchase v. Matteson*, 6 Duer, 588; S. C. 25 N. Y. 211; *Colegrove v. Harlem & New Haven R. R. Co.* 6 Duer, 382; S. C. 20 N. Y. 492; *Bowdoin v. Coleman*, 3 Ab. 431; S. C. 6 Duer, 182; *Bates v. James*, 3 id. 45;) or "in any other mode, or in any other stage of the cause." (*Leavitt v. Fisher*, 4 Duer, 23. See *Davis v. Mayor, &c.*, of New York, 14 N. Y. 506. Wait's Code, 240.)

So all objections to the pleading demurred to, except those specified, are waived. (*Malone v. Stilwell*, 15 Ab. 421; *Nellis v. De Forest*, 16 Barb. 61; *Gill v. Johnson*, 1 Metc. [Ky.] 649; *Lee v. Walker*, 3 id. 61.) Thus, where a demurrer states, as grounds that the complaint does not state facts sufficient to constitute a cause of action, and is interposed without any objection for the want of proper parties, or to the form of action, the latter objections are waived, and for all purposes of the demurrer, the complaint will be deemed unobjectionable by reason of any such defect. (*Loomis v. Tift*, 16 Barb. 541.) So where, upon a demurrer to the answer, the defendant claims that the complaint is defective, he will be deemed to have waived all objections to the complaint not raised by answer or demurrer, except the want of jurisdiction, or of a cause of action. (*People v. Banker*, 8 How. Pr. 258; *Winterston v. Eighth Av. R. R. Co.* 2 Hilt. 389.)

In *Conn. Bank v. Smith*, (9 Ab. 168; S. C. 17 How. 487), where the demurrer specified as ground of demurrer, that the complaint did not state facts sufficient to constitute a cause of action; among other things, that it did not show the plaintiff's capacity to sue; it was held that although the omission to show the plaintiff's capacity to sue was not a failure to state facts sufficient to constitute a cause of action, yet the objection that the complaint did not show the plaintiff's capacity to sue was sufficiently stated in the demurrer to enable the defendant to have the benefit of it on the argument.

All objections to the sufficiency of the complaint, if not presented by demurrer, must be raised at the special term or circuit, before they can be available on appeal. (*Pope v. Dinsmore*, 8 Ab. 429; S. C. 29 Barb. 367; *Carley v. Wilkins*, 6 id. 558; *contra*, *Cole v. Blunt*, 2 Bosw. 116, 125.)

An objection proper to be taken by demurrer will be waived if taken by answer only. (*Patchin v. Peck*, 38 N. Y. 39; S. C. 5 Trans. Ap. 33; *Mayhew v. Robinson*, 10 How. Pr. 162; *Ingraham v. Baldwin*, 12 Barb. 9; S. C. 9 N. Y. 45; *Bagget v. Boulger*, 2 Duer, 160; *Bank of Waterville v. Beltser*, 13 How. Pr. 270; *Gasset v. Crocker*, 10 Ab. 133; *Dennison v. Dennison*, 9 How. Pr. 246.) In an action under a statute, if the pleading does not conform to the requirements of the statute, the objection is not waived by answering. (*Stannard v. Eytinge*, 5 Rob. 90.) But it seems a defendant waives the objection of non-joinder of parties defendant by setting up a counter-claim in favor of himself, jointly with such other parties, and against the plaintiff. (*Secor v. Law*, 9 Bosw. 163, 185; S. C. 3 Keyes, 525.)

The objection that there is a "defect of parties plaintiff or defendant," means that there are too few, not that there are too many parties. (*Palmer v. Davis*, 28 N. Y. 242.) Where a creditor sues for himself only, the objection that he should also sue on behalf of others, is not a mere objection for defect of parties, and may be raised for the first time on the trial. (*Greene v. Breck*, 10 Ab. 42; S. C. 32 Barb. 73.)

The objection that the complaint does not state facts sufficient to constitute a cause of action, is available at any stage of the action. Omitting to demur does not waive it. (*Coffin v. Reynolds*, 37 N. Y. 640; S. C. 5 Trans. Ap. 36; *Higgins v. Freeman*, 2 Duer, 650; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Gould v. Glass*, 19 Barb. 179; *De Witt v. Chandler*, 11 Ab. 459.)

If an action is not brought in the name of the real party in interest, the objection will be waived by its not being set up as a defence. (*Savage v. Corn Exchange Fire Ins. Co.* 4 Bosw. 15.)

The objection to the right of the plaintiffs to recover, for want of legal capacity to sue, or of jurisdiction, cannot be raised for the first time on appeal to the general term. If the defendant omits to take the objection by demurrer, or at the trial, he

will be deemed to have waived it. (*Mosselman v. Caen*, 34 Barb. 66; S. C. 21 How. Pr. 228.) And it seems that after having failed to demur, the defendant cannot raise the question, at the trial, as to the legal capacity of the plaintiffs to sue. (Per Clerke J. *Ibid.*)

Yet an incurable defect in the complaint is never waived, but the objection may be raised whenever the parties are before the court, at special term, by motion, or on the trial, by motion in arrest after verdict. (*Burnham v. De Bevoise*, 8 How. Pr. 160; *Budd v. Bingham*, 8 Barb. 494.) Thus, the exemption of a foreign consul from the jurisdiction of a state court is not waived by an answer to the merits. (*Valarino v. Thompson*, 7 N. Y. 576; *Flynn v. Stoughton*, 5 Barb. 115.) His being sued together with a citizen, on a joint contract, does not give jurisdiction to the state courts. (*Ib.*; *Rock River Bank v. Hoffman*, 22 How. 250, 510; 14 Ab. 72.)

In *Kentucky*, where it appears from the petition that there is a defect of parties, and the objection for want of parties is not made by demurrer, it shall be deemed to have been waived. (Civ. Code, sec. 123.) It has been held this provision applies to all actions, whether the defendant has been actually or only constructively summoned. (*Gill v. Johnson*, 1 Mete. 649.)

In *Indiana*, when good cause of demurrer appears upon the face of the complaint, and the defendant fails to demur, he thereby waives the objection; unless it be to the jurisdiction of the court over the subject of the action, or to the sufficiency of the facts to constitute a cause of action. (Bick. Civ. Pr. 102; 2 Rev. Stat. 39, sec. 54; Laws of 1855, p. 60; 10 Ind. R. 117, 568; 14 id. 89.) And whenever the complaint will bar another suit for the same cause, and was not demurred to in the court below, its sufficiency cannot be questioned in the Supreme Court. (10 Ind. R. 568.)

Omission to demur to answer. If the answer contains a statement of new matter constituting a counter-claim, and the plaintiff fails to reply or demur thereto, within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement. (Code, § 154.)

The omission of a defendant to move for judgment under this section, does not preclude him from taking advantage on the trial, of admissions made by the pleadings. (*Bridge v. Payson*, 5 Sandf. 210.) The motion under this section, relates only to a case where the answer relies on new matter. (*Brown v. Spear*, 5 How. Pr. 146; S. C. 9 N. Y. Leg. Obs. 97; 3 Code Rep. 192.)

(29) *Demurrer to answer.* The plaintiff may, in all cases, demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims. (Code, § 153.)

If new matter set up in a defence, is sham or irrelevant, the plaintiff should move to strike it out. If it does not on its face, constitute a defence, he should demur. (*Smith v. Countryman*, 30 N. Y. 655. See *Meyer v. Fiegel*, 7 Rob. 128; S. C. 34 How. 438.) If the plaintiff replies to a counter-claim, he thereby waives all objections to its form, or amendable defects. (*Ayres v. O'Farrell*, 10 Bosw. 143. See *Smith v. Countryman*, 30 N. Y. 655.)

An answer which sets up no new matter, but merely denies the allegations of the complaint, is not demurrable. (*Maretsck v. Cauldwell*, 19 Ab. 35; S. C. 2 Rob. 715; *Smith v. Greenin*, 2 Sandf. 702; *Ketcham v. Zerega*, 1 E. D. Smith, 557; *Thomas v. Harrop*, 7 How. Pr. 57; *People v. Banker*, 8 id. 258; *Reilay v. Thomas*, 11 id. 266; *Lund v. Seamen's Savings Bank*, 37 Barb. 129; S. C. 23 How. Pr. 258; *Rice v. O'Connor*, 10 Ab. 362. *Contra*, *Hopkins v. Everett*, 6 How. Pr. 159; S. C. 3 Code Rep. 150.) Nor is it a ground of demurrer that an answer alleges facts as a counter-claim, which only constitute a defence. (*Wait v. Ferguson*, 14 Ab. 379.) Nor are redundancy, irrelevancy or uncertainty, grounds of demurrer. (*Ketcham v. Zerega*, 1 E. D. Smith, 554; *Smith v. Greenin*, 2 Sandf. 702; *Watson v. Husson*, 1 Duer, 242; S. C. 14 N. Y. 60, *sub. nom.*, *Drummond v. Husson*; *Richards v. Edick*, 17 Barb. 261. But an answer setting up as a defence new matter which does not constitute one may be demurred to for insufficiency. (*Merritt v. Millard*, 5 Bosw. 645; *Fabricotti v. Lavinitz*, 1 Code Rep., N. S. 122; S. C. 3 Sandf. 743; *Rice v. O'Connor*, 1 Ab. 362. And an answer alleging that the defendant is civilly dead is bad on demurrer. (*Freeman v. Frank*, 10 Ab. 370.) Where the allegations of an answer are contradictory, a demurrer only admits those allegations which the law adjudges to be true. A demurrer to an answer that the defendant is civilly dead, does not admit the death; for civil death is a fiction which is contradicted by the very fact that the defendant has answered. (*Ib.*)

A demurrer will not lie to a part of an entire defence in an answer. (*Cobb v. Frazer*, 3 Code Rep. 43; S. C. 4 How. Pr. 413; *Welch v. Hazleton*, 14 id. 97.) Nor to one

defence which is inconsistent with his reply denying other defences. (*Burr v. Wright*, 9 How. Pr. 542.) The grounds of a demurrer to an answer must be plainly stated. (*Ketcham v. Zerega*, 1 E. D. Smith, 554.) But on a demurrer for insufficiency it is enough to specify generally that the answer is insufficient. (*Arthur v. Brooks*, 14 Barb. 533; *Hyde v. Conrad*, 5 How. Pr. 112; S. C. 3 Code Rep. 162.) Where the ground of a demurrer to an answer is that "it does not state facts sufficient to constitute a defence," it is sufficient merely to state that fact as the ground thereof without pointing out wherein it is insufficient in other respects. (*Amibal v. Hunter*, 6 How. Pr. 255; *Hyde v. Conrad*, 5 id. 112.)

On a demurrer to an answer, the sufficiency of the complaint may be attacked in order to show that the court has no jurisdiction of the action, or that it does not state a cause of action. (*People v. Banker*, 8 How. Pr. 258; *Fry v. Bennett*, 1 Code Rep. N. S. 238; S. C. 5 Sandf. 54; 9 N. Y. Leg. Obs. 330; *Schwab v. Furniss*, 1 Code Rep. N. S. 342; S. C. 4 Sandf. 704; *sub. nom. Schwab v. Furniss*; *Stoddard v. Onondaga Annual Conference*, 12 Barb. 573; *Noxon v. Bentley*, 7 How. Pr. 316; *Newman v. Supervisors of Livingston Co.* 1 Lans. 476; *Pardo v. Osgood*, 2 Ab., N. S. 365; S. C. 5 Rob. 348; *People v. Booth*, 32 N. Y. 397.)

When the answer contains a statement of new matter constituting a counter-claim, and the plaintiff fails to reply or demur thereto within the time specified by law, the defendant may move for such judgment as he is entitled to upon such statement. (Code, § 154.) On demurrer to the answer for insufficiency, the defendants may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action. (*Pardo v. Osgood*, 2 Ab., N. S. 365; *People v. Booth*, 32 N. Y. 397.) Judgment must be given against the party who is chargeable with the first material error. (*Collier v. Wheldon*, 1 Mo. Rep. 1; *Clark v. Murphy*, id. 114; *Wimer v. Shelton*, 7 id. 266.) But where upon a demurrer to the answer the defendant claims that the complaint is defective, he will be deemed to have waived all objections to the complaint not raised by answer or demurrer, except a want of jurisdiction or of a cause of action. (*People v. Banker*, 8 How. Pr. 258; *Winterson v. Eighth Av. R. R. Co.* 2 Hilton, 389.)

In *Kentucky* a demurrer to an answer, under the Code of practice, involves the sufficiency of the petition; if that be bad it is unnecessary to decide on the sufficiency of the answer. (*Martin v. McDonald*, 14 B. Monroe, 547.) On demurrer to the answer the defendant may avail himself of any of the objections to the petition which are not deemed to be waived under sec. 123 of the Civil Code by a failure to make them by answer or demurrer. *Aliter* as to objections thus waived. (*Mitchell v. Mattingly*, 1 Metc. 237.) A demurrer to the answer brings the whole of the pleadings before the court; and in deciding upon the demurrer it is the duty of the court to decide against the party who committed the first fault. (5 Mon. 528; 3 Mar. 322.) If the petition is insufficient it must be so adjudged. (*Young v. Duhure*, 4 Metc. 239.)

(30) *Demurrer to reply.* If the reply of the plaintiff to any defense set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof. (Code, § 155.)

A reply may be demurred to for insufficiency. The demurrer must state wherein it is insufficient; otherwise the plaintiff may move to have it struck out, or made more definite. (*White v. Joy*, 13 N. Y. 83, 89.) The term "insufficient," used in sec. 155, seems to refer to the matter stated in the replication. (Ib.) A departure, that is where a party quits or departs from the case he has first made in his complaint, and has recourse to another in his reply, is not a ground of demurrer, but is an irregularity, which may be corrected on motion. (Ib.)

It is a well settled principle that upon the determination of a demurrer to any pleading, judgment must be given against the party who has committed the first error. (*Newan v. Supervisors of Livingston county*, 1 Lans. 476. See *Noxon v. Bentley*, 7 How. Pr. 316.) Hence, on demurrer to a reply, although the reply is bad, if the answer is bad in substance, the plaintiff is entitled to judgment. (*Halliday v. Noble*, 1 Barb. 138; S. C. 1 N. Y. 330.)

(31) *Judgment.* On demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue of fact, joined upon the same pleading and found in favor of the same party; and judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; because, upon the whole, it appears that the plaintiff had no cause of action. (*Clearwater v. Meredith*, 1 Wall. 25.)

On demurrer, judgment must be given against the party who committed the first material error. (*Collier v. Wheldon*, 1 Mo. Rep. 1; *Clark v. Murphy*, id. 114; *Young v. Duhure*, 4 Met. Ky. 229; Myers' Code of Ky. 355.)

In the *United States Courts* the general rule is, that notwithstanding the particu-

SECTION IV.

PLEA.

Nature and uses of pleas.] Where an objection to the bill is not apparent on the bill itself, the defendant, if he wishes to take advantage of it, must show to the court the matter which creates the objection, either by answer or plea. A plea is a special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred. (o) (32)

The defence proper for a plea is such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to the part of it to which the bill applies. (p) But it is not necessary that it should consist of a single fact; for though a defence offered by way of plea consists of a great variety of circumstances, yet if they all tend to one point, the plea may be good. (q)

The defences which may be set up by plea are either founded upon some matter not apparent upon the face of the bill—in which case the * plea is called an *affirmative plea*—or upon some new fact or [* 115] claim of facts not apparent upon the face of the bill, or upon a denial of the truth of some matter stated in the bill, upon which the complainant's right depends. A plea of this sort is styled a *negative plea*.

(o) Mitf. Eq. Pl. 218. Heartt v. Corning, 3 Paige, 566.

(p) Id. 219.

(q) Id. 296. Cann v. Cann, 1 P. Wms. 725. Ashurst v. Eyres, 3 Atk. 341. 15 Ves. 79, 82.

lar pleading demurred to may be defective, the court will examine all the pleadings in the cause, and render judgment against the party chargeable with the first fault in pleading. (*Cooke v. Graham*, 3 Cranch, 229; *United States v. Gurney*, 4 id. 333; *United States v. Arthur*, 5 id. 257; *Sprigg v. Bank of Mount Pleasant*, 10 Pet. 257; S. C. 1 *McLean*, 178; *Gorman v. Lenox*, 15 Pet. 115; *United States v. Sawyer*, 1 Gall. 86; *Bookee v. Crosby*, 2 Paine, 432; *Egberts v. Dibble*, 3 *McLean*, 86; *Bank of Illinois v. Brady*, id. 263; *Greathouse v. Dunlap*, id. 303; *McCue v. Corporation of Washington*, 3 Cranch, 639.) As a demurrer brings up the sufficiency of all pleadings which have preceded it. (*Marshall v. Platte County*, 12 Mo. R. 83.) But this rule applies only to substantial defects. The fault must be one that is bad on general demurrer. (*Jackson v. Rundlett*, 1 Woodb. and M. 381.) and the rule applies only while the proceedings are pending, and under the control of the court. (*Dickson v. Wilkinson*, 3 How. Pr. 59.)

By Rule 38 of the Rules of Practice in Equity Courts of the United States, if the plaintiff shall not set down any demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a Judge of the court shall allow him further time for the purpose.

In *Michigan*, upon issue being joined on a demurrer, the court, unless the defect or imperfection in the pleading be specially expressed in the demurrer, shall proceed and give judgment according to the very right of the case, if sufficient matter appears in the pleadings to enable it to do so, without regarding such defect or imperfection. (Comp. Laws, Vol. 2, p. 1150, § 19.)

(32) By the Code of New York, the plea is abolished; the only pleadings on the part of the defendant being either a demurrer, or an answer. Code, §§ 140, 143.) The same provision is to be found in the Codes of *Kansas*. (§ 93); *Wisconsin*, (§ 4 of chap. 145); *Ohio*, (§ 84); *Minnesota*, (sec. LVIII. [62]); and *Kentucky*, (sec. 117).

A plea will be overruled if it does not set up any new matter, although the objection raised by it would have been valid if it had been urged by way of demurrer to the bill. (*r*)

One of the uses of a plea is to raise the objection of a want of proper parties. Thus, where the complainant has omitted to bring before the court persons who are necessary parties, but the objection does not appear upon the face of the bill, so as to allow the defendant to demur, the objection may be made by plea or answer, in a plain and explicit manner, showing who are the necessary parties. (*s*)

Another of the uses of a plea is to object to the jurisdiction of the court. Thus, where the matter in dispute does not exceed one hundred dollars, if that fact does not appear on the face of the bill, the defendant may plead it in bar of the suit. (*t*)

Form of.] A plea is preceded by a title in this form: "The plea of C. D., a defendant, to the bill of complaint of A. B., complainant," or, "The joint and several plea of C. D. and E. F. defendants," etc. Where it is a plea of husband and wife, the words "and several" should be inserted; though these words will not vitiate the plea—being more surplusage. (*u*) Where a plea was prepared as a joint plea of a husband and wife, but the wife refused to swear to it, whereupon the husband put in the plea and applied that it should stand for himself, it was so ordered. (*v*)

When a plea is accompanied by an answer, it must be entitled "The plea and answer," or, "The joint plea and answer," or, "The joint and several plea and answer," according to the circumstances.

A plea, like a demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the bill. The plea next states how much of the bill it is intended to cover, and what part in particular; and this must be clearly and distinctly shown. (*w*) Therefore, a plea to such parts of the bill as are not answered, will be overruled as too general. (*x*)

[*116] * Where a plea is to the whole of the relief sought by the bill, but it is necessary that the defendant should support his plea by an answer as to facts stated, which may avoid the bar, the plea should not extend to the whole bill, but should be in the form of a plea to all the relief and all the discovery sought by the bill, except certain parts of the discovery, which are to be answered. (*y*)

(*r*) *Cozine v. Graham*, 2 Paige, 177.

(*s*) *Robinson v. Smith*, 3 Paige, 222. *Mitchell v. Lenox*, 2 id. 280.

(*t*) *Smets v. Williams*, 4 Paige, 364.

(*u*) *Fitch v. Chapman*, 7 Sim. & Stu. 31.

(*v*) *Pain v. —*, 1 C. C. 269. *Pavie v. A'Court*, 1 Dick. 13.

(*w*) *Mitf. Eq. Pl.* 294, 300.

(*x*) *Id. ib.* *Anon.* 3 Atk. 70.

(*y*) *Lord Portarlington v. Soulby*, 6 Sim. 356.

The matter relied upon as an objection to the suit or bill generally follows, accompanied by such averments as are necessary to support it. (*z*) And where a plea is of matter which shows an imperfection in the frame of the suit, it should point out in what that imperfection consists. Where, for instance, a plea is for want of parties, it must not only show that there is a deficiency of parties, but should point out who the parties are that are wanting. (*a*)

The plea commonly concludes with a repetition that the matters so offered are relied upon as an objection or bar to the suit, or so much of it as the plea extends to; and prays the judgment of the court whether the defendant ought to be compelled further to answer the bill, or such parts as is thus pleaded to. (*b*)

If the plea is double, i. e. tenders more than one defence as the result of the facts stated, it will be bad; (*c*) and if filed without leave, it is irregular, as well as liable to be overruled. (*d*) Thus, two distinct pleas in bar, different in their nature, as a plea of the statute of limitations and a discharge under the insolvent act, cannot be pleaded together, without the previous leave of the court. (*e*) But in some cases the court, on a special application, upon notice, will allow the defendant to put in a double plea. (*f*)

A plea is not rendered double by the mere insertion therein of several averments that are necessary to exclude conclusions arising from allegations which are made in the bill, to anticipate and defeat the bar which might be set up in the plea. (*g*)

The rule that a defendant cannot plead double, is not to be understood as precluding the defendant from putting in several pleas to different parts of the same bill. It merely prohibits his pleading, without *previous leave, a double defence to the whole bill or to the [*117] same portion of it. A defendant may plead different matters to separate parts of the same bill, in the same manner as he may demur to different portions of the bill. (*h*)

A defendant may, in like manner, plead and demur, or plead and answer, to different parts of the same bill, provided he points out distinctly, the different portions of the bill which are intended to be covered by the plea, the demurrer, and the answer. He must likewise, where he puts in several pleas to the same bill, point out to which particular part of the bill each plea is applicable. But the rule which has

(*z*) Mitf. 300.(*a*) *Merewether v. Mellish*, 13 Ves. 433.(*b*) Mitf. 300.(*c*) *Nobkissen v. Hastings*, 5 Ves. jun. 84. *Jones v. Frost*, 3 Mad. 1, 8. 3 Anst. 733. 6 Ves. 12. *Goodrich v. Pendleton*, 3 John. Ch. 386.(*d*) *Kay v. Marshall*, 1 Keen, 192. *Gibson v. Whitehead*, 4 Mad. 241. *Hardman v. Ellames*, 5 Sim. 640.(*e*) *Salts v. Tobias*, 7 John. Ch. 214.(*f*) *Bogardus v. Trinity Church*, 4 Paige, 178.(*g*) *Moreton v. Harrison*, 1 Bland. 493. *Ridgley v. Warfield*, id. 494.

been stated as applicable to a demurrer, viz: that it cannot be good in part and bad in part, is not applicable, with the same strictness, to a plea; for it is well settled that a plea may be bad in part and not in the whole; and the court will allow it to so much of the bill as it is properly applicable to. (*i*)

The rule that a plea may be allowed in part only is to be understood with reference to its *extent*, i. e. to the quantity of the bill covered by it, and not to the ground of defence offered by it. If any part of the *defence* made by the plea is bad, the whole must be overruled. (*k*)

In addition to the requisites of a plea already mentioned, it may be stated that the plea must be *certain*. It must tender issuable matter, the truth or falsehood of which may be replied to or put in issue; and that not in the form of general propositions, but specifically and distinctly. (*l*)

Where the plea is accompanied by an answer, the answer must follow the conclusion of the plea. If the answer is merely to support the plea, it is stated to be made for that purpose, "not waiving the plea." If the plea is to part of the bill only, and there is an answer to the rest, it is expressed to be an answer to so much of the bill as is not before pleaded to; and is preceded by the same protestation against waiver of the plea. (*m*)

Signature.] A plea must be signed by counsel; except when it is taken under a commission; in which case it is held unnecessary. (*n*)

Where pleas are not to be sworn to, they need not be signed by the defendant—the signature of counsel being sufficient.

When plea must be upon oath.] Pleas in bar of matters *in pais*, which matters, to render the defence complete, would require to be [*118] *proved at the hearing, must be put in upon the oath of the defendant; but pleas to the jurisdiction of the court, or in disability of the person of the complainant, or pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself, or any other court, need not be upon oath. (*o*) But if there are necessary averments of matters *in pais*, supporting a plea of a record, it must be on oath. (*p*) So a plea of the statute of limitations, or of any other statute which requires averments to bring the defendant's case within their operation, must be upon oath. But a mere averment of identity will not render it necessary that a plea of matter of record

(*i*) Mitf. 296. Coop. Eq. Pl. 230. Beames on Pleas, 45. 1 Atk. 450, 52. 2 id. 44, 281. 1 Dick. 249. 2 Sch. & Lef 725. French v. Shotwell, 20 John. 698. 4 Wash. C. C. 595.
 (*k*) Mitf. Pl. 297. (*l*) Nabob of Arcot v. East I. Co. 3 Bro. C. C. 292.
 (*m*) Mitf. Eq. Pl. 300. (*n*) Simes v. Smith 4 Mad 366.
 (*o*) Mitf. 301, 247. Umlin v. Hudson, 1 Vern. 332. (*p*) Wall v. Stubbs, 2 Ves. & B. 354

should be put in upon oath. Therefore, where a plea of the complainant's conviction for forgery was put in without oath, the court held it sufficient, although there was no averment of the identity of the complainant. (*q*) And so the circumstance of a plea of outlawry containing such an averment will not render it necessary that it should be upon oath. (*r*)

In all cases where a plea is accompanied by an answer, it must be put in upon oath. Thus, where an answer and plea were taken by commission, and the return was, "This answer was taken upon oath," so that the plea did not appear to have been upon oath, it was rejected, though without costs, as the court thought it might have been owing to an error of the commissioners. (*s*)

It is to be observed, that where a plea which ought to be upon oath is put in without one, the irregularity is not one which can be waived by the complainant's taking any proceeding upon it—such as setting it down, etc. (*t*)

A plea must be verified by oath, although the complainant has expressly waived an answer from the defendant on oath. (*u*) If a plea is not sworn to, the complainant may apply for an order to set it aside, or to have it taken off the files of the court; but he cannot make the objection upon the argument of the plea. (*v*) If the negative averments in a plea by an executor relate to transactions in the lifetime of the testator, or to acts done by others, it is not necessary they should be sworn to positively. It is sufficient if they are made upon the defendant's belief only. (*w*) A plea is not evidence in behalf of the defendant, as to the facts stated in it, so as to require the testimony of more than one *witness to contradict it; even where it negatives a material *[119] averment in the bill. (*x*)

When to be filed.] No plea can be received after the *return* of an attachment with proclamations, unless with the special leave of the court, granted upon motion. (*y*) Up to that point of process, a plea, whether accompanied by an answer or not, may be received; but if filed after that time, it may be taken off the file upon motion. (*z*) If, however, after an attachment with proclamations returned, a defendant succeeds in obtaining an order for time to *answer*, he may, under such order, put in any plea which requires the sanction of an oath, but not one which is not upon oath, such as a plea of outlawry, or a former de-

(*q*) — *v. Davies*, 19 Ves. 81. (*r*) *Took v. Took*, 2 Vern. 197. *Pratt v. Taylor*, 1 Ch. Ca. 237.

(*s*) *Jefferson v. Dawson*, 3 id. 208.

(*u*) *Heartt v. Corning*, 3 Paige. 566.

(*v*) *Id. ib.* 2 Ves. & B. 351.

(*w*) *Id. ib.* Poole v. Poole, 1 Qouunge. 331.

(*x*) *Heartt v. Corning*, 3 Paige, 569.

(*y*) *Lloyd v. Gunter*, 1 Vern. 275. *Newton v. Dent*, 1 Dick. 234. *Sanders v. Murney*, 1 Sim. & Stu. 225.

(*z*) *Id. ib.* 1 Dan. 6th

cree. (a) And this is doubtless for the reason that for many purposes, a plea is considered a special answer. (b) (33)

The plea being filed, a copy must be served on the complainant or his solicitor.

Replication to plea.] The complainant has ten days after notice of the plea being filed, to file a replication thereto or to amend his bill. If he does not take issue on the plea, or amend his bill within that time, either party may notice the plea for argument at the next, or any subsequent, term. (c)

If the complainant, without argument, thinks the plea, though good in form and substance, not true in point of fact, he may take issue upon it by filing a replication, and proceed to examine witnesses, as in the case of an answer, to disprove the facts upon which it is endeavored to be supported. (d) The effect of filing a replication to a plea is, that the complainant admits the plea to be good; and its *truth* is the only matter in question. (e) When issue is thus taken upon the plea, the defendant must prove the facts it sets up. (f) If he succeeds in proving the truth of the matter pleaded, the suit, so far as the plea extends, is barred. (g)

A replication puts in issue nothing except what is distinctly averred in the plea. (h)

[*120] **Amendment of bill after plea.*] If the complainant amends his bill, under the 47th rule, it will be considered as an admission of the validity of the plea, as if the same had been allowed on argument.

It has been held that if the complainant, after a plea has been filed, amends his bill, thereby allowing the plea to be good, the defendant will be entitled to the same time to answer, as he would have upon an original bill; the amended bill, in such a case, standing in the place of a new bill—the amendment being permitted only to save expense. (i)

Where, after a plea had been set down for hearing, the complainant obtained and served an order to amend his bill, and when the plea came on to be heard did not appear, the plea was allowed with costs; the lord chancellor saying that he much doubted whether an order to amend, without more, would strike the plea off the record. (k)

(a) *Id. ib.* 2 Dan. 218. 3 Paige, 566.

(c) Rule 47.

(e) *Id. ib.* *Freec. in Ch.* 58. *Harris v. Ingledew.* 3 P. Wms. 95. *Daniels v. Taggart's adm'r,* 1 Gill & John, 311.

(f) *Mos.* 73. 2 Ves. 247. *Ord v. Huddleston,* Dick. 510.

(g) *Wichalse v. Short,* 3 Bro. P. C. 558. *Hinde.* 225. 1 Gill & John, 211. *Fish v. Miller,* 5 Paige, 26.

(i) *Spencer v. Brpan,* 9 Ves. 231.

(k) *Jennings v. Pearce,* 1 Ves. jun. 447.

(d) *Mitt. Eq. Pl.* 301, 2.

(b) See *Heart v. Corning,* 3 Paige, 566.

(h) *Fish v. Miller,* 5 Paige, 26.

(j) *Wichalse v. Short,* 3 Bro. P. C. 558.

(l) *Hinde.* 225.

(m) *1 Gill & John,* 211.

(n) *Fish v. Miller,* 5 Paige, 26.

(o) *Spencer v. Brpan,* 9 Ves. 231.

(p) *Jennings v. Pearce,* 1 Ves. jun. 447.

(q) *Fish v. Miller,* 5 Paige, 26.

(r) *Wichalse v. Short,* 3 Bro. P. C. 558.

(s) *Hinde.* 225.

(t) *1 Gill & John,* 211.

(u) *Fish v. Miller,* 5 Paige, 26.

(33) The practice in relation to putting in a plea after the defendant is in contempt for want of an answer, is said to be correctly stated above. (Per Chancellor Walworth, in *Wallis v. Talmage*, 10 Paige, 444.)

Withdrawing plea.] If a defendant, after a plea has been set down, should not wish to argue it, he may apply for liberty to withdraw his plea, on payment of taxed costs.^(l) Thus, where a plea has offered a substantial defence, but has been so informally pleaded that it would be difficult or impossible to amend it, the court has given the defendant leave to withdraw it, and plead *de novo*.^(m)

Argument of plea.] The proceedings upon the argument of a plea are nearly the same, *mutatis mutandis*, as those upon the argument of a demurrer; which have been already referred to. It may be observed, in addition to what has been stated, that if a plea is supported by an answer, upon the argument of the plea, the answer may be read to counterprove the plea; and, if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled and ordered to stand for an answer only.⁽ⁿ⁾ And where a defendant had answered to an original bill, which was afterwards amended, whereupon the defendant put in a plea to the amended bill, the complainant was permitted to read the answer to the original bill, to counterprove the plea to the amended bill.^(o)

Upon the argument of a plea, every fact stated in the bill, and not denied by the averments in the plea and by the answer in support of the plea, must be taken as true.^(p)

*If a plea be set down for argument by the complainant, [*121] without replying to it, the matter contained in it must be considered as true.^(q)

Where issue is taken upon a plea, and the truth of such plea is established by the proofs, the bill must be dismissed; as the court, in that stage of the proceedings, does not inquire or decide as to the validity of the matters pleaded, as a defence to the suit.^(r)

A plea, upon argument, may be either allowed simply; or the benefit of it may be saved to the hearing; or it may be ordered to stand for an answer; or it may be overruled. The effect of each of these judgments will now be stated.

Effect of allowing plea.] If, upon argument, a plea is allowed, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, be true. If, therefore, the plea is allowed, the complainant may, within ten days after notice of such allowance, take issue on the plea (by

(l) 1 Smith, 234.

(m) Nobkissen v. Hastings, 2 Ves. jun. 84. Watkins v. Stone, 2 Sim. & Stu. 560.

(n) Mitf. Eq. Pl. 304. 3 Atk. 304.

(o) Hildyard v. Cressy, 3 Atk. 304.

(p) Bogardus v. Trinity Church, 4 Paige. 178.

(q) Ex'rs of Gallagher v. Roberts, 1 Wash. C. C. Rep. 320.

(r) Dows v. Michael, 6 Paige, 139.

replying to it) on payment of the costs of the hearing thereupon. (s)

If the complainant files a replication to the plea, within the ten days after notice of its allowance, the defendant will be obliged to prove the truth of the facts set up in the plea. (t) If the complainant omits to file a replication in such a case, not only the validity of the plea as a bar is admitted, but the truth of the facts set up in it; and of course the suit is at an end.

If the plea has been replied to, the complainant may, if he pleases, go into evidence to disprove it; and if he has, in his bill, alleged any matter which, if true, may have the effect of avoiding the plea, such as notice, fraud, &c., he may examine any witnesses he may have, to support his allegation. And where the plea introduces matter of a negative nature, such as denial of notice, fraud, &c., it will be necessary for him, in case sufficient is not admitted by the answer in support of the plea to show the existence of the notice or fraud, to go into evidence in support of the affirmative of the proposition. (u)

When a plea is allowed, it is considered as a full answer; and an injunction obtained until answer will be dissolved upon application, as a matter of course. (v)

Saving the benefit of a plea, to the hearing.] It sometimes happens that upon the argument of a plea, the court considers that although [*122] so far as then appears, it may be a good defence, yet there may be matter disclosed in evidence, which, supposing the matter pleaded to be strictly true, would avoid it. In such a case the court, in order that it may not preclude the question by allowing the plea, directs that the benefit of it shall be saved to the defendant at the hearing. (w) Thus in the case of *Heartt v. Corning*, (x) a plea of settled partnership accounts was held to be well pleaded; but as facts might be disclosed justifying a decree to surcharge and falsify, the benefit of it was saved until the hearing. To have allowed it, simply, would have made it a conclusive bar.

The effect of an order for this purpose is to give the complainant an opportunity of replying and going into evidence, without overruling the plea. (y)

When the benefit of the plea is reserved to the hearing, such part of the bill as is covered by the plea is not to be answered. (z)

(s) Rule 47.

(t) See Mitf. 302.

(u) *Eyre v. Dolphin*, 2 Ball & B. 303. *Saunders v. Leslie*, id. 515.

(v) *Phillips v. Langhorn*, 1 Dick. 118.

(w) Mitf. Eq. Pl. 303. See *Astley v. Fountaine*, Finch, 4.

(x) 3 Paige, 572.

(y) See *Cooth v. Jackson*, 6 Ves. 12, 13.

(z) For. Rom, 64.

Neither party recovers costs on the argument of a plea where the benefit of it is saved to the defendant until the hearing. (a)

Ordering a plea to stand for an answer.] When a plea is allowed to stand for an answer, it is determined that it contains matter which, if put in the form of an answer, would have constituted a valid defence to some material part of the matters to which it is pleaded as a bar, but that it is not a full defence to the whole matter which it professes to cover, or that it is informally pleaded, or is improperly offered as a defence by way of plea, or that it is not properly supported by answer. (b) But a plea which sets up no valid defence to any part of the matter it professes to cover, will not be permitted to stand for an answer. If a plea to the whole bill, unaccompanied by an answer, is allowed to stand for an answer, without reserving to the complainant the right to except, it is to be deemed a full answer, though not necessarily a perfect defence. (c) But where a plea is ordered to stand for an answer with liberty to except, or the plea is accompanied by an answer, which will enable the complainant to except without special leave, the master, upon a reference of the exceptions, must decide as to the sufficiency of the answer, considering the plea as a part thereof. (d)

Where a plea is ordered to stand for an answer, without its being *mentioned in the order whether the complainant may ex- [*123] cept, he will not be allowed to except; because by the terms "for an answer" in the order, a sufficient answer is meant—an insufficient answer being no answer. (e)

And liberty to except is sometimes qualified so as to protect the defendant from any particular discovery which he ought not to be called upon to make. (f)

When a plea has been ordered to stand for an answer, with liberty to except, the complainant must proceed to deliver his exceptions within the usual time allowed for excepting to an answer; (g) otherwise the answer will be deemed sufficient. (h)

Costs.] When a plea is ordered to stand for an answer, the complainant is entitled to the usual costs of overruling a plea. (i)

Overruling plea.] If upon argument the court is of opinion that the plea cannot, under any circumstances, be made use of as a defence, it is simply overruled, and the complainant may proceed to have his

(a) *Heartt v. Corning*, 3 Paige. 566.

(b) *Orcutt v. Orms* 3 Paige. 461. Mitf. 303. Lube's Ev. Pl. 46.

(c) *Id.* 459. Mitf. 304.

(d) *Id.* ib.

(e) *Seillon v. Leven*, 3 P. Wms. 239

(f) *Bunb.* 265. 2 Atk. 240. 3 P. Wms. 315. 4 Bro. C. C. 639. 6 Ves. 586.

(g) See Rule 50.

(h) *Idem.*

(i) *Hollowing v. Butler*, 2 Mad. 245.

costs taxed, and to issue process for the recovery of them. He may also, if the plea has been to the whole bill, and the defendant's time for answering has expired, issue an attachment for want of an answer, (*k*) unless the defendant has obtained either from a master or from the court at the hearing, (*l*) an extension of time to answer. In such case the attachment must not be issued till the extended time for answering has expired.

Overruling plea as frivolous.] If a plea is overruled as frivolous, or, upon issue taken thereon, is found to be untrue, the complainant may have an order to take the bill as confessed; or he may compel the defendant to answer, at his election. (*m*) A frivolous plea may be noticed for argument as frivolous by the complainant, on any motion day, as well as in term; and the complainant may thereupon move for a final decree in the cause, as upon a bill taken as confessed. (*n*) But to entitle the complainant to such a decree, he must give special notice to the defendant that he intends to move for an order to overrule the plea as frivolous, and to take the bill as confessed, and for a final decree thereon. (*o*)

Whenever a plea is overruled for any other cause than as being frivolous, (e. g. upon the merits,) no other plea will be received; and the defendant must answer the bill and pay the costs of the hearing, within twenty days after notice of the order overruling the plea, or such other time as may be prescribed by the court, in such order. If he fails to put in his answer and pay the costs within the time prescribed, the bill may be taken as confessed, and the matter thereof decreed accordingly; or the complainant may have an attachment to compel an answer. (*p*)

After a plea has been overruled, the defendant cannot have an *ex parte* order for further time to answer, beyond the time allowed by the order overruling the plea. (*q*) The 49th rule is not applicable to the case of a plea to a part of the bill only and an answer to the residue. In such a case, if the plea to a part of the bill is overruled, the complainant must except to the answer already put in, for insufficiency when he wishes to obtain a further answer to the part of the bill which was attempted to be covered by the plea. (*r*)

As no other plea or a demurrer can be received after a plea has been overruled, the only effect of overruling it is to oblige the defendant

(*l*) Waterton v. Croft, 6 Sim. 438.

(*m*) Rule 49.

(*o*) *Id.* *ib.*

(*q*) Trim. v. Baker Turr. & Russ. 253.

(*r*) Kuypers v. Reformed Dutch Church, 6 Paige, 570.

(*k*) Hinde, 224.

(*n*) Bowman v. Marshall, 9 Paige, 78.

(*p*) Rule 49.

to put in an answer and pay the costs, or in default thereof, to have a decree *pro confesso* entered against him.

If the plea was to part of the bill only, accompanied by an answer to the rest, the complainant may proceed to compel an answer to the part intended to be covered by the plea, by exceptions to the answer. (*s*) The complainant has twenty days, after the plea is overruled, in such a case, to except to the answer; at the expiration of which time, if no exceptions are taken, and no order for further time has been granted, the answer will be deemed sufficient. If the complainant excepts to the answer for insufficiency, the defendant may, within eight days thereafter, give a written notice of his submission to answer all or any of such exceptions; and he will be liable for the costs of the exceptions which he submits to answer. (*t*)

Where there is a plea to a part of the bill, and an answer to the residue, the complainant may except to the answer before the argument of the plea. But the effect of such exceptions is to admit the validity of the plea. (*u*)

*The answer of an infant by his guardian *ad litem* cannot[*125] be excepted to for insufficiency. (*v*)

A defendant in a bill of revivor cannot plead to the original bill a plea which has been pleaded by the original defendant and overruled; (*w*) but if a plea has been put in, and the original defendant has died before argument, the defendant to the bill of revivor may plead the same matter *de novo*.

Where plea is found to be false.] If at the hearing the plea is not found to be true, it will be overruled as false, and the complainant will be entitled to a decree as on a bill taken as confessed. But in such a case the complainant will not lose the benefit of an answer, if a discovery is necessary. He may have an order to examine the defendant on interrogatories, before a master, as to the discovery sought by the bill. (*x*) And where a plea contains several distinct averments or allegations of fact, all the allegations must be supported by the proofs, or the plea will be overruled as false. (*y*)

Plea of former decree, &c.] If the defendant pleads a former decree, another suit pending for the same cause, or other matter of record, in the court of chancery, he must, at the time of filing such plea, obtain an order of reference to a master to examine and report whether the plea be true; and he must procure the master's report within twenty

(*s*) Strickland v. Mackenzie, 1 Dick. 49.

(*u*) Boyd v. Mills, 13 Ves. 85. Mitt. 317.

(*w*) Dows v. McMichael, 2 Paige. 345, Souzer v. De Meyer, id. 574. Brownsword v. Edwards. 2 Ves. sen. 247. 2 Ves. & B. 158,

(*x*) Id. ib.

(*t*) Rule 50.

(*v*) Samuda v. Furtado, 3 Bro. C. C. 70.

(*y*) Dows v. McMichael, 6 Paige, 139.

days thereafter. If he neglects to procure the master's report within that time, or the report is against the verity of the plea, the plea will be considered as overruled, and the complainant may proceed as if no such plea had been filed. But if the master's report establishes the truth of the plea, either party may notice it for argument, at any time after the report is confirmed. (z)

Where, upon such a plea, the defendant obtains the master's report in favor of the truth of the plea, he cannot have an order to dismiss the complainant's bill, on motion. But he must bring the case on to be heard upon the plea and the master's report, to enable the court to decide upon the validity of such plea. (a)

Although it is necessary that the first suit should be for the same matter as the second, it is not requisite that the second suit should be for the whole matter embraced by the first. (b) It is, however, required [*126] site that *the whole effect of the second suit should be attainable in the first. (c) And if, after the plea has been set down for argument, it appears upon its face that this is not the case, the court will at once overrule the plea. (d) It sometimes happens, however, that the second bill embraces the whole subject in dispute more completely than the first. In such cases the practice appears to be to dismiss the first bill, with costs, and to direct the defendants in the second cause to answer, upon being paid the costs of a plea allowed; which puts the case upon the second bill in the same situation that it would have been in if the first bill had been dismissed before the filing of the second. (e)

A plea of another suit depending will not be good if the suit is depending in a court in another country. (f) Where the original suit has been commenced in a court of inferior jurisdiction, the plea will not be good if the defendant has avoided the effect of the suit, by going out of the jurisdiction of that court. (g)

To afford a good ground for a plea of another suit pending, the suit must be in a court of equity. (h) If the suit is in a court of law, the defendant has a different remedy, viz. by putting the plaintiff to his election.

There are some cases, however, in which the court will interfere to restrain a second suit brought against the defendant for the same matter, upon motion, without requiring him to plead the pendency of the former suit; as in the case of two or more suits instituted on behalf of

(z) Rule 48. Beames' Orders, 176.

(a) Hart v. Phillips, 9 Paige, 293.

(b) Eoor v. Welsh Copper Co. 1 Eq. Ca. Abr. 39.

(c) Law v. Rigby, 3 Bro. Ch. Ca. 60. Pickford v. Hunter, 5 Sim. 122.

(d) 5 Sim. 122. (e) Crofts v. Wortley, 1 Ch. Ca. 241. Mitf. 248.

(f) Lord Dillon v. Alvares, 4 Ves. 357. Foster v. Vassall, 3 Atk. 587.

(g) Mitf. Eq. Pl. 246.

(h) Howell v. Waldron, 2 Ch. Ca. 85.

an infant for the same matter. (*i*) So in the case of creditors suing an executor or administrator, after a decree for an account, at the suit of other creditors, the court will, upon motion by the defendant, stay the proceedings in the second cause without requiring him to plead the pendency of the first suit. (*k*)

It is not necessary to a plea of this nature that the former suit should be between precisely the same parties as the latter. (*l*)

A decree or order of the court by which the rights of the parties have been determined, or another bill for the same matter dismissed, may be pleaded to a new bill for the same matter; and this even if the party bringing the new bill where an infant at the time of the former decree. (*m*) * But a decree or order dismissing a former bill for [* 127] the same matter, can only be pleaded in bar to a new bill where the dismissal was upon hearing, and was not in terms directed to be without prejudice. (*n*) The former decree will be a bar, however, though it was made merely for want of evidence. (*o*) A decree, to be a bar in another suit, must be for the same matter as the bill to which it is pleaded; (*p*) must be conclusive of the rights of the complainants in the bill to which it is pleaded, or of those under whom they claim; (*q*) and it must be in its nature final, or afterwards made so by order; (*r*) and it must be signed and enrolled. (*s*).

Amending plea.] It sometimes happens, that where there is evidently a material ground of defence disclosed in the plea, but owing to some evident slip or mistake, the plea has not been correctly framed, the court, in this respect, following the courts of law, will exercise a discretion in allowing it to be amended. (*t*) Thus, where a plea which in substance showed a defect of parties, instead of stating that additional parties were necessary, and naming them, prayed judgment whether the defendant ought to be called upon for further answer, the court, upon the argument, instead of overruling the plea on the ground of informality, gave the defendant leave to amend it. (*u*)

Pleading de novo.] In some cases, where a plea has offered a substantial defence, but has been so informally pleaded that it would be difficult or impossible to amend it, the court, instead of allowing the defendant to amend his plea, has given him leave to withdraw it altogether, and plead *de novo*. (*v*)

(*i*) Mitf. Eq. Pl. 27.

(*k*) Paxton v. Douglass, 8 Ves. 520. See also Pickford v. Hunter, 5 Sim. 122.

(*l*) Mitf. 243. Neve v. Weston, 3 Atk. 557.

(*m*) Id. 237.

(*n*) Mitf. 237.

(*o*) Jones v. Nixon, 1 Younge, 359.

(*p*) Minor Canons of St. Paul v. Crickett, Wightw. 30.

(*q*) Morret v. Westerne, 2 Vern. 663.

(*r*) Mitf. 237.

(*s*) Anon. 3 Atk. 809. Kinsey v. Kinsey, 2 Ves. 577.

(*t*) Beames on Pleas, 321.

(*u*) Merriweather v. Mellish, 13 Ves. 437. See also Waters v. Mayhew, 1 Sim. & Stu. 220.

Pope v. Bish. 1 Anst. 59.

(*v*) Nobkissen v. Hastings, 2 Ves. jun. 84. Watkins v. Stone, 2 Sim. & Stu. 560.

We have already seen that if a plea is *overruled*, the defendant will not be allowed to put in a second plea. (*w*)

Liberty to amend, or to plead *de novo* will only be granted in cases where there is an apparent good ground of defence disclosed by the plea, but owing to some accident or mistake, it has been informally pleaded. Where a substantial ground of defence has been omitted, such permission will not be given. (*x*)

[*128] *Although where the error is very palpable, the court will give the defendant leave to amend at the argument of the plea, the most usual course is for the defendant to make a subsequent motion for leave to amend his plea. This form of proceeding is rendered necessary by the circumstance that the court always requires to be told precisely what the amendment is to be, and how the slip happened, before it will allow the amendment to take place. (*y*) And, in one case, Lord Thurlow refused to entertain the question whether the plea might be amended or not, upon the argument, because no motion had been made on the subject; and he said he should expect that whenever such a motion should be made, the form of the plea intended to be put in should be laid before the court; for amendments, when moved, ought to be stated, that the court may see whether it is material that the cause should be delayed for the purpose of admitting them, (*z*)

But an amendment of a plea will not be allowed, if it has been amended once before. (*a*)

When plea must be supported by answer.] Where there is any statement or charge in the bill which affords an equitable circumstance in favor of the complainant's case, against the matter pleaded, (such as fraud, or notice of title,) that statement or charge must be denied by way of answer, as well as by averment in the plea. (*b*)

In general, an answer in support of a plea cannot be required in those cases where such negative averments as those above stated are not necessary. Where the defence can be made by a *pure* plea, that is, a plea which merely suggests matter in avoidance of the complainant's right to sue, as stated in the bill, an answer in support of the plea is not required. In such a case, the defendant, by his plea, admits the complainant's case; and so full and complete is the admission, that if, after argument, issue be joined upon the truth of the plea, and the plea be

(*w*) See ante, p. 123.

(*x*) *Freehand v. Johnson*. 1 Anst. 276. S. C. 2 id. 407.

(*y*) ? Dan. 231. *Newman v. Wallis*. 2 Bro. C. C. 147. *Wood v. Strickland*, 2 Ves. & B. 150, 157. *Jackson v. Rowe*, 4 Russ. 524.

(*z*) *Nabob of Arcot v. East India Co.* 1 Ves. jun. 372. 3 Bro. C. C. 292, 300.

(*a*) Id. ib.

(*b*) *Mitf.* 239, 244.

found false, there is an end to the dispute, and the complainant is entitled to a decree upon this implied admission of his case. (*c*)

The cases in which it is necessary that a plea should be supported by answer have been very conveniently divided into—1st. Those where the complainant admits the existence of a legal bar, and charges some equitable circumstances to avoid its effect; and 2d. Those where the *complainant does not admit the existence of any legal bar, but [*129] states some circumstances which may be true, and to which there may be a valid ground of plea, together with other circumstances which are inconsistent with the substantial validity of a plea. (*d*)

An answer in support of a plea *is no part of the defence*. The defence is the matter set up by the plea; the answer is that evidence which the complainant has a right to require and to use, to invalidate the defence made by the plea; and the complainant is entitled to make use of it not only upon the hearing of the cause, upon the issue raised by the plea, after the plea shall have been decided to be a good bar upon argument, but upon the argument of the plea itself, before any evidence can be given; (*e*) for the purpose of counterproving the plea, by reading from it any facts or admissions which may negative the matters pleaded or averred in the plea. (*f*)

The answer in support of the plea being no part of the defence, but only what the complainant has a right to require, to enable him to avoid that defence, it follows that it must be full and clear; otherwise it will not support the plea; for the court will intend all matters charged in the bill, to which the complainant is entitled to an answer, to be against the pleader, unless they are fully and clearly denied. (*g*)

But although an answer in support of a plea is required to be full and clear, yet if the equitable matters charged are fully and clearly denied, it may be sufficient to support the plea, although all the circumstances charged in the bill may not be precisely answered. (*h*) In such cases, however, the complainant is not precluded by the circumstance of the court having held, upon the argument of the plea, that the charges in the bill are sufficiently denied to exclude intendment against the pleader, from afterwards excepting to the sufficiency of the answer, in any point in which he may consider it defective. (*i*)

Where the complainant waives the necessity of an answer being put in on oath, if the defendant puts in a plea to the bill, he need not support it by answer. (*k*)

(*c*) Wigram on Disc. 36. Wood v. Strickland, 2 Ves. & B. 158. 2 Ves. 247.

(*d*) Hare on Disc. 30.

(*e*) Mitf. 244, n.

(*f*) Hildyard v. Cressy, 3 Atk. 303. Honey v. Honey, 1 Sim. & Stn. 569.

(*g*) Mitf. 244. 3 Atk. 303.

(*h*) Id. ib.

(*i*) Id. 299. Waters v. Glanville, Gilb. Rep. 184. 3 Bro. P. C. 372.

(*k*) Heatt v. Corning, 3 Paige. 566.

[*130]

*SECTION V.

ANSWER.

Nature and uses.] If the case stated by the complainant's bill is not such as to render a resort to a demurrer or plea necessary or advisable, or if either of those methods of defence has been adopted, and the plea or demurrer overruled either wholly or in part, the defendant, unless he disclaims, must put in his answer to the facts in the complainant's bill; provided such facts are essential to enable the complainant to obtain a decree, and are not such as the defendant is excused from answering. By which answer, as has been before observed, the defendant, controverting the case stated by the complainant, may confess and avoid, or traverse and deny the several parts of the bill; or admitting the case made by it, may submit to the judgment of the court upon the bill, or upon a new case made by the answer, or both.

An answer is the most usual method of defence to a bill in chancery. And it may be put in either to the whole bill, or to such parts of it as are not covered by plea or demurrer. (34) As it is capable of embrac-

(34) When a defendant makes his defence by answer, he must set up all the various grounds of defence upon which he intends to rely. (*Warren v. Warren*, 30 Vt. Rep. 530.)

Where the complaint alleges a divisible cause of action, or several distinct causes of action, the defendant may deny part, some, or one of the cause or causes of action, and leave the remainder unanswered. (*Smith v. Shufelt*, 3 Code R. 175; *Tracy v. Humphrey*, id. 190; S. C. 5 How. Pr. 155; *Willis v. Taggard*, 6 id. 433; *Genesee Mu. Ins. Co. v. Moynihan*, 5 id. 321; *Snyder v. White*, 6 id. 321.) Or answer it by any other defence or defences. (*Longworthy v. Knapp*, 4 Ab. 115.)

The Code (§ 151) provides that the defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

Where the defendant both answers and demurs to the same pleading, the plaintiff can treat neither the answer nor the demurrer as a nullity; he should move to strike out the demurrer or the answer, or for an order that the defendant elect by which he will abide. (*Spellman v. Woider*, 5 How. Pr. 5; *Howard v. Michigan Southern R. R. Co.*, id. 205; S. C. 3 Code Rep. 213. See also *Clarkson v. Mitchell*, 3 E. D. Smith, 269; *Bolton v. Gardner*, 3 Paige, 273; *Clark v. Phelps*, 6 John. Ch. 214.)

A defendant, after having put in an answer, will not be allowed to withdraw it and put in a demurrer, unless special reasons are shown. (*Finch v. Pindon*, 19 Ab. 96.)

The general rule of pleading, in chancery, is that a defendant cannot by answer excuse himself from answering. (*Bank of Utica v. Mersereau*, 7 Paige, 517.) It is said by Justice Story (Eq. Pl. § 847), to be far from universally true, as is sometimes alleged, that a defendant answering can take every ground of defence which he might insist on by way of demurrer or plea, to the bill.

There are some exceptions to the rule that a defendant cannot, by answer, excuse himself from answering; as where an answer would tend to criminate the defendant, or subject him to a penalty, forfeiture or punishment. (*Brockway v. Copp*, 3 Paige, 539; *Skinner v. Judson*, 8 Conn. 528; *Livingston v. Harris*, 3 Paige, 528; *Leggett v. Postley*, 2 id. 599.) Or where an answer would involve a violation of professional confidence. (Story Eq. Pld. § 599, &c.; 1 Greenl. Ev. § 237; *Gresley's Eq. Ev.* §§ 278 to 284; *Brown v. Payson*, 6 N. Hamp. 443; *Foster v. Hall*, 12 Pick. 89; *Aiken v. Kilburne*, 27 Maine, 251; *Brazier v. Fortune*, 10 Ala. 516.) So the defendant is not bound to answer matters which are purely scandalous or impertinent, or

ing more circumstances than a plea, it may for this reason be used with much greater propriety in cases where the defendant is not anxious to prevent a discovery, although the plea might be a complete bar. But where, by introducing additional circumstances, he has a good opportunity of showing his case in a more favorable light, the answer is the best mode of defence.

An answer serves a double purpose: *first*, that of answering the complainant's case as made by his bill; and *second*, that of stating to the court the nature of the defence upon which the defendant means to rely.

These twofold properties of an answer will now be considered.

FIRST, *of the manner of answering the complainant's case.*] (35) The

irrelevant. (Story Eq. Pl. § 846.) The statute of limitations, and lapse of time, may be relied upon as a defence, by answer, as well as by plea and demurrer. (Id. § 751; *Van Hook v. Whitlock*, 7 Paige, 373; *Maury v. Mason*, 8 Porter, 213.)

Rule 44 of the Equity Rules of the *United States courts*, provides that a defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he is at liberty so to decline, notwithstanding he answers other parts of the bill from which he might have protected himself by demurrer.

(35) Under the Code, the answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition. (Code of *New York*, § 149; Codes of *Minnesota*; Public Statutes of 1859, p. 541; of *Wisconsin*, § 54; Rev. Stat. of 1858, p. 722; of *Kansas*, § 101; General Laws of 1862, p. 140; of *Ohio*, § 92; of *Kentucky*, § 125.)

The first use of an answer, mentioned in the above section, is that of a denial of the allegations of the complaint.

An answer must contain either a general or a specific denial of the complaint, or a statement of new matter constituting a defence. (*Mattison v. Smith*, 1 Rob. 706; S. C. 19 Ab. 288.) Where the complaint was for goods sold and delivered, and the answer alleged, secondly, that the plaintiff never sold the defendant any goods which had not been paid for by him; and thirdly, that if the plaintiff ever sold any goods to the defendant, they were sold on credit, and not to be paid for in nine years from the day of sale; the answer was held bad, and struck out as not amounting either to a denial, or a statement of new matter. (*Hamilton v. Hough*, 13 How. Pr. 14.)

An answer containing a general and a specific denial of the same matter is bad for redundancy; and the defendant will be compelled, on motion, to elect which he will retain. (*Dennison v. Dennison*, 9 How. Pr. 246; *Blake v. Eldred*, 18 id. 240.)

An answer is sufficient if it constitutes a defence or counter-claim to so much of the complaint as it professes to answer. (*McKyring v. Bull*, 16 N. Y. 297, 307; *Allen v. Haskins*, 5 Duer, 332; *Kneedler v. Sternberg*, 10 How. Pr. 68.) But if it assumes to answer the whole cause of action, and in fact only answers part, it may be demurred to. (*Foster v. Hazen*, 12 Barb. 547; *Beach v. Barons*, 13 id. 306; *Thumb v. Walrath*, 6 How. Pr. 196; S. C. 1 Code Rep., N. S. 316; *Willis v. Taggard*, 6 How. Pr. 433; *Nicholas v. Dusenbury*, 2 N. Y. 283; *Howk v. Pallard*, 6 Blackf. 108; *Hickley v. Grosjean*, id. 351.) If it professes to answer only a part, without specifying what part, it is sufficient if it denies a material allegation in the complaint. (*Cottingham v. State*, 7 Blackf. 405.) If it professes to answer only a specified part, it is confined to that part, though it, in reality, constitutes a legal defence to the whole action. (*Cross v. Watson*, 6 Blackf. 129.)

An answer should so distinctly specify the portion of the complaint to which it applies that the court can see, at once, what it covers. (*Davison v. Schermerhorn*, 1 Barb., S. C. 480.)

It has been seen that section 149 of the Code requires that the answer shall contain "a general or specific denial of each material allegation of the complaint controverted by the defendant; or of any knowledge or information thereof sufficient to form a belief."

defendant must answer all the facts charged in the bill. Though it is customary for the bill, in order more particularly to direct the defendant's attention to the parts to which the complainant requires an answer, and to prevent evasion on the part of the defendant, to add a repetition by way of interrogatory, of the matters most essential to be answered, which interrogatories must be fully answered; yet a mere answer to those interrogatories only will not be a sufficient compliance with the requisition in the bill, unless they go to all the facts stated or [*131] *charged in the bill to which the complainant has a right to require an answer. (1)

(1) 1 Dan. 487. 2 id. 246.

A general denial is a denial of all the allegations of the complaint, taken together. A specific denial is a denial of one or of each allegation, taken separately. (*Mattison v. Smith*, 1 Rob. 706; S. C. 19 Ab. 288; *Dennison v. Dennison*, 9 How. Pr. 246; *Seward v. Miller*, 6 id. 312.)

The rule in regard to the facts proper to be pleaded, has not been essentially changed or modified by the Code, except as to those matters which might formerly be proved under the general issue, to defeat the action. It is only the material allegations in a complaint which the defendant is under the necessity of controverting to prevent their being taken as true; not casual inferences. (*Stoddard v. The Onondaga Annual Conference*, 12 Barb. 573.)

The denial in an answer may be general to the whole complaint; that is, in the language usually employed, "The defendant denies each and every allegation contained in the complaint." (Van Sant. Eq. Pr. 200.) A denial of each and every material allegation, &c., has been held insufficient, as leaving it in the mind of the defendant to judge of the materiality of the allegations. (Ib. *Mattison v. Smith*, 19 Ab. 288.) Or, if there should be some one or more of the allegations which the defendant is willing to admit, denying the residue, he may say generally, that he denies each and every allegation, except certain parts therein admitted. (Ibid. *Parshall v. Tillou*, 13 How. Pr. 7; *Genesee Mut. Ins. Co. v. Moynihan*, 5 id. 321; *Smith v. Wells*, 20 id. 158; *Wooden v. Waffle*, 6 id. 145; S. C. 1 Code Rep., N. S. 392.) Instead of this general form of denial to each of the allegations in the complaint, or each of them except, &c., the defendant may specifically deny each or any number of the allegations of the complaint separately, (Van Sant. Eq. Pr. 200,) and leave the remainder unanswered. (*Smith v. Shufelt*, 3 Code R. 175; *Tracy v. Humphrey*, id. 190; S. C. 5 How. Pr. 155; *Willis v. Taggard*, 6 How. Pr. 433; *Genesee Mutual Ins. Co. v. Moynihan*, 5 id. 321; *Snyder v. White*, 6 id. 321;) or answer it by any other defence or defences. (*Longworthy v. Knapp*, 4 Ab. 115.) Or, if the fact which the defendant wishes to controvert be not correctly stated, or the defendant wishes to vary the statement in any way, he may specifically deny the allegation as made, and accompany his denial with a correct statement of the alleged fact. (Ib.) Merely making a counter-statement, or giving a different version of the matter from that contained in the complaint, without denying the allegations thereof, is not specifically controverting such allegations. The plaintiff's allegations will, therefore, be deemed admitted, unless put in issue by some general, or by a direct specific denial. (Ib.) It is not necessary, or indeed proper, that the defendant should in terms admit any particular allegation. The Code does not specify such admissions as any part of the answer; and in *Gould v. Williams*, (9 How. Pr. 51,) they were held to be surplusage and improperly inserted in the answer. Yet, in *Mattison v. Smith*, (19 Ab. 291,) it is said by Bosworth, Ch. J., that the Code, by requiring the defendant to verify his answer when the complaint is verified, intended to require him to admit all the allegations which, if true, were true of his own knowledge, or incur the risk of suffering the pains and penalties of perjury.

A statement that the defendant "denies each and every allegation of the complaint," is sufficient as a general denial. (*Kellogg v. Church*, 4 How. Pr. 339; *Radde v. Ruckgaber*, 3 Duer, 684.) So, also, is an answer which denies all the allegations between specified folios. (*Mattison v. Smith*, 19 Ab. 288, 291; S. C. 1 Rob. 706.)

An answer may contain a general denial of part of a complaint, and a specific one

The defendant is not bound to answer an interrogatory, unless it is founded upon some charge in the bill. (*m*) And if a bill contains interrogatories which are not founded upon the previous statements or charges, exceptions will lie to it for impertinence. (*n*) It is sufficient, however, if the interrogatory is founded upon a statement in the bill which is inserted therein merely as evidence in support of the main

(*m*) *Mechanics' Bank v. Levy*, 3 Paige, 606.

(*n*) *Wigram on Disc.* 74.

of the remainder. (*Blake v. Eldred*, 18 How. Pr. 240.) The word "controverted" in the Code, in connection with the word "denial," whether the denial be general or specific, requires that the answer should, by its words, so describe the allegations of the complaint controverted, that any person of intelligence, though not a lawyer, can identify them. (*Mattison v. Smith*, 19 Ab. 292.)

Where, in an action for goods sold and delivered, the complaint alleged the sale and the indebtedness of the defendant therefor, and the answer admitted the sale, but alleged that it was on a credit of six months and that the credit had not expired; held to be a special denial. (*Gilbert v. Cram*, 12 How. Pr. 455.)

An answer which alleges that the defendant has no knowledge or information sufficient to form a belief whether the allegations of the complaint are true, forms a complete issue. (*Livingston v. Hammer*, 7 Bosw. 670; *Ketcham v. Zerega*, 1 E. D. Smith, 554; *Flood v. Reynolds*, 13 How. Pr. 112; *Leach v. Boynton*, 3 Ab. 1, 3; *Townsend v. Platt*, id. 325.)

But where the facts alleged in the complaint, if true, must necessarily be known to the defendant, or where he must be deemed as matter of law, to have notice thereof, such a denial may be stricken out, on motion, as sham, unless he give some explanation showing his good faith in the matter. (*Edwards v. Lent*, 8 How. Pr. 28; *Ketcham v. Zerega*, 1 E. D. Smith, 554; *Kellogg v. Baker*, 15 Ab. 287.) In *Beebe v. Marvin*, (17 Ab. 194,) such a denial was stricken out in an action to recover on a judgment where the defendant had appeared in the action in which the judgment sued on was recovered. So where the defendant admits the execution of an instrument, but adopts this form of denial as to the contents; (*Wesson v. Judd*, 1 Ab. 254,) or where he denies in this manner the indorsement and transfer of a note by him. (*Fales v. Hicks*, 12 Ab. 153.)

An allegation that the defendant "does not know of his information or otherwise, that," &c., has been held not to be a denial. (*Sayre v. Cushing*, 7 Ab. 371.)

It has been questioned whether, under section 149 of the Code, an answer stating that "the defendant, upon information and belief, denies," is a sufficient denial. (*Hackett v. Richards*, 3 E. D. Smith, 13, 19.) But, in *Sackett v. Havens*, (7 Ab. 371, n.,) it was held that where a party has no knowledge, or not sufficient knowledge to admit or deny, the Code permits him to state the fact of such want of knowledge, and that is equivalent to a denial; but that where he has information on which he has formed a belief, he cannot use that form of answer; that in such a case he may admit or deny upon information and belief. The former equity rule in regard to such a form of denial, has been applied to pleadings under the Code; that is to say, a denial of any knowledge or information sufficient to form a belief cannot be interposed to an allegation which is presumptively within the knowledge of the defendant; nor can it be interposed even to an allegation as to which the defendant is bound to make inquiries and inform himself, before putting in his answer. (*Van Sant. Eq. Pr.* 201; *Chapman v. Palmer*, 12 How. Pr. 37; *Fales v. Hicks*, id. 153; *Richardson v. Wilton*, 4 Sandf. 708; *Sherman v. N. Y. Central Mills*, 1 Ab. 187; *Thorn v. The Same*, 10 How. Pr. 19; *Wesson v. Judd*, 1 Ab. 254; *Hance v. Rumming*, 2 E. D. Smith, 48; *Mott v. Burnett*, id. 50; 1 Code Rep., N. S. 255.) If it be so interposed, it will be adjudged frivolous, (*Ib.*) or at least struck out, on motion, as sham. (*Leach v. Boynton*, 3 Ab. 1.)

In general, *hypothetical* pleading is objectionable; but there are cases in which a defendant may be permitted to answer in a hypothetical form, and in which, being called upon to answer under oath, he can, as a conscientious man, answer in that form only, without waiving one or more of his defences. (*Ketcham v. Zerega*, 1 E. D. Smith, 553.) A defence may be hypothetically predicated upon a fact alleged in the complaint, which is not presumptively within the knowledge of the defendant, when he denies any knowledge or information of such fact sufficient to form a belief. (*Brown v. Ryckman*, 12 How. Pr. 313.) Thus, the defendant may allege that *if* the plaintiff is the owner of the note, he took it with notice of the failure of cou-

charges. (o) Where a fact is stated in the bill by way of recital merely, without any interrogatory calling for an answer as to that fact, the defendant is not bound either to admit or deny the same. And if he admits the main fact charged in the bill, he need not answer to the other matters which are merely stated as evidence of that fact. (p)

(o) 3 Paige, 606.

(p) Id. ib.

sideration; that if he (the plaintiff) is the owner of the note, he obtained it as an attorney-at-law, for the purpose of prosecuting it contrary to the statute. (Ibid.)

In *Davis v. Potter*, (4 How. Pr. 155, S. C. 2 Code Rep. 99,) an answer which contained a denial upon "belief" only was held sufficient. But an answer is insufficient if it allege merely that the defendant has not sufficient knowledge on the subject to form a belief without referring to his information. (*Edwards v. Lent*, 8 How. Pr. 28.) It is only when he has neither knowledge nor information that he can controvert an allegation under this provision of the Code. (Ibid.) An answer containing the allegation that "defendant is not informed, and cannot state whether," &c., is not a sufficient denial. (*Elton v. Markham*, 20 Barb. 343.) This form of answer, viz: "want of any knowledge or information sufficient," &c., is one peculiarly proper where the defendant is ignorant of the facts alleged, which he cannot safely deny, and is not bound to admit, but must verify in his answer. (*Snyder v. White*, 6 How. Pr. 321.)

An answer which, instead of denying the allegations of the complaint, contains a version of the transaction which is partially inconsistent with such allegations, and merely implies that the allegations are controverted, or justifies an inference that such is its effect, is not a denial. (*West v. American Exchange Bank*, 44 Barb. 176; *Wood v. Whiting*, 21 id. 190. See *Hamilton v. Hough*, 13 How. Pr. 14; *Isles v. Tucker*, 5 Duer, 393; *Loosey v. Orser*, 4 Bosw. 392; *Gilbert v. Cram*, 12 How. Pr. 455.) Where an answer alleged that the contract set up in the complaint was "incorrectly stated," and also contained a specific denial of several parts of the same, without any further general denial it was held that the agreement, except those parts specifically denied, was admitted. (*Levy v. Bend*, 1 E. D. Smith, 169.) A denial of any "knowledge or information sufficient to form a belief" as to any particular allegation, is sufficient to put the allegation in issue, and oblige the plaintiff to sustain it by proof, as effectually as a positive denial; and it is unnecessary to go further and state "and therefore he denies the same." (*Flood v. Reynolds*, 13 How. Pr. 112; *Leach v. Boynton*, 3 Ab. 1; *Duncan v. Lawrence*, 6 id. 304.) An allegation that "the defendant is ignorant of whether," &c., or is "not informed and cannot state," has been considered insufficient. (*Wood v. Staniel*, 3 Code Rep. 152; *Elton v. Markham*, 20 Barb. 348. See *Sayre v. Cushing*, 7 Ab. 371.) So, in *Nichols v. Jones*, (6 How. Pr. 355,) a denial to the effect that the defendant "has no recollection sufficient to form a belief," was held a mere evasion, and as forming no material issue.

But where the facts are such that it is probable the defendant cannot recollect them so as to answer more positively, a denial of the facts according to his knowledge, recollection and belief, (by the former chancery practice,) (*Hall v. Wood*, 1 Paige, 404,) and a denial of any knowledge or information sufficient to form a belief (by the practice under the Code) will be sufficient. (*Van Sant. Eq. Pr. 202.*) If the defendant never knew or heard of the facts charged, except as they are stated in the complaint, he is not bound to admit or deny them, or to express any belief one way or the other. (*Sloan v. Little*, 3 Paige, 103; *Utica Ins. Co. v. Lynch*, id. 210.) When the defendant has no knowledge or information as to the facts stated he may deny in this form, generally, without answering each charge separately. (*Utica Ins. Co. v. Lynch*, 3 Paige, 210.) But he cannot so answer matters either known to him or charged in the complaint to be within his personal knowledge, but must answer the substance of each charge distinctly and particularly. (Ib.)

A defendant sued as maker with an indorser of a promissory note, may, by a general denial of knowledge or information sufficient to form a belief, put in issue the allegations of the complaint as to the transfer of the note to the plaintiff by the other defendant, and that at maturity it was duly presented therefor. (*Flood v. Reynolds*, 13 How. Pr. 112.) That is, the defendant is not required to go through the idle ceremony of denying the truth of the allegations after having asserted that he has no belief whatever, whether they are true or not. (Ib.; *Sherman v. Bushnell*, 7

If any facts are stated in the bill which are material to the complainant's case, they must be answered, even though the complainant does not call the defendant's attention to them by specific interrogatories. The general interrogatory or requisition in the bill that the defendant "may full answer make to all and singular the premises," &c.

id. 171; *Thorn v. New York Central Mills*, 10 id. 20; *Duncan v. Lawrence*, 6 Ab. 304; S. C. 3 Bosw. 103.)

Where an answer contains an allegation of want of knowledge or information which is for any cause insufficient, and is followed by a further allegation, "and therefore he denies," &c., the latter will be disregarded. (*Chapman v. Palmer*, 12 How. Pr. 38; *Edwards v. Lent*, 8 id. 28.) A denial "for the want of knowledge sufficient to form a belief," instead of "any knowledge or information," &c., is not sufficient. (*Haye v. Bolles*, 33 How. 267; S. C. 2 Daly, 231; *Edwards v. Lent*, 8 How. Pr. 28; *Ketcham v. Zerega*, 1 E. D. Smith, 554.)

Under the form of a general denial the answer may deny all the allegations in the complaint in such terms that if any one is true the denial is false; or, it may deny specifically such allegations as the defendant intends to controvert on the trial. But it is not clear that anything in the Code warrants the grouping of several material allegations, and denying them as an aggregate in terms which are not inconsistent with the truth of any one of them. (*Young v. Catlett*, 6 Duer, 437, 443.)

It is not enough when a charge is made in the complaint with all the circumstances of time, place, &c., to deny such charge generally in the words thereof; but in all cases where the charge embraces several particulars the answer should be in the disjunctive, denying each particular, (*King v. Ray*, 11 Paige, 239; *Davis v. Mapes*, 2 id. 105; *Hopkins v. Everett*, 3 Code Rep. 150; S. C. 6 How. Pr. 159.) and not in the alternative. (*Otis v. Ross*, 8 How. Pr. 193; S. C. 11 N. Y. Leg. Obs. 343; *Corbin v. George*, 2 Ab. 465.)

Where an answer, without denying any of the facts stated in the complaint, alleged that the defendant "denies that the said plaintiff is entitled to the sum of money demanded in this action, or any part thereof," it was held defective. (*Drake v. Cockcroft*, 1 Ab. 203; S. C. 10 How. Pr. 377; 4 E. D. Smith, 34, 39.) So, an answer that the defendants "are not indebted in manner and form as in the complaint alleged," is always insufficient, it being a denial of a conclusion of law, (*Pierson v. Cooley*, 1 Code Rep. 91.) except where the plaintiff states in general terms, as his cause of action, that the defendant is indebted to him, in which case the indebtedness is an issuable fact. (*Morrow v. Congan*, 3 Ab. 323.) And an answer of "not indebted" is sufficient. (*Anon.* 2 Code R. 67.)

An allegation in an answer that the defendant never gave the note to the plaintiff, is a denial of the allegation in the complaint that the defendant made the note, so far as making includes delivery, and also of the further allegation that the defendant delivered the note to the plaintiff. (*Sawyer v. Warner*, 15 Barb. 282.) Under a general denial the defendant cannot insist that the plaintiff has not legal capacity to sue, where that fact does not appear on the face of the complaint, (*Dillage v. Parks*, 31 Barb. 132; *California Steam Nav. Co. v. Wright*, 8 Cal. 585,) or that there is a defect of parties plaintiff; (*Abbe v. Clark*, 31 Barb. 238;) or that the plaintiff is not the real party in interest; (*Jackson v. Whedon*, 1 E. D. Smith, 141; S. C. 3 Code Rep. 186; *Savage v. Corn Exchange, &c. Ins. Co.* 4 Bosw. 2; *Westervelt v. Alcock*, 3 E. D. Smith, 243;) or in an action by a domestic corporation, deny the incorporation of the plaintiff; (*East River Bank v. Rogers*, 7 Bosw. 493; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309;) otherwise as to a foreign corporation. (*Waterville Manuf. Co. v. Bryan*, 14 Barb. 182.)

Every fact impliedly averred in the complaint may be traversed by the answer the same as if it were expressly averred. (*Prindle v. Caruthers*, 15 N. Y. 425; *Bellinger v. Craigie*, 31 Barb. 534.) And it seems that if not so traversed it is admitted. (*Anable v. Steam Engine Co.* 16 Ab. 286; S. C. 25 N. Y. 470, *sub nom.* *Anable v. Conklin.*)

Parties who make contracts with a corporation *de facto* cannot afterwards deny its legal existence. (*White v. Ross*, 15 Ab. 66; *East River Bank v. Rogers*, 7 Bosw. 494.) Thus, in an action by a corporation *de facto* against one of its members to recover monthly dues, or against a party dealing with it, the defendant is not permitted to allege that it was not also a corporation *de jure* at the commencement of the suit (*Mechanics' Building Association v. Stevens*, 5 Duer, *vid.*)

is sufficient to entitle the complainant to a full disclosure of the whole subject matter of the bill, equally as if he had specially interrogated the defendant to every fact stated in the bill. (q) (36)

(q) 1 John. Ch. Rep. 65.

A positive denial of fraud, in an answer, will not prevail against admissions in the same pleading, of facts which show that the transaction was fraudulent. (*Robinson v. Stewart*, 10 N. Y. 189; *Storer v. Coe*, 2 Bosw. 662; *Maurice v. New York Dry Dock Co.* 3 Edw. 143.)

An answer which avers that the plaintiff is not the lawful holder and owner of the note mentioned in the complaint, is sufficient to admit evidence that the plaintiff is not the owner or holder. (*Seeley v. Engell*, 13 N. Y. 542; *Arrangoiz v. Fraser*, 2 Hilton, 244.) In an action on a promissory note which the complaint averred was made and indorsed by the defendant, and also that the plaintiff was the lawful owner and holder of it, the answer contained only a denial that the plaintiff was such owner and holder. *Held*, that this, owing to the peculiar form of the complaint, was not a denial of a conclusion of law, but of an issuable fact. (*McKnight v. Hunt*, 3 Duer, 615; *Hull v. Wheeler*, 7 Ab. 412; *Metropolitan Bank v. Lord*, 1 id. 185; S. C. 4 Duer, 630.)

Where the complaint alleges a contract which would be void if not in writing, but does not expressly allege that it was in writing, an answer which merely denies the existence of any contract, is sufficient. (*Livingston v. Smith*, 14 How. Pr. 490; *Amburger v. Marvin*, 4 E. D. Smith, 393; *Champlin v. Parish*, 11 Paige, 405.) If the defendant admits the making of a contract, and sets out its terms, his answer will be sufficient, although it omits to set up the statute of frauds as a bar. (*Haight v. Child*, 34 Barb. 186.)

Where the complaint, in an action to charge the separate estate of a married woman, alleges her coverture, an answer denying that she is a married woman, or has a separate estate, is insufficient, since the act of 1860. (*Attkin v. Clark*, 16 Ab. 328, n.)

Under the *California* practice, where the complaint is sworn to, the defendant must deny specifically each allegation in the complaint. But by each allegation is meant each *material* allegation; for if the plaintiff makes averments in his complaint not necessary or material to present his cause of action; or if he avers *conclusions of law*, or sets out *evidence*, these need not be traversed: for they are not issuable facts, or if issuable, they are not pertinent to the case. (2 *Estee's Prac.* 643.) Because the plaintiff gives a history, in his complaint, is no excuse for the defendant's denying the truth of that history. Nor is it proper to seek out the very words of the complaint, and then negative each and every one of them. An issue is not as well or as clearly made by negating the language of the complaint in terms, as by denying the *facts* expressed by such language. (Id. 644.)

Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer, on the ground that it is sham. If some of the denials are deemed good, and the others bad, he may move to strike out the latter. Answers consisting of denials which do not explicitly traverse the material allegations of the complaint, are held so far sham and irrelevant within the meaning of the statute. (*Gay v. Winter*, 34 Cal. 153.)

In *Illinois* every defendant is required, by the Chancery Code, to answer fully all the allegations and interrogatories of the complaint, except such as are not required to be answered, by reason of exceptions, plea or demurrer thereto allowed. (Stat. of 1859, vol. i, p. 141, § 23.)

(36) Actions for a *discovery* on oath, are abolished by the Code. Section 389 provides that no action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed; nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed in Chapter VI of the Code.

By subsequent sections, provision is made for the examination of parties to actions as witnesses, at or before the trial, at the instance of the adverse party or of any one of several adverse parties. (Code, §§ 390 to 397.) Section 390 authorizes a party to examine his adversary as a witness on the trial, in the same manner, and subject to the same rules of examination, as any other witness, either at the trial, or conditionally, or upon commission. By section 391, the examination, instead of being

The rule is well settled that a defendant who submits to answer must

had at the trial, may be had at any time before the trial, in the manner therein directed. Section 392 prescribes the mode of compelling the attendance of the party sought to be examined. By section 393 the examination of a party thus taken may be rebutted by adverse testimony. By section 394 the party may be punished as for a contempt, if he refuses to attend and testify, and his complaint, answer or reply may be stricken out. By section 395 testimony by a party, not responsive to the inquiries, may be rebutted by the oath of the party calling him. Section 396 authorizes the examination of persons for whose benefit the action is brought or defended. And section 397, the examination of a co-plaintiff or a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, etc.

These provisions of the Code are a substitute for the former practice in respect to a discovery. It has been held that they apply only to civil actions. (*Williams v. The People*, 33 N. Y. 688; S. C. 45 Barb. 201.) The statute of 1867 provides that in any trial or inquiry in any suit, action or proceeding, the husband or wife of any party thereto, or of any person in whose behalf such suit, &c., is brought, prosecuted, opposed or defended, shall be competent and compellable to give evidence the same as any other witness, on behalf of any party to such suit, &c.; except that no husband or wife shall be competent or compellable to give evidence for or against the other in any criminal action or proceeding (unless it be to prove the fact of marriage in case of bigamy), or in any action or proceeding instituted in consequence of adultery (except to prove the fact of marriage); or in any action or proceeding for or on account of criminal conversation. (Laws of 1867, ch. 887, §§ 1, 2.) And no husband or wife shall be compellable to disclose any confidential communication, made by one to the other, during their marriage. (Id. § 3.)

When husband and wife are parties to an action and witnesses in their own behalf, or in behalf of any other party, they are subject to the same rules of examination as other witnesses (except as provided by statute.) (*Wehrkamp v. Willett*, 1 Keyes, 250.) When a married man is examined as a witness, the fact that his answer may subject him to a civil action for divorce, will not excuse him from answering. (*Taylor v. Jennings*, 7 Rob. 581.)

Within section 390 of the Code, a party to an action is one who is named plaintiff or defendant, and appears on the record as such. (*Woods v. DeFiganere*, 16 Ab. 1; S. C. 1 Rob. 607; 25 How. 522.)

A party to an action, who is made a witness by statute, is subject to the same requisitions, restrictions and tests as other witnesses. (*Forward v. Harris*, 30 Barb. 338; *Burnett v. Harris*, 50 id. 379; *Rivenburgh v. Rivenburgh*, 47 id. 419; *Ketchum v. Tyson*, 3 Murphy's Law and Eq. 314; see *Roberts v. Gee*, 15 Barb. 449.) The statute allowing parties to be witnesses has not abrogated the law admitting books of account as evidence. (*Tomlinson v. Borst*, 30 Barb. 42; *Stroud v. Tilton*, 3 Keyes, 139. See *Clarke v. Smith*, 46 Barb. 30.) Nor has it changed the rule of law which requires the execution of attested instruments to be proved by the subscribing witness. (*Whyman v. Gath*, 8 Exch. 803; S. C. 20 Eng. L. & Eq. 359. See also, *Story v. Lovett*, 1 E. D. Smith, 153; *Jones v. Underwood*, 28 Barb. 481, 484; *King v. Smith*, 21 id. 158; *Giberton v. Ginocchio*, 1 Hilt. 218.) A party to an action who is made a witness by the opposite party, is entitled to fees as a condition of his attendance, the same as other witnesses. (*Hewlett v. Brown*, 1 Bosw. 655; S. C. 7 Ab. 74; *Woods v. DeFiganere*, 1 Rob. 607, 641; S. C. 25 How. 522; 16 Ab. 1; *Draper v. Henningsen*, 1 Bosw. 611; *Taggard v. Gardner*, 2 Sandf. 669; S. C. 2 Code R. 82.)

A party to an action may, at the instance of an adverse party, be compelled, by the process of subpoena, *duces tecum*, not only to appear at the trial and submit to a personal examination, but to produce papers and books in his possession precisely as any other witness may be so compelled. And a witness, when properly subpoenaed, is as much bound to produce books and papers in his possession, as evidence, as to testify orally; and his neglect of either is a contempt of court. (*Bonesteel v. Lynde*, 8 How. Pr. 226; S. C. id. 352. See also, *Garighe v. Laroche*, 6 Ab. 284, n.; S. C. 1 Rob. 659. *Brett v. Bucknam*, 32 Barb. 655.) Yet the president or other officer of a corporation which is a party to an action, is not bound to produce on the trial the books of the corporation under a subpoena *duces tecum* issued by the adverse party, he having no such property in, or control over, them as gives the right or makes it his duty to produce them. Their proper place is the office in which the business is transacted to which they relate. (*La Farge v. La Farge Insurance Co.* 14 How. Pr. 26; S. C. 6 Duer, 680.) It is otherwise, however, with the officers of

an unincorporated joint stock company. (*Woods v. De Figanerie*, 16 Ab. 159; S. C. 1 Rob. 659.) When a corporation is the defendant, the plaintiff cannot have an order for the examination of such defendant as a witness, by its president and secretary. The 390th and 391st sections of the Code refer to the examination of *parties*, not of the *agents, officers*, or servants of parties to a suit. It was not the intention of the legislature to authorize the examination of a corporation as a witness. (*Goodyear v. The Phoenix Rubber Company*, 48 Barb. 522.)

If a witness, without good excuse, neglects to obey a subpoena *duces tecum*, with which he is served, by failing to produce, upon the trial, the books or papers specified therein, he is liable to the injured party for all damages sustained by him in consequence thereof. (*Hasbrouck v. Baker*, 10 John. 248; *Lane v. Cole*, 12 Barb. 680; *Heermans v. Williams*, 11 Wend. 636; *Cogswell v. Meech*, 12 id. 147; *Courtney v. Baker*, 3 Denio, 27.)

A party cannot be examined as a witness, under section 391, before issue joined, unless a case is made justifying an order for the taking of his testimony *de bene esse*. (*Bell v. Richmond*, 50 Barb. 571; S. C. 4 Ab., N. S. 44; *Norton v. Abbott*, 28 How. 373. See *Roche v. Furran*, 12 N. Y. Leg. Obs. 121. *Contra*, *McVickar v. Greenleaf*, 4 Rob. 657; S. C. 30 How. Pr. 61; 1 Ab., N. S. 452, *sub nom.* *McVickar v. Ketchum*; *Fullerton v. Gaylord*, 7 id. 551; *Duffy v. Lynch*, 36 How. 509.)

An order for the examination of the adverse party, under this section, is allowed as a matter of right, before trial, upon showing that the action is at issue, and that the applicant desires such examination as to matters material to the issue. (*Cook v. Bidwell*, 29 How. Pr. 483; S. C. 17 Ab. 300; *Fullerton v. Gaylord*, 7 Rob. 552.) And it is error to deny the application without good cause shown for not permitting the examination. (*Green v. Wood*, 15 How. Pr. 338; S. C. 6 Ab. 277.) On an application for the examination of the adverse party as a witness, the applicant must present an affidavit stating: 1st. The nature of the action and the plaintiff's demand; 2d. If the application be made by the defendant, then the nature of his defence; 3d. The name and residence of the proposed witness. (*Greene v. Herder*, 7 Rob. 455; S. C. 30 How. 210; 4 Rob. 655. See *Van Rensselaer v. Tubbs*, 31 How. 193; *Norton v. Abbott*, 28 id. 388.) Upon such affidavit the party may apply for such an order as is mentioned in the Revised Statutes (2 R. S. 392, § 3), in relation to the conditional examination of witnesses; and also for the summons provided for in § 10 of the same statute. (Ib.) The order so obtained should be served upon the attorneys of all the parties who have appeared; or, if the time for appearance has not yet expired, then upon all the adverse parties themselves who have not appeared. And the summons should also be served upon the proposed witnesses (in the same manner as a subpoena, and the like amount of fees paid.) (Ib.) If the proposed witness fails to appear, the party who has procured the order and summons may, upon a proper affidavit, obtain a warrant directing the sheriff to apprehend such witness and bring him before the judge; or may, on a proper affidavit and notice, have an order directing the pleading of the recalcant witness to be stricken out. (Ib.)

Service of a judge's order, and of a notice to attend for examination in another state, is utterly void and ineffectual for any purpose. The service must be within this state. (*Appleton v. Appleton*, 50 Barb. 486.) The limit of the examination of a party is discretionary with the judge. It is in effect a cross-examination, and governed by the same rules. (*Plato v. Kelly*, 16 Ab. 188.) The fact that a witness, by giving testimony, may thereby render himself liable to a civil suit will not excuse him from testifying; nor, where the testimony is material, can he refuse to answer on the ground that his testimony will tend to disgrace him. (*Taylor v. Jennings*, 7 Rob. 581.) If the witness refuses to answer a legal and pertinent question, it is the duty of the judge to issue his warrant for the commitment of such witness. An order merely adjudging the witness to be in contempt is unauthorized by law, and for that reason is not appealable. (*People ex rel. Valiente v. Dyckman*, 24 How. Pr. 223.)

To compel the attendance of a party as a witness, under section 392, a summons should be issued by the judge, such as was issued under the Revised Statutes (2 R. S. 393, § 10,) upon a conditional examination. (*Van Rensselaer v. Tubbs*, 31 How. 193; *Garigle v. Laroche*, 14 id. 451; S. C. 6 Ab. 284, *sub nom.* *Garigle v. Laroche*; *Bleecker v. Carroll*, 2 id. 82; *Draper v. Henningsen*, 1 Bosw. 614. *Contra* *Treed v. Brown*, 5 Ab. 418.) And his fees for attending as a witness must be paid. (*Taggard v. Gardner*, 2 Sandf. 669; S. C. 2 Code R. 82; *Draper v. Henningsen*, *supra*.)

A party examines an adverse party under sections 390, 391 and 392, at his peril; and whatever evidence is taken, before or at the trial, without objection, is competent and may be used, notwithstanding the restriction in § 399. (*Barry v. Galvin*, 37 How. 310; *Greene v. Herder*, 7 Rob. 455, 461; S. C. 30 How. 210.)

When a party calls an adverse party as a witness, he thereby represents him as de-

answer fully; (r) (37) that is, he must answer the whole of the state-

(r) *Cuyler v. Bogert*, 3 Paige. 388. *Hagthorp v. Hook*, 1 Gill. & John. 272.

serving of credit, and is precluded from denying it by introducing evidence for the purpose of impeaching him, showing either that his general character for truth is bad, or that he has previously made contradictory statements. (*Pickard v. Collins*, 23 Barb. 444; *Barry v. Galvin*, 37 How. 310.) Yet the party calling such witness may, by any pertinent evidence, show a fact to be otherwise than as testified to by him, and this may be done by proving admissions of the witness. (*Pickard v. Collins. supra*; *Parsons v. Suydam*, 3 E. D. Smith, 276; *Armstrong v. Clark*, 2 Code Rep. 143; *Bemis v. Kyle*, 5 Ab., N. S. 232; *People v. Skeekan*, 49 Barb. 217.) Thus, where, on a question of fact, the plaintiff's and defendant's testimony is entirely contradictory, a letter written by one of the parties previous to the commencement of the action, flatly contradicting his testimony, will be decisive in favor of the other party. (*Boyd v. Cott*, 20 How. Pr. 384.) But if the plaintiff and defendant are both men of good character, and of equal credibility, and both are sworn and contradict each other upon a question of fact, so that their evidence cannot be reconciled, the case will be evenly balanced in the absence of other testimony, and the complaint will be dismissed. (*Losee v. Morey*, 57 Barb. 561.) When a party makes himself a witness in his own behalf, his credibility is not indorsed by the opposite party, and he may be contradicted or impeached the same as any other witness. (*Forward v. Harris*, 30 Barb. 338; *Varona v. Socarras*, 8 Ab. 302.)

In order to authorize the punishment of a party for contempt in refusing to be examined as a witness, under the above sections of the Code, it need not appear that the misconduct was calculated to, or did defeat, impair, impede or prejudice the rights or remedies of any party, as required (2 R. S. 533, § 20) in ordinary cases of contempt. (*Woods v. De Figueire*, 1 Rob. 607; S. C. 16 Ab. 1; 25 How. Pr. 522.) Section 394 does not give the court the power to stay the party's proceedings in the action where he refuses or neglects to attend for examination before trial. (*Appleton v. Appleton*, 50 Barb. 486.) In *Bennett v. Hall*, (10 N. Y. Leg. Obs. 191,) a motion for an order to strike out the answer of a defendant for failure to attend was denied, where, after he was subpoenaed, and before the time fixed for his examination, he, in pursuance of a previous arrangement, sailed for California.

Proceedings to punish for contempt, or to strike out a pleading, must be founded on affidavits served on eight days' notice. (*Hewlett v. Brown*, 1 Bosw. 655; S. C. 7 Ab. 74. See *Norton v. Abbott*, 28 How. 388.) The service of a mere notice to attend as a witness, without summons, and without payment of witnesses' fees, will not warrant the punishment for contempt of a party refusing to attend and testify. (Ib.) A default in not attending and submitting to an examination may be waived by the subsequent acts of the adverse party in postponing the examination from time to time, or failing to attend. (*Satterlee v. De Comeau*, 7 Rob. 661; *Gardiner v. Peterson*, 14 How. Pr. 513.)

Section 397 of the Code "has had no force or application in any possible case since 1860." (*Card v. Card*, 39 N. Y. 321; S. C. 7 Trans. App. 144.)

Proceedings for the production and discovery of books and papers are regulated by the Revised Statutes, (2 R. S. 199, §§ 30 to 36,) the Code of Procedure, (§ 383,) and the Rules of the Court. (Rules 18 to 23.)

Section 388 of the Code is not a substitute for the provisions of the Revised Statutes on the subject, but is auxiliary thereto. (*Gould v. McCarty*, 11 N. Y. 575; *Morrison v. Sturges*, 26 How. 177; *Follett v. Weed*, 3 id. 303; *Dole v. Fellows*, 5 id. 451; *Davis v. Dunham*, 13 id. 425; *Pindar v. Seaman*, 33 Barb. 140.) The Code enlarges the remedy for obtaining of evidence; and if a party satisfactorily establishes the fact that any document is in the possession, or under the control, of the adverse party relating to the merits of the prosecution or defence, the court may order its inspection. (*Case v. Banta*, 9 Bosw. 595.)

An application to obtain a discovery of books and papers is not an action. (*Follett v. Weed*, 3 How. Pr. 303; S. C. 1 Code Rep. 65.)

(37) *Lancaster v. Evors*, 1 Ph. 251; *Hare on Disc.* 225, 256; *Thorpe v. Macaulay*, 5 Mad. 218; *Faulder v. Stuart*, 11 Ves. 296; *Mazaredo v. Maitland*, 3 Mad. 66; *Swinborne v. Nelson*, 16 Beav. 416; *Murray v. Coster*, 4 Cowen, 640; 1 Dan. Ch. Pr. 733; *Hill v. Crany*, 2 English, 536.

It may be taken as a general rule that if the charge in the bill embraces several particulars, the answer should be in the disjunctive, denying each particular; or admitting some and denying the others, according to the fact. (*Davis v. Mapes*, 2 Paige, 105.) Where suspicious circumstances, gross fraud and collusion are charged

ments and charges contained in the bill, and all the interrogatories properly founded upon them, at least so far as they are necessary to enable the complainant to have a complete decree against him in case he succeeds in the suit. (*s*)

This rule that where a defendant submits to answer he must answer fully, applies to all cases where the defence intended to be set up by the defendant extends to the entire subject of the suit; such for instance as that the complainant has no title to equitable relief—or that he has no interest in the subject—or that the defendant himself has no interest in the subject—or that he is a purchaser for a valuable consideration—that the bill does not declare a purpose for which equity will assume a jurisdiction to compel a discovery—or that the complainant is *under some personal disability, by which he is incapacitated to sue; in all these cases a defendant who does not avail himself of the objection to answering, either by demurrer or plea, but submits to answer the bill, must answer fully; unless he comes within some or one of the exceptions to the rule, which furnish a special ground for objecting to the discovery sought. (*t*) These exceptions are twelve in number: 1. Where the answer would criminate the defendant; (*u*) 2. Where he is a purchaser for a valuable consideration without notice; (*v*) 3. Where the complainant has no title; (*w*) 4. Where executors are defendants and the demand has become stale from the great

(*s*) *Bank of Utica v. Messerean*, 7 Paige, 517.

(*u*) 1 John. Ch. Rep. 65. 2 Paige, 599. 1 Hayw. 168 .1 Root, 310.

(*v*) *Id. ib.*

(*t*) *Hare on Disc.* 256.

(*u*) 1 John. Ch. Rep. 65.

(*w*) 4 id. 205.

in a bill, a defendant will be held to a strict rule in answering. Not only his motives but his secret designs, his “unuttered thoughts,” must be exposed. (*Mechanics’ Bank v. Levy*, 1 Edw. 316.)

The 39th equity rule of the *United States courts* provides that “the rule that if the defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply, in cases where he might by plea, protect himself from such answer and discovery; and the defendant shall be entitled, in all cases, by answer, to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form), in bar of or to the merits of the bill of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea touching the matters set forth in the bill, to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser, for a valuable consideration, without notice, may set up that defence by way of answer, instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.”

By the 54th Equity Rule, where no account, payment, conveyance, or other direct relief is sought against a party, not being an infant, such party, on the service of a subpoena upon him, need not appear and answer the bill unless the plaintiff specially requires him to do so by the prayer of his bill. But he may appear and answer at his option. If he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

lapse of time; (*x*) 5. Where the answer of the defendant will subject him to a penalty; (*y*) 6. Where the defendant is a judgment creditor, and the bill is filed by a subsequent purchaser, and seeks to impeach the consideration or validity of the judgment; (*z*) 7. Where a defence is set up which meets and controverts the complainant's title; (*a*) 8. Where the bill is filed for an account of partnership transactions, and the defendant denies the partnership; (*b*) 9. Where the defendant is called upon to answer whether his transactions with third persons were usurious or not, at the instance of a creditor of that third person, who does not himself complain, or seek a discovery, especially if there is no charge of fraud; (*c*) 10. Where certain documents are set forth historically, in the stating part of the bill, the defendant is not bound to answer to the facts contained or stated in such documents, unless particularly stated, distinct from the documents; yet he must answer to the fact of the existence of such documents according to his knowledge or his information and belief; (*d*) 11. Where the facts charged are not material or necessary for the complainant's decree; (*e*) 12. Where the matters as to which an answer is sought were reposed in the defendant as counsel, attorney, solicitor, arbitrator, grand-juror, physician, minister, &c. (*f*)

A defendant cannot, however, in his answer, excuse himself from making a full discovery by merely denying the complainant's title to discovery and relief; as the complainant is entitled to a discovery of all matters which will be essential to the relief claimed, in case he should *succeed in showing that the particular defence set up in the [*133] answer is false or unfounded. (*g*)

The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or is necessary to substantiate his proceedings, and make them regular; (*h*) or to enable the court to make a decree against the defendant. (*i*) But the defendant need not answer questions which, though material to the general object of the suit, do not affect himself. (*k*) And where the defendant, who is a trustee, or in the nature of one, states in his answer generally that he is a stranger to the several matters in the bill mentioned, and that he cannot set forth any further or other answer thereto, either as to his knowledge, belief, or otherwise;

(*x*) *Id.* *ib.* 6 *id.* 137.

(*y*) 2 *Har. & Gill.* 382. 4 *John. Ch. Rep.* 432. 6 *Conn. Rep.* 361. 2 *Young & Jer.* 183. 18 *John.* 592. 3 *Paige.* 528.

(*a*) 4 *Cowen's Rep.* 641.

(*c*) *Smith v. Fisher*, 2 *Desaus.* 275.

(*e*) *Davis v. Mapes*, 2 *Paige.* 105.

(*g*) *Bank of Utica v. Mersereau*, 7 *Paige.* 517.

(*i*) *Agar v. Regent's Canal Co.*, *Coop.* 215.

(*z*) 6 *John. Ch. Rep.* 235.

(*b*) 3 *Bro.* 488. n.

(*d*) 3 *John. Ch. Rep.* 297.

(*f*) *Mitt. Eq. Pl.* 224.

(*h*) 2 *Paige.* 105.

(*k*) 2 *Dan.* 253.

it seems, that where it appears clearly no benefit would result to the complainant from requiring an answer to each fact and interrogatory, the answer will be considered sufficient. (*l*)

When it is said that a defendant who undertakes to answer should answer fully, it must be understood to apply only to matters *which are well pleaded*; that is, to the facts stated and charged. To matters of law, or inferences of law drawn from the facts, he need not answer. Thus, a defendant ought to answer, when required to do so, whether a will was published by the testator in the presence of three witnesses; but he is not obliged to answer to an interrogatory requiring him to say whether the publication was such as is required by law to pass freeholds by devise. Sometimes a defendant, instead of answering such interrogatories, submits the point to the judgment of the court; but it is not necessary to do so. (*m*)

A defendant must answer "as to his knowledge, remembrance, information and belief," according to the general requisition in the bill. (*38*) And in general, where matters charged in the bill as the acts of the defendant himself, are of such a nature that he can be presumed to recollect them, if they ever took place, a positive answer is required. (*n*) (*39*) Thus, on a bill filed charging usury, an answer that the defendant does not remember the terms on which the money was lent, will be considered evasive, and tantamount to an admission of usury. (*o*) So [**134*] where the *bill directly charged upon the defendant that he had made and entered into a certain agreement, it was held that a simple denial, by the defendant in his answer, "according to his recollection and belief," was insufficient, and ought to be treated as a mere evasion. (*p*) And where any thing is alleged in the bill as the act or deed of the defendant, or as a matter within his personal knowledge, if he does not deny such allegation, in his answer, according to his recollection and belief, the allegation in the bill will be considered as admitted, for all the purposes of the suit. (*q*) But where the facts are such that it is probable the defendant cannot recollect them, so as to answer more positively, a denial of the facts according to his knowledge, recollection and belief will be sufficient. (*r*)

(*l*) See *Jones v. Wiggins*, 2 Young & Jer 385; 1 id. 340. (*m*) 2 Dan. 256.
 (*n*) *Hall v. Wood*, 1 Paige, 404; *Sloan v. Little*, 3 id. 103. *Prac. Reg.* 13. 3 A. K. Marsh. Rep. 6. (*o*) *Scotts v. Hume*, Litt. Sel. Ca. 379. (*p*) *Taylor v. Luther*, 2 Sumner, 228.
 (*q*) Rule 17. See also 2 Bibb, 67, 69; 3 Monroe, 187; 3 Litt. 57; 1 J. J. Marsh. 212; 4 id. 87, 90. (*r*) *Hall v. Wood*, 1 Paige, 404.

(*38*) 1 Dan. Ch. Pr. 3d Am. ed. 737; Story Eq. Pl. § 354, &c.; *Trademen's Bank v. Hyatt*, 2 Edw. 195; *Bailey v. Wilson*, 1 Dev. & Bat. Eq. 187; *Norton v. Warner*, 3 Edw. 106; *Miles v. Miles*, 7 Foster, (N. H.) 447.

(*39*) *Woods v. Morrell*, 1 John. Ch. 103; *Devereaux v. Cooper*, 11 Vt. Rep. 103; *Miles v. Miles*, 7 Foster, (N. Hamp.) 447; *Pitts v. Hooper*, 16 Geo. 442; *Dinsmoor v. Hazelton*, 2 Foster, 535; *Kittredge v. Claremont Bank*, 3 Story, C. C. 510.

Where the defendant denies all knowledge of a fact charged in the bill, but admits his belief as to the fact charged, it is not necessary for him to deny any information on the subject. (*s*) (40)

To a bill filed for relief against a usurious mortgage, charging the usurious act as having been done by the defendant in person, he cannot answer that he has no knowledge, information, recollection, or belief, other than that derived from the facts stated in the complainant's bill, and that therefore he neither denies or admits the same; but the defendant, although the facts are not charged to have occurred within seven years, (which was formerly necessary under the 54th of Lord Clarendon's orders,) must at least admit or deny the facts according to the best of his knowledge and belief. But if the defendant never heard of or knew the facts charged, except as they are stated in the complainant's bill, he is not bound to admit or deny them, or to express any belief one way or the other. (*t*) If he has any information on the subject, however, other than such as is derived from the bill, he must answer as to such information, and as to his belief or disbelief of the facts charged. (*u*) Where the defendant has no knowledge as to the facts stated in the bill, he may deny, generally, all knowledge or information of the same, without answering as to each charge separately, and may put the allegations of the complainant in issue by the general traverse at the end of his answer. (*v*)

*As to matters which are not alleged to be the defendant's [*135] own acts, or to be within his personal knowledge, it is sufficient if the defendant, in his negative averments, denies the facts charged, upon his belief only; but he must so frame his averments that the complainant can put the facts in issue by a replication. (*w*)

It is not a sufficient answer to the matters charged in the bill for the defendant to aver that he has no knowledge or information of the same, except what is derived from certain depositions taken previous to the filing of the bill; which depositions are not annexed to the answer nor the substance thereof stated therein. (*x*)

Where a defendant is answering as to his own acts, or as to other matters either known to him or charged in the bill to be within his personal knowledge, he must answer the substance of each charge distinctly and particularly. (*y*)

(*s*) *Davis v. Mapes*, 2 Paige, 105.

(*t*) *Sloan v. Little*, 3 Paige, 103. *Utica Ins. Co. v. Lynch*, id. 210. 2 id. 105. 3 John. Ch. Rep. 297. But see *Coop. Eq. Pl.* 314

(*u*) *Id. ib.*

(*x*) *Cuyler v. Bogert*, id. 186.

(*w*) *Utica Ins. Co. v. Lynch*, 3 Paige, 210.

(*y*) *Bolton v. Gardner*, 3 Paige, 272.

(*y*) *Utica Ins. Co. v. Lynch*, 3 Paige, 210.

(40) So where the defendant states that he is "utterly and entirely ignorant" as to the fact to which he is interrogated—that is sufficient. (*Morris v. Parker*, 3 John. Ch. 297; *Norton v. Warner*, 3 Edw. 106.)

It is not a sufficient answer to certain specific facts charged in the bill, to say "that they may be true, &c., but the defendant has no knowledge of, but is a stranger to the foregoing facts, and leaves the plaintiff to prove the same." (z) Nor is it sufficient to say that "the defendant has not any knowledge of the foregoing matters but from the statement thereof in the bill;" but the defendant should answer as to his information and belief, and admit or deny any information *dehors* the bill; as that he has no information, or is utterly and entirely ignorant, &c. (a) And if the facts stated in the bill are not within his personal knowledge, but he has had information concerning them, aside from the bill, he must state his belief in regard to such matters. (b)

It is also to be observed that a defendant is bound to make use of due diligence to acquire the information necessary to enable him to make the discovery called for. Thus, it has been held that a defendant must answer not only as to all facts within his knowledge, but as to those which he can ascertain from an inspection of books and papers in his possession or under his control. (c) (41) So where defendants, filling the character of trustees, are called upon to set out an account, they cannot frame their answer so as merely to give a sufficient ground for an account in the master's office. They are bound to give the best account they can by their answer, not in an oppressive way, but by [*136] referring to books, &c., sufficiently* to make them parts of their answer, and afford the complainant an opportunity of inspection, in order that he may be able to ascertain whether that is the best account the defendants can give. (d) But where executors or other trustees are called upon to set out accounts, they must set them forth; although for the purpose of rendering their schedules less burthensome, they may, instead of going too much into particulars, refer to the original accounts in their possession in the manner above stated. And when it

(z) *Smith v. Lasher*, 5 John. Ch. Rep. 247. But see 2 Sim. & Stu. 183.

(a) *Id. ib.*

(c) *Davis v. Mapes*, 2 Paige, 105.

(b) *Devereaux v. Cooper*, 11 Verm. Rep. 103.

(d) *White v. Williams*, 8 Ves. 193.

(41) Or which he can ascertain by inquiry of parties connected with him in the transaction or suit. (*Van Sant. Eq. Pr.* 203.) In *Kittredge v. Claremont Bank*. (1 Wood & Mi. 244.) Woodbury, J., said, that the officers answering for the bank sued; if they were not the same persons who were in office at the time of the transaction inquired about, ought to go not only to the records, books and files, for information, but to the former officers, if living, and ascertain, as near as might be, the truth of the matters about which they were interrogated.

A defendant who has it in his power to obtain information cannot escape from discovery simply by saying he does not know. (2 *Lindley on Partu.* 814, 815; *White v. Barker*, 5 De G. & Sm. 746; *Seeley v. Boehm*, 2 Madd. 176; *Drake v. Syms*, 8 W. R. 85; *Att'y Gen. v. Rees*, 12 Beav. 50; *Taylor v. Rundell*, 1 Y. & C. 128; 1 Ph. 222; *Martineau v. Cox*, 2 Young & C. 638.)

But a defendant ought not to be required to obtain information so as to meet the plaintiff's wishes, and thereby become his agent to procure testimony. (*Morris v. Parker*, 3 John. Ch. 301.)

is said that a defendant may refer to accounts in his possession, it must not be understood as authorizing him to refer, by his answer, to accounts made out by himself for the purposes of the case, but only to accounts previously in existence. (e)

The complainant may call for an answer on oath not only to the main charges in the bill, upon which his claim to relief is founded, but also as to matters of evidence and collateral facts stated in the bill which are material in establishing the main charges, or in ascertaining the nature or kind of relief to which he is entitled. (f)

To so much of the bill as is material and necessary for the defendant to answer, he must reply directly, without evasion, and not by way of negative pregnant. He must not answer the charges merely literally, but he must confess or traverse the substance of each charge positively and with certainty. Particular and precise charges must be answered particularly and positively, and not in a general manner, even though the general answer may amount to a full denial of the charge. (g) (42) But if any of the particular inquiries in the bill are as to matters which are totally immaterial to the case, the defendant need not answer them. Thus, where a bill required the defendant to set forth whether certain bonds were not given for a valuable and *bona fide* consideration, and if not, for what consideration they were given? and the defendant denied that such bonds (if given) were given for a valuable consideration, but did not answer as to any other consideration, it was held that the question need not be answered; because the law knows of no other consideration than a *bona fide* consideration. (h) If the charge in the bill embraces several particulars, the answer should be in the disjunctive,

(e) See *Alsager v. Johnson*, 4 Ves. 224.

(f) *Mechanics' Bank v. Levy*, 3 Paige. 606.

(g) *Woods v. Morrell*, 1 John. Ch. 103. 1 Sim. & Stu. 235. 6 Ves. 792. 3 Litt. Rep. 80.

(h) *Daniel v. Bishop*, 13 Price, 15.

(42) It is not enough, when a charge is made with all the circumstances of time, place, &c., to deny such charge generally, in the words thereof; but in all cases where the charge embraces several particulars, the answer should be in the disjunctive, denying each particular. (*Van Sant. Eq. Pr.* 204; *King v. Ray*, 11 Paige, 239; *Davis v. Mapes*, 2 id. 105.)

If the defendant deny a fact, he must traverse it directly, and not by way of negative pregnant. Thus, if a fact be laid to have been done with divers circumstances, the defendant may not traverse it literally, but he must traverse the point of substance. (1 *Dan. Ch. Pr.* 739; *Morris v. Barker*, 3 John. Ch. 297; *Smith v. Lasher*, 5 id. 247; *Pettit v. Candler*, 3 Wend. 618; *Thompson v. Mills*, 4 Ired. Eq. 330; *Story Eq. Pl.* § 852; *High v. Balte*, 10 Yerger, 335.) For example, if one be charged to have done a thing upon such a day, or in such a place, he must not deny that he did it *modo et forma*; for that implies that in some sort he did it. (*Id.* 740.) So if he be charged with the receipt of £100, he must traverse that he hath not received £100, nor any part thereof: and if he has received any part, he must set forth what part. (*Ibid.*) In *Robinson v. Woodgate*, (3 *Edw.* 422.) the bill charged a sale on credit. The answer admitted it, "but not without taking a security therefor." As here was a negative pregnant, and the defendant had answered no further, the court decided that he must state the security, and add all the particulars concerning it.

denying each particular; or admitting some and denying the others, according to the fact. (*i*) And where a defendant is asked by the bill [*137] *whether he has not received certain sums of money specified in the bill, the mere setting forth a general account by way of schedule to the answer, and referring to it as containing a full account of all sums of money received by the defendant, will not be sufficient. The defendant is bound to answer as to the specific sums, and all the circumstances attending them, which may be inquired after, in the body of his answer. (*k*)

An answer will be sufficient to dissolve an injunction, although it do not positively deny the facts in the bill, provided it set forth circumstances which disprove them. (*l*)

To so much of the bill as it is necessary and material for the defendant to answer, he must speak directly and without evasion; and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge. (*m*) And if called upon to set out a deed or other instrument in the words and figures thereof, he should do so, or give some reason for not complying with the requisition. (*n*) But he may avoid this by admitting that he has the deed, &c. in his possession, and offering to give the complainant a copy of it. (*o*) It is said to be a proper precaution, where a defendant sets out a deed or other instrument in his answer, whether in *hæc verba*, or by way of recital, to crave leave to refer to it; as by so doing, the defendant makes it a part of his answer, and relieves himself from any charge in case it should be erroneously set out. (*p*)

SECONDLY, of the manner of stating the defendant's defence.] (43)

(*i*) *Davis v. Mapes*, 2 Paige, 105.

(*k*) *Hibbert v. Durand*, cited 2 Cox, 135; S. C. 1 Bro. C. C. 503. Mitf. Pl. 250.

(*l*) *McFarland v. McDowall*, 1 Car. Law Repos. 110.

(*m*) Mitf. Eq. Pl. 250.

(*o*) 1 Harr. Ch. Pr. 185.

(*n*) *Prac. Reg.* 204.

(*p*) 2 Dan. 259.

(43) The second use of an answer, specified in section 149 of the Code, is that of setting up *new matter constituting a defence*.

New matter is that which admits the cause of action alleged in the complaint, yet constitutes a defence to the same. (*Gilbert v. Crane*, 12 How. Pr. 455; *Radde v. Ruckgaber*, 3 Duer, 634; *Brazill v. Isham*, 12 N. Y. 17; *Bellinger v. Craigue*, 34 Barb. 534; S. C. approved, 41 N. Y. 116; *Carter v. Koezley*, 14 Ab. 147; S. C. 9 Bosw. 583; *Walrod v. Bennett*, 6 Barb. 144.) But matter which merely denies the essential allegations of the complaint, or states circumstances which, if testified to by credible witnesses, would disprove them, is not new matter; as for example, where, in an action for malicious prosecution and false imprisonment, the complaint alleged want of probable cause, it was held that a statement of facts, in the answer, to show the existence of probable cause was not new matter, but only evidence that such allegation was untrue, viz: the want of probable cause. (*Radde v. Ruckgaber*, 3 Duer, 684; *Rost v. Harris*, 12 Ab. 446.)

The new matter constituting a defence, in an answer under the Code, means some fact which the plaintiff is not bound to prove, in the first instance, to establish his cause of action, and which goes in avoidance or discharge of the cause of action alleged in the complaint. (*Stoddard v. Onondaga Conference*, 12 Barb. 573.) The

Besides answering the complainant's case as made by the bill, the defendant must state to the court, in his answer, all the circumstances of

answer should consist of allegations or averments of *fact*, stated positively, or upon information and belief. (*Simmons v. Fairchild*, 42 Barb. 409.)

The new matter must be contained in the answer; otherwise the defendant cannot avail himself of it on the trial. (*Morrell v. Irving Fire Ins. Co.* 33 N. Y. 429, 447; *Tilson v. Clark*, 45 Barb. 178; *Mechanics' Bank of Williamsburg v. Foster*, 44 id. 87; *S. C.* 29 How. 408; 19 Ab. 47; *Fry v. Bennett*, 28 N. Y. 325; *S. C.* 3 Bosw. 200; 9 Ab. 45; *Rapalee v. Stewart*, 27 N. Y. 310; *Taylor v. Richards*, 9 Bosw. 679; *Simmons v. Law*, 8 id. 214; *Allen v. Mercantile Ins. Co.* 46 Barb. 642; *Deifendorff v. Gage*, 7 id. 18; *Kelsey v. Western*, 2 N. Y. 501; *N. Y. Cent. Ins. Co. v. Nat. Protect. Ins. Co.* 20 Barb. 468; *S. C.* rev'd, 14 N. Y. 85; *Baker v. Bailey*, 16 Barb. 54; *Dewey v. Hoag*, 15 id. 365; *Fay v. Grimsstead*, 10 id. 321; *Andrews v. Bond*, 16 id. 633; *Walton v. Minturn*, 1 Cal. 362; *Field v. Mayor, &c., of New York*, 6 N. Y. 179; *McKyring v. Bull*, 16 N. Y. 297; *Bucknam v. Brett*, 13 Ab. 119; *S. C.* 35 Barb. 596; 22 How. Pr. 233; *Sandford v. Travers*, 7 Bosw. 498; 40 N. Y. 140; *Johnson v. McIntosh*, 31 Barb. 267; *Button v. McCauley*, 5 Ab., N. S. 29; *Wright v. Delafield*, 25 N. Y. 266.) Not even if it appears from the plaintiff's evidence offered in support of his case. (*Dingledein v. Third Avenue R. R. Co.* 9 Bosw. 91; *S. C.* 37 N. Y. 575; 34 How. 630; *Brazill v. Isham*, 12 N. Y. 9.) The language "The answer of the defendant *must contain*," &c., is imperative. (*McKyring v. Bull*, 16 N. Y. 297, 307.)

A defensive answer of new matter must contain, *first*, matter constituting a *defence*. This relates to the *substance*. *Second*, it must be "in ordinary and concise language, without repetition." This relates merely to the *form*. If an answer of new matter substantially conforms to these two requisites, it will be good; and nothing else is necessary to make it an available defence. (*Van Sant. Eq. Pr.* 205.)

Under this section the defendant is required, in all cases, to plead any new matter constituting either an entire or partial defence, and cannot give such matter in evidence in mitigation of damages, when not set up in the answer. (*McKyring v. Bull*, 16 N. Y. 297.) Thus, where the complaint alleged that the plaintiff did labor and service for and at the request of the defendant, which was worth \$650, and concluded with an averment that there was due the plaintiff on account of such service, over and above all payments and set-offs, \$134, and a demand of judgment for that sum, with interest, and the answer consisted only of a general denial of all the allegations of the complaint, it was *held* that evidence of payment, as a defence to the action, or of partial payment in mitigation, was inadmissible on the trial, because neither was pleaded. (*Id.*) A defendant cannot give evidence of any new matter not contained in his answer. (*Deifendorff v. Gage*, 7 Barb. 18.) And an answer of new matter should state every fact which the defendant must prove on the trial to make out a defence. (*Allen v. Patterson*, 7 N. Y. 478; *Bailey v. Ryder*, 10 id. 363; *Nicoll v. Fash*, 59 Barb. 275.) Where, conceding the truth of an answer, the defendant would not be entitled to judgment, because other facts, not averred, would need to be proven to establish the defence, the omission to plead those facts will prevent his giving evidence to support them. Hence, the answer is defective. (*Nicoll v. Fash, supra.*) Where, in an action against a telegraph company, it appeared from the complaint that the defendant never transmitted the plaintiff's message, and from the answer that, by the contract, the defendant was not responsible for delay, error or remissness in the delivery of the same, it was held that the answer set up no defence, but admitted the substance of the complaint, viz: an entire omission to send or deliver the message. (*Baldwin v. U. S. Tel. Co.* 54 Barb. 505; *S. C.* 6 Ab. N. S. 405.) So, where it appeared from the answer that the defendant received the message from a connecting telegraph line, under a different or special agreement, but it did not appear that such agreement was made with, or known of by, the plaintiff. (*Id.*) So, also, where the answer alleged that the injury which the plaintiff complained of resulted from his own negligence, but did not state facts on which the court could adjudge such negligence as matter of law. (*Id.*)

When an action is brought by a foreign corporation, to recover moneys loaned in this state, the defendant is not allowed to allege that the plaintiff was precluded from making such loan by the terms of its charter. When it is a simple question of capacity to contract, arising either on a question of regularity of organization, or of powers conferred by the charter, a party who has had the benefit of the contract cannot question its validity in an action founded upon it. (*Steam Navigation Co. v. Weed*, 17 Barb. 378.)

which he intends to avail himself by way of defence; for it is a rule that a defendant is bound to apprise the complainant by his answer,

An answer under the above section (149) of the Code, assimilates itself, in every respect, to the former answer in chancery. The defence of new matter which may be set up need not be such as technically constitutes a *bar* to the action, but may include, as in an answer in chancery, a defence *pro tanto*, or a partial defence, such as abatement of damages going to a part of the consideration, and other cases of recoupment, or set-off, payment, and the like. (Van Sant. Eq. Pr. 206; *Van Epps v. Harrison*, 5 Hill, 63; *Houghton v. Townsend*, 8 How. Pr. 442; *Bush v. Prosser*, 11 N. Y. 344.) Indeed, it has been held that such matters of partial defence, as payments, &c., are defences as far as they go, and not only may, but must, be taken by answer, in order to be available in proof on the trial. (*McKyring v. Bull*, 16 N. Y. 297; *Willis v. Taggard*, 6 How. Pr. 433; *Wightman v. Shankland*, 18 id. 80.)

As to answers of new matter which contain within themselves a full defence to the entire cause of action, the general rules relative to the statement of the essential facts in a *complaint* are equally applicable to an answer. (Van Sant. Eq. Pr. 208.) Thus, the facts themselves, constituting the defence, must be stated, and not the *evidence* of the facts, or collateral circumstances. The facts alone must be stated, and not *legal conclusions* or inferences of law. The facts must be stated as *facts*, logically and directly, and not in *hypothetical form*, or in an evasive or ambiguous manner, nor in the alternative; and, if so stated, will be struck out on motion. (Ib.; *Corbin v. George*, 2 Ab. 465.)

A defendant may set up in his answer, since the Code as well as before, matters of defence arising since the commencement of the action, such as settlement, discharge of the action, and the like. (*Willis v. Chipp*, 9 How. Pr. 568; *Donovan v. Hunt*, 7 Ab. 29; *Price v. Peters*, 15 Ab. 197.)

Section 150 of the Code allows a defendant to set forth, by answer, as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated *legal* or *equitable*, or both.

Under this section an *equitable defence* may be interposed to a purely legal cause of action, and whether the relief demanded be legal or equitable, he may set up the same defence. (Van Sant. Eq. Pr. 209; *Foot v. Sprague*, 12 How. Pr. 355; *Burgett v. Bissell*, 5 id. 192; S. C. 3 Code R. 215; *Hunt v. Farmers' Loan & Trust Co.* 8 How. Pr. 418; *Van De Sande v. Hall*, 13 id. 458; *Haire v. Baker*, 5 N. Y. 357; *Hinman v. Judson*, 13 Barb. 629.) Thus, in an action upon a judgment, the defendant may set up as a defence that it was obtained by fraud. (*Dobson v. Pearce*, 12 N. Y. 156.) In an action to recover the possession of land, he may set up in his answer a mistake in the conveyance, (*Bartlett v. Judd*, 23 Barb. 262,) or that he is equitably the owner of the premises, and entitled to a conveyance thereof. (*Crary v. Goodman*, 12 N. Y. 266.) Yet it is not every equitable claim that may be thus set up as a defence. Thus, in an action to recover damages for diverting a water-course, the defendant cannot set up, either by way of equitable defence or counter-claim, the violation by the plaintiff of an agreement relative to the deepening of the channel made prior to the alleged diversion of the water. (*Pattison v. Richards*, 22 Barb. 143.) Under the head of equitable defences are included all matters which before would have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. (*Dobson v. Pearce*, 12 N. Y. 156; S. C. 1 Ab. 103; 1 Duer, 142.) It seems that an equitable defence must be set up in this way, since it is no longer allowable to bring an action for the mere purpose of restraining the prosecution of another action pending in the same court. (*Foot v. Sprague*, 12 How. Pr. 355; *Auburn City Bank v. Leonard*, 20 id. 193.) That a deed, absolute on its face, was intended as a mortgage, is available as a defence in any action. (*Despard v. Walbridge*, 15 N. Y. 374.)

An answer must show whether it is a mere defence or a counter-claim. (*Clough v. Murray*, 19 Ab. 97.) So where the defence set up is a failure of consideration, the answer must show whether it is a total or a partial failure. (Ib.) And it must distinctly aver all those facts which, when the plaintiff's case is admitted or proved, the defendant must prove in order to defeat a recovery. (*Taylor v. Richards*, 9 How. 679; *Dennis v. Snell*, 54 Barb. 411; S. C. 34 How. 467; 50 Barb. 95; *Catlin v. Gunter*, 1 Duer, 266; S. C. 11 N. Y. Leg. O. 201; *Ayrault v. Chamberlain*, 33 Barb. 229; approved, 31 N. Y. 614; *Carter v. Koczley*, 14 Ab. 147; S. C. 9 Bosw. 553; *Jacobs v. Remsen*, 12 Ab. 390; S. C. 35 Barb. 334; 36 N. Y. 638; *Savage v. Corn Exchange, &c. Ins. Co.* 4 Bosw. 2; *Beuty v. Swarthout*, 32 Barb. 293; *Pier v. Finch*, 29 id. 170.)

of the nature of the case he intends to set up; and that too in a clear,

A defendant, in his answer of new matter, in order to avoid a cause of action, need not confess it. He has the right to say: "I deny your alleged cause of action, but if you shall succeed in proving it, still I am not liable, because," &c. (*Taylor v. Richards*, 9 Bosw. 679; *contra*, *Gregory v. Trainer*, 4 E. D. Smith, 58; S. C. 1 Ab. 209. See also *Anibal v. Hunter*, 6 How. 255; S. C. 1 Code Rep. N. S. 403; *Sayles v. Wooden*, 6 How. Pr. 81; S. C. 1 Code Rep., N. S. 409; *Porter v. McCreedy*, id. 88; *Lewis v. Kendall*, 9 How. Pr. 59; S. C. 1 Code Rep., N. S. 402; *Arthur v. Brooks*, 14 Barb. 533.)

Where an answer setting up the statute of limitations averred that the several causes of action, "if any such there were, or still are, did not accrue within," &c., it was held bad, as not sufficiently admitting the cause of action. (*Conger v. Johnston*, 2 Denio, 96.) In pleading new matter the answer will be sufficient if it refer to the cause of action to be answered as "the supposed cause of action;" (*Evestaff v. Russell*, 10 Mees. & Wels. 365;) or to say, "the supposed cause of action, if any such there be;" (*McCormick v. Pickering*, 4 N. Y. 280;) or, "the sum claimed and demanded;" (*Scadding v. Eyles*, 9 Ad. & El., N. S. 853; *Margetts v. Buys*, 4 Ad. & El. 489.) The true rule is to allow the defendant to put in as many defences as he may have, whether consistent with each other or otherwise. (*Stiles v. Comstock*, 9 How. Pr. 48.)

In a foreclosure suit brought by the assignee of a mortgage, an answer denying that the mortgage was duly assigned to the plaintiff for a valuable consideration, and alleging that the same, if ever sold by the mortgagee, was sold to B., one of the defendants; and that if any assignment was ever made by the mortgagee to the plaintiff, the same was only so in form; and that the money to purchase the same was furnished by B., was held defective, because, 1st. It set up matter in avoidance, and did not admit that but for the avoidance the action could be sustained. 2d. It was hypothetical. 3d. It set up matter in avoidance, and at the same time denied the allegation it sought to avoid. 4th. It was argumentative. (*Arthur v. Brooks*, 14 Barb. 533.)

Where an answer in an action for goods sold and delivered denied that the plaintiff ever sold any goods to the defendant which had not been paid for, and also averred that if the plaintiff ever sold the defendant any goods they were sold on a credit, and not to be paid for in nine years from the day of sale, it was stricken out, on motion, as not amounting to a denial or an allegation of new matter. (*Hamilton v. Hough*, 13 How. Pr. 14.)

The word "defence," in § 149, sub 2, of the Code, is not used in its primal legal sense, to wit: resistance or denial, but is used to signify such new matter as constitutes either a complete or a partial bar to the action; *e. g.*, justification, recoupment, &c. (*Houghton v. Townsend*, 8 How. Pr. 441; *Ross v. Longmuir*, 15 Ab. 326; S. C. 24 How. 49.) Thus, the word defence has ceased to mean only justification, and, as now used, it applies to matters which go to a partial as well as a total extinguishment of the plaintiff's claim. (*Bush v. Prosser*, 11 N. Y. 347, 352.)

A total or partial failure of the consideration for which a note was given, although a good defence to be pleaded, does not amount to a counter-claim. (*Gleason v. Moen*, 2 Duer, 640; *Barr v. Baker*, 9 Mo. 850.) Where the defendant, in an action to recover rent, sets up in his answer a false and fraudulent representation by the plaintiff's assignor, as to the quantity of land mentioned in the lease, and claims to *recoupe* his damages on account of such representations, such defence cannot be considered a counter-claim. (*Van De Sande v. Hall*, 13 How. Pr. 453.) Where a defendant desires to avail himself of the defence of false and fraudulent representations, he must allege that he was misled by the representations, or that his belief in their truth induced him to enter into the contract, &c. (*Ib.*)

In an action for goods sold, the defendant may set up in diminution of the plaintiff's demand, a claim for damages sustained by him in consequence of the partial non-fulfilment of the contract on the part of the plaintiff. (*Willis v. Taggard*, 6 How. Pr. 433.)

It is not necessary after inserting in an answer a statement which shows that the plaintiff ought not to recover, to add the reasons why he should not. (*Bendit v. Amesley*, 42 Barb. 193; S. C. 27 How. 184.)

An answer must show whether it is a mere defence, or a counter-claim. (*Clough v. Murray*, 19 Ab. 97.) So, where the defence set up is a failure of consideration, the answer must show whether it is a total or a partial failure. (*Ib.*)

To constitute a good answer of *another action pending*, it must appear that the suit pending is for the same identical cause of action as that in which the answer is

unambiguous manner; and that he cannot avail himself of any matter

interposed, (*Kelsey v. Ward*, 16 Ab. 93; S. C. 32 How. 618; *Haire v. Baker*, 5 N. Y. 357,) and between the same parties or their privies. (*Goddard v. Benson*, 15 Ab. 191.) Where an answer alleged, for a defence, that "there is another action now pending between the same parties for the same identical cause of action mentioned in the complaint in this action," it was held sufficiently definite and certain. (*Ward v. Dewey*, 12 How. Pr. 193.) The Code has not changed the former rule of law that the pendency of a prior suit in a court of the United States, or of a sister state, is no defence to an action in this state. (*Cook v. Litchfield*, 5 Sandf. 330; S. C. 9 N. Y. 279; (*Burrows v. Miller*, 5 How. Pr. 51; *Republic of Mexico v. Arrangoiz*, 5 Duer, 643; *Williams v. Ayrault*, 31 Barb. 364; *Strong v. Stevens*, 4 Duer, 668.) But where a party thus sues in two courts for the same cause of action, he will be compelled to elect in which he will proceed, and the other action will be stayed. (*Hammond v. Baker*, 1 Code Rep., N. S. 105; S. C. 3 Sandf. 704.) Where, during the pendency of an action for a divorce, on the ground of adultery with a specified person, the plaintiff brought a second action for the same relief, on the ground of another and subsequent act of adultery with the same person, charged to have occurred after the commencement of the first action, it was held that an answer in the second suit, of another action pending for the same cause, was insufficient, and that the first action was not a bar to the second. (*Cordier v. Cordier*, 26 How. 187.) It is immaterial that the prior proceeding is not an action, but was instituted by the party who sets it up as a bar. (*Groshon v. Lyon*, 16 Barb. 461; S. C. 1 Code Rep., N. S. 348.) An action is between the same parties, although those who are acting in one action are defendants in the other. (Ib.) In an action on a promissory note, it is a good defence that before the action was commenced, the plaintiff had instituted proceedings under the lien law, to enforce his lien upon the buildings, on account of the same work and materials as those for which the note was given, and that such proceedings are still pending. Both actions are substantially for the same cause, and no remedy can be obtained in the latter which cannot be obtained in the one first brought. (*Ogden v. Bodle*, 2 Duer, 611.) And see *Mills v. Block*, 30 Barb. 549.) Upon an answer showing the pendency of a former suit, it is competent for the plaintiff to discontinue the former suit, and a replication of such discontinuance is good. (*Averill v. Patterson*, 10 How. Pr. 85; S. C. 10 N. Y. 500.) But such discontinuance must be effected before the second action is noticed for trial. (*Swart v. Borst*, 17 How. Pr. 63.) When an order of discontinuance has been made, that part of the answer which sets up the former suit will be stricken out as sham. (*Clark v. Clark*, 7 Rob. 276.) Where, after an answer has set up the defence of another action pending, a recovery is had in the first action, the defendant should move, on affidavits and notice, for leave to plead that fact by a supplemental answer. (*Hendricks v. Decker*, 35 Barb. 298.)

A former recovery, to be sufficient as a defence to a subsequent action for the same cause, must be by the judgment of a court or other competent tribunal. (*Cushman v. Bean*, 2 Hilt. 341.) Payment, before judgment, and after suit commenced, is not such a recovery. (Ib.) A judgment in one action for one quarter's wages under a contract of hiring, is a bar to a second suit upon the same contract, for wages of subsequent quarters and damages. (*Colburn v. Woodworth*, 31 Barb. 331; approved, 41 N. Y. 116; *Donovan v. Hunt*, 7 Ab. 23.) A former judgment, recovered by an agent, is a bar to a subsequent action for the same cause, by his principal. (*Kent v. Hudson River R. R. Co.* 22 Barb. 273.) An answer which sets up a former recovery as a defence, must show the identity of the two causes of action, (*Phillips v. Berick*, 16 John. 137; *Secor v. Sturgis*, 16 N. Y. 548; S. C. 2 Ab. 69,) and that the actions are between the same parties or their privies. (*Goddard v. Benson*, 15 Ab. 191.) In an action against one of several joint contractors, an answer alleging that judgment has already been obtained by the plaintiff against one of the joint contractors for the same debt, is good, though the plaintiff has obtained nothing from his judgment. (*King v. Hoare*, 13 Mees. & Wels. 494.) So a judgment against one of the plaintiff's joint debtors upon his individual obligation, executed as a security for the joint debt, is a bar to a subsequent action against both. (*Benson v. Paine*, 3 Ab. 28; S. C. 17 How. Pr. 407; 2 Hilt. 552.)

Where an answer to a complaint by the payee, on a promissory note, alleged that the payee was not the sole owner and holder of the note, but owned it jointly with another, and therefore, he was not individually entitled to recover on said note, it was held frivolous, and that the answer should have denied that the payee was a trustee of an express trust, as to the other owner's interest. (*Tompkins v. Acer*, 10 How. Pr. 303.) An answer alleging that the plaintiff is not the owner and holder of

in defence which is not stated in his answer, even though it should appear in his evidence. (q)

(q) *Stanley v. Robinson*, 1 Russ. & My. 525. But see 1 Eq. Ca. Abr. 223.

the note, but that C. D. is the owner and real party in interest, creates no issue, and is bad on demurrer. (*Brown v. Ryckman*, 12 How. Pr. 313. *Contra*, *Tamiser v. Cascard*, 17 Ab. 187; *Arrangoiz v. Fraser*, 2 Hilt. 244.) So, an answer alleging, not by way of denial, but as new matter, that the plaintiff are not the real parties in interest, is frivolous. (*Fosdick v. Groff*, 22 How. 158.) And an allegation that the plaintiff is not the lawful owner or holder of the note is insufficient to admit evidence of that fact. (*Seeley v. Engell*, 17 Barb. 530; S. C. rev'd, 13 N. Y. 542.) So an answer alleging "that the plaintiff who prosecutes the action is not the real party in interest, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue, without joining with him the person for whose benefit the suit is prosecuted," is bad as not stating the facts on which the defendant relies to show that the plaintiff has no right to sue. (*Russell v. Clapp*, 3 Code Rep. 64; S. C. 4 How. Pr. 347; 7 Barb. 482; *Bentley v. Jones*, 4 How. Pr. 202.)

In an action for the foreclosure of a mortgage, by the assignee thereof, the answer denied that the mortgage was ever duly assigned, transferred and delivered to the plaintiff for a valuable consideration, but that the same, if ever sold by the mortgagee, was sold to one of the defendants; that if sold to or assigned to the plaintiff, it was only so in form; and that said defendant furnished the money to purchase the same, and was the real party in interest. Held that the answer was defective, as avoiding without confessing the cause of action; as being hypothetical; as avoiding and denying at the same time, one allegation; and as being argumentative. (*Arthur v. Brooks*, 14 Barb. 533.)

An answer alleging *false representations* as a defence is not sufficient unless it also aver that the defendant was misled by, or that his belief in the truth of, such representations, induced him to enter into the contract. (*Van De Sande v. Hall*, 13 How. Pr. 453.) So, also, it must aver the defendant has done all in his power to restore the plaintiff to his former condition; or that fact cannot be proved on the trial. (*Decendorf v. Beardsley*, 23 Barb. 657.)

In all cases of *presumptive payment*, at law or in equity, the pleadings must contain an averment of payment; otherwise the presumption cannot be raised. (*Fellers v. Lee*, 2 Barb. 433; *Henderson v. Henderson*, 3 Denio, 314; *Pattison v. Taylor*, 1 Code Rep., N. S. 174; S. C. 8 Barb. 250; *Martin v. Gage*, 9 N. Y. 398; *New York Life Ins. and Trust Co. v. Covert*, 29 Barb. 435; S. C. 6 Ab., N. S. 154; 33 How. 619.) Where an answer of payment does not state the time thereof, it will be held to mean payment before the commencement of the suit. (*Boyd v. Weeks*, 2 Denio, 321.) The allegation that payment was made after the cause of action accrued, renders it unnecessary to specify any particular day. (*Beesley v. Dolley*, 6 Bing., N. C. 37.) An answer of payment to the plaintiff's wife, and her acceptance in satisfaction, must also aver that she was authorized to receive payment. (*Offley v. Clay*, 2 Man. & G. 172; S. C. 2 Scott, N. R. 372.) In an action upon a promissory note, against the maker, an answer alleging that the note was paid and satisfied to the plaintiff by a third person, for whose accommodation it was made, is sufficient to admit evidence of any facts which amount to an actual payment by such third person. (*Farmers' Bank of Long Island v. Sherman*, 6 Bosw. 181; S. C. 33 N. Y. 69; 29 How. 573.)

In setting up a defence under a public statute, it is not necessary to set forth the statute in the answer, or to allege the existence of a statute of which the court is bound to take notice judicially. It is sufficient to state the facts which are necessary to bring the case within the operation of the statute, and to insist that upon those facts the plaintiff's right or remedy is at an end, or never existed. The court will then judicially notice the existence of the statute, and declare its legal effects upon the case as made by the pleadings. (*Bogardus v. Trinity Church*, 4 Paige, 178; S. C. 15 Wend. 111.) But where the defence of a statute abrogating a common law right is relied on, the facts making the statute applicable must be explicitly averred, and not left to mere inference. (*Miller v. Roessler*, 4 E. D. Smith, 234.) It seems that when it appears from the complaint that the time of statutory limitation has expired, it is not a good ground of demurrer, but the statute should be set up in the answer. (*Voorkies v. Voorkies*, 24 Barb. 150.) An answer averring that the action ought not to be sustained, because the cause of action mentioned in the complaint

The complainant has a right to be informed by the answer not only

did not accrue to the plaintiff at any time within six years next before the commencement of the action, is sufficient. (*Bell v. Yates*, 33 Barb. 627.)

An answer of *tender* before action brought, must aver that the defendant always has been, and still is, ready to pay the amount tendered. (*Roosevelt v. Bull's Head Bank*, 45 Barb. 579; *Wilder v. Seelye*, 8 id. 408; *Livingston v. Harrison*, 2 E. D. Smith, 197; *Brown v. Ferguson*, 2 Denio, 193.) And the amount tendered must be brought into court. (Ib.: *Hill v. Place*, 7 Rob. 389; S. C. 36 How. 26; 5 Ab., N. S. 18; *Simpson v. French*, 25 How. 464; *Roosevelt v. N. Y. & Harlem R. Co.* 45 Barb. 554; S. C. 30 How. 226.) Yet where it is not brought into court, the irregularity will be waived by accepting the answer without raising the objection. (Ib.; *Sheridan v. Smith*, 2 Hill, 535.) The answer should aver that the money is brought into court. (*Hill v. Place*, 7 Rob. 389, 391; S. C. 36 How. 26; 5 Ab., N. S. 18.) But where the tender does not discharge the debt, but only defeats a particular remedy, it is unnecessary to show continued readiness to pay, or bring the money into court. (*Kortright v. Cady*, 21 N. Y. 343; S. C. 5 Ab. 358; 23 Barb. 490.) If a tender of the amount of the demand in suit is made before the actual service of the summons upon the defendant, though after its delivery to the sheriff for service, the defendant may bring the money into court, and plead the tender as a tender before action commenced. (*Knight v. Beach*, 7 Ab., N. S. 241.) In *Simpson v. French*, (25 How. 464,) the plaintiff returned an answer averring tender, and assigned as a reason therefor that it was not accompanied by a notice of payment into court. The court held this the correct practice.

Whenever a tender is made, and insisted on in the pleadings, the creditor is entitled to that amount. (*Logue v. Gillick*, 1 E. D. Smith, 398; *Wood v. Perry*, 1 Barb. 114.) A tender admits the amount tendered to be due, and the creditor is not required to establish it by proof. (Ib.) Yet it seems that where a portion of the creditor's claim so admitted, is contained in a counter-claim set up by the answer, the creditor may not be entitled to receive the amount of such tender. (*Roosevelt v. N. Y. & Harlem R. Co.* 45 Barb. 554; S. C. 30 How. 231.)

Paying money into court does not waive a tender made before action commenced, and which is set up as a defence in the answer. (*Wilder v. Seelye*, 8 Barb. 408.)

In an action for *breach of covenant*, an answer averring that the defendant had, in all things, well and truly kept all and singular the covenants, &c., of said lease, is bad, as tendering an issue of law and not of fact. (*Beach v. Barons*, 13 Barb. 305.)

In an action for the *specific performance* of a contract for the sale of lands, which was by parol, an answer admitting a contract, but different in terms from the one alleged in the complaint, and omitting to set up the statute of frauds, was held sufficient, in *Haight v. Child*, (34 Barb. 186.)

In an action against a *surety*, for the default of his principal, the defendant may, in his answer, demand to be subrogated to the place of the plaintiff. (*Bank of Toronto v. Hunter*, 20 How. Pr. 292; S. C. 4 Bosw. 646.)

Under a pleading which avers the *performance* of a contract, the breach of which is alleged by the opposite party, evidence cannot be given in *excuse* of non-performance. (*Hosley v. Black*, 23 N. Y. 443; S. C. 26 How. 97; *Oakley v. Morton*, 11 N. Y. 25; *Crandall v. Clark*, 7 Barb. 169.) Yet the pleading may be amended so as to allow such evidence. (Ib.) Facts in excuse of non-performance may be pleaded, (*Webb v. James*, 8 Mees. & Wels. 645; 1 Dowl., N. S. 36; *Clark v. Crandall*, 27 Barb. 73,) but cannot be admitted under a plea that the plaintiff was injured by his own wrong. (*White v. Audsall*, 1 Mees. & Wels. 348; S. C. Tyr. & Gr. 785.)

Where the answer sets up a *non-joinder of parties* defendant, alleging that such parties are jointly liable, it must point out the names of the parties who ought to be brought in as co-defendants; (*Wigand v. Sichel*, 3 Keyes, 120; *Fowler v. Kennedy*, 2 Ab. 347;) and should aver that they are living, and within the jurisdiction of the court. (*Wooster v. Chamberlain*, 28 Barb. 602.) An allegation that they "all reside" in a certain place, is a sufficient averment that they are living persons. (*Taylor v. Richards*, 9 Bosw. 679.)

A party alleging *usury* as a defence must distinctly aver every particular necessary to establish the usury charged, and distinctly deny every supposable fact which, if true, would render the transaction lawful. (*Banks v. Van Antwerp*, 5 Ab. 411; S. C. 15 How. Pr. 29. See *Mechanics' Bank of Williamsburgh v. Foster*, 44 Barb. 87; S. C. 29 How. 408; 19 Ab. 47.) The plain and concise statement of facts formerly required has not been relaxed by the Code. (*Manning v. Tyler*, 21 N. Y. 567; *Cutler v. Wright*, 22 id. 472.) The answer must set forth the contract, specifying its terms, and the amount of usurious interest receivable by the lender. (*Gould v. Horner*, 12

of all the facts to be proved, but of the use to be made of them, and of *the nature of the conclusions intended to be drawn from [*138] them. (r) But this is not to be understood as applying to conclusions of law.

A defendant may, by his answer, set up any number of defences, provided they are not inconsistent with each other. (s) (44) But if the

(r) 2 Dan. 240. Wightw. 324.

(s) 2 Anst. 397, 386. McCle. 317. 4 Gwill. 1329.

Barb. 601; S. C. 1 Code Rep., N. S. 356; *Griggs v. Howe*, 31 Barb. 100; S. C. 2 Keyes, 574; 3 id. 166; 31 How. 639.) But in *Dagal v. Simmons*, (23 N. Y. 491,) an answer alleging an agreement to give more than legal interest; that the lender deducted from the amount for which, with the interest, the note was made "about enough," as he said, "to buy a barrel of flour," viz: seven or eight dollars, was held sufficient.

In order to predicate the defence of usury in the transfer of the note sued on to the plaintiff, the answer should show that it did not have a valid existence at the time it was discounted by the plaintiff. (*Burrall v. Bowen*, 21 How. 378.) It is necessary to aver the facts which show that the note had no validity. (Ib.) It is not enough to allege that "said note was usurious in its inception; that the payee knew it was executed fraudulently, and to be sold usuriously above the rate of seven per cent. per annum, to-wit: one and one-half per cent. a month." (*Gould v. Horner*, 12 Barb. 601; S. C. 1 Code Rep., N. S. 356; *Curtis v. Masten*, 11 Paige, 15; approved, 21 N. Y. 567.) Nor to allege that the note was sold at a per cent. of interest exceeding \$7 per annum upon \$100, and that the plaintiff received the note at said usurious rate of interest. (*Morris v. Slatery*, 6 Ab. 75.) When the answer attempts to set up the defence of usury on the ground that the alleged usurious securities were first sold in another state or county, it must state what those laws were at the time of such sale, and the particular facts which rendered the alleged transaction usurious under those laws. (*Curtis v. Masten*, 11 Paige, 15; *Cutler v. Wright*, 22 N. Y. 472.) Corporations, including all joint-stock companies, and all associations which have any of the powers and privileges of a corporation, not allowed to individuals or to partnerships, are prohibited from setting up usury as a defence. (Laws of 1850, ch. 172.) And as a receiver of a corporation, appointed under the statute "concerning proceedings against corporations in equity," is the immediate representative thereof, he cannot, therefore, set up the defence of usury in any stage of the case, not even at the final hearing, though such defence was alleged in the pleading, and was established by proofs before the act was passed. (*Curtis v. Leavitt*, 15 N. Y. 13.)

It is not necessary that a defence should be accompanied by the reason why it should operate as a bar. (*Bridge v. Payson*, 5 Sandf. 210) As there can be but one answer under the Code, it must contain every defence, whether operating in abatement, or as a perpetual bar, upon which the defendant means to rely. (Ib.) Hence, it is no objection to an answer that, after taking issue upon the material allegations in the complaint, it alleges, as a defence, matter in abatement. (Ib.)

If new matter set up in a defence is sham or irrelevant, the plaintiff should move to strike it out. If it does not on its face constitute a defence, he should demur. (*Smith v. Countryman*, 30 N. Y. 655. See *Meyer v. Fiegel*, 7 Rob. 128; S. C. 34 How. 438.) Section 153 of the Code allows the plaintiff, in all cases, to demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defence; and he may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims.

(44) SEVERAL DEFENCES; COUNTER-CLAIMS; EQUITABLE DEFENCES; SEPARATE STATEMENT AND NUMBERING.

The defendant may set forth, by answer, as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished. (Code, § 150.)

Several defences.] Section 150 is a statutory prohibition against duplicity in stating two defences together. (*Boyce v. Brown*, 7 Barb. 80; S. C. 3 How. Pr. 391.) But an answer which denies two allegations, both of which are necessary to make out a

answer either sets up inconsistent defences, or an alternative of inconsistent defences, it is bad. (t) Where a defendant, by his answer, sets

(t) *Jesus College v. Gibbs*, 1 Young & Coll. 145. 6 Price, 504.

good cause of action, does not contain a double defence. (*Otis v. Ross*, 8 How. Pr. 193; S. C. 11 N. Y. Leg. Obs. 343.) This section does not relate to defences of mere denials. (Ib.) Where an answer first denied each and every allegation in the complaint, and then, in separately numbered paragraphs, admitted in terms, many averments of the complaint; on a motion to strike out as false either the general denial or the admission, the general denial was ordered to be struck out unless the defendant should withdraw the admissions. (*Willet v. The Metropolitan Ins. Co.* 2 Bosw. 679.)

The following defences may be pleaded together: Infancy and a general denial (*Mott v. Burnett*, 2 E. D. Smith, 52); a general release and general denial (*Kellogg v. Baker*, 15 Ab. 287); in an action to recover the possession of personal property, a general denial and justification of the taking (*Hackley v. Ogman*, 10 How. Pr. 44. See *Hellebrand v. Booth*, 7 Texas, 499); a denial of knowledge or information sufficient to form a belief as to the title of the plaintiff, and a lien on the property in suit. (*Townsend v. Platt*, 3 Ab. 325.) A denial of the full amount claimed to be due and a tender of that amount, are all but one defence. (*Spencer v. Tooker*, 12 Ab. 353; S. C. 21 How. Pr. 333.)

The Code contains no provisions which allow part of an answer to be struck out on the specific ground of inconsistency with other parts. (*Ostrom v. Bixby*, 9 How. Pr. 57; *Hollenbeck v. Clow*, id. 289; *Smith v. Wells*, 20 How. Pr. 158.) And when the court assumes to compel the defendant to elect between inconsistent defences, it must do so on the ground that from the very nature of the case it is impossible that the defendant can have two such defences. (*Hollenbeck v. Clow*, *supra*.) Defences not formerly inconsistent should not be held inconsistent under the Code. (*Lansing v. Parker*, 9 How. Pr. 288.) The distinction between pleas in bar and abatement is abolished; hence a defence of a defect of parties can be joined with one on the merits. (*Mayhew v. Robinson*, 10 How. Pr. 164; *Sweet v. Tuttle*, id. 40; S. C. 14 N. Y. 465; *Bridge v. Payson*, 5 Sandf. 210; *Gardner v. Clark*, 21 N. Y. 399; *contra*, *Stone v. Miller*, 7 Barb. 368; *King v. Vanderbilt*, 7 How. Pr. 385; *Van Buskirk v. Roberts*, 14 id. 61; S. C. 27 id. 600.) But a plea of tender and general denial cannot be joined. (*Livingston v. Harrison*, 2 E. D. Smith, 197.)

A defendant should never be required to elect between a denial of a material allegation in the complaint, and new matter constituting a defence. (*Hollenbeck v. Clow*, 9 How. Pr. 289.) Nor, as a condition of answering new matter, to make an admission of the facts alleged which shall preclude him from denying them on the trial. (*Ketcham v. Zerega*, 1 E. D. Smith, 560; *Brown v. Ryckman*, 12 How. Pr. 313; *Hollenbeck v. Clow*, *supra*; *Stiles v. Comstock*, 9 How. Pr. 48; *Lansing v. Parker*, id. 288; *Hackley v. Ogman*, 10 id. 44; *Mott v. Burnett*, 2 E. D. Smith, 52; 1 Code Rep., N. S. 225.

Counter-claims.] It has been already seen that under § 149 of the Code, the answer may contain a statement of any new matter constituting a defence or *counter-claim*, in ordinary and concise language, without repetition. We have sufficiently considered the subject of new matter constituting "a defence," in note 43, ante, p. 137. It remains to examine the subject of *counter-claim*.

The counter-claim mentioned in section 149, must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. (Code, § 150.)

A counter-claim has been defined to be where the demand is against the plaintiff, and for which a judgment might be recovered against him. (*Tyler v. Willis*, 33 Barb. 327; *Drake v. Cockcroft*, 4 E. D. Smith, 34; S. C. 1 Ab. Pr. 203; *Askins v. Hearn*, 3 Ab. Pr. 184; *Schnaderbeck v. Worth*, 8 id. 37; *Xenia Branch Bank v. Lee*, 2 Bosw. 694; S. C. 7 Ab. 372; *Barhyte v. Hughes*, 33 Barb. 320; *De Leyer v. Michaels*, 5 Ab. 208; *Gottler v. Babcock*, 7 id. 392; *Mayor, &c. of N. Y. v. Parker & Co. Steamship Co.* 12 id. 300.) In an action arising upon contract, it is any other cause of action arising also upon contract, and existing at the commencement of the action, (Cal. Pr. Act, § 47,) or, in other words, a cause of action in favor of the defendant, upon which he might have sued the plaintiff, and obtained affirmative relief in a sep-

up two inconsistent defences, the result will be to deprive him of the benefit of either, and to entitle the complainant to a decree. (u) Some-

(u) 2 Dan. 248. Sed. vide 3 Anst. 702.

arate action. (*Howard v. Shores*, 20 Cal. 277; *Belleau v. Thompson*, 33 id. 495.) It includes both set-off and recoupment, and is broader and more comprehensive than either. (*Clinton v. Eddy*, 1 Laus. 61; *Vassear v. Livingston*, 13 N. Y. 248; S. C. 4 Duer, 235; *Beardsley v. Stover*, 7 How. Pr. 294.) It is intended to secure to a defendant all the relief which either an action at law, or a bill in equity, or a cross-action would have secured him on the same state of facts. (*Leavenworth v. Packer*, 52 Barb. 132; *Boston Silk &c. Mills v. Eull*, 37 How. 299.) It must be something that resists or modifies the plaintiff's claim. (*National Fire Ins. Co. v. McKay*, 21 N. Y. 195; *Pattison v. Richards*, 22 Barb. 143; *Leavenworth v. Packer*, *supra*.) It must exist against the plaintiff as well as against the defendant. (*Davidson v. Remington*, 12 How. Pr. 310; *Bates v. Rosekrans*, 37 N. Y. 409; S. C. 4 Ab., N. S. 276.) The Code is express that the claim "must be one existing in favor of a defendant and against a plaintiff" (§ 150), and this language is so plain as to leave no room for interpretation; but § 112 qualifies its effect. (*Merrick v. Gordon*, 20 N. Y. 93. See also *Duncan v. Stanton*, 30 Barb. 533; *Schubart v. Hawteau*, 34 id. 447; *Tyler v. Willis*, 33 id. 327; S. C. 12 Ab. 465; *Chaffee v. Cox*, 1 Hilt. 78; *Wilsie v. Northam*, 3 Bosw. 162; *Cummings v. Morris*, 3 id. 560; S. C. 25 N. Y. 625; *Lowell v. Lane*, 33 Barb. 292; *La Farge v. Halsey*, 4 Ab. 397; S. C. 1 Bosw. 171.) A counter-claim to be valid must be a claim against the plaintiff on the record. The right to set up a counter-claim against the assignee of a demand, after the assignment, is not reserved or given in any part of the Code. (*Spencer v. Babcock*, 22 Barb. 326; *Weeks v. Pryor*, 27 id. 79.)

In *Vassear v. Livingston*, (13 N. Y. 243.) DENTO, J., says: "A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant." It may be of a legal or an equitable nature, or both. (*Currie v. Cowles*, 6 Bosw. 452; *Lemon v. Trull*, 13 How. Pr. 248.) A counter-claim must be pleaded as such. (*Beers v. Waterbury*, 8 Bosw. 396.) To designate it as a "further defence" is not sufficient. (*Bates v. Rosekrans*, 37 N. Y. 409; S. C. 4 Ab., N. S. 276; 4 Trans. App. 332.) The answer should state whether it interposes a defence or a counter-claim. (*Clough v. Murray*, 19 Ab. 97.) But no particular form of words is necessary to make a pleading a counter-claim. If the party, in any reasonable language, intimates that he intends to make a personal claim in his own favor against the plaintiff, that is sufficient. (*Bates v. Rosekrans*, 37 N. Y. 412.) The ordinary and most satisfactory form of giving that intimation, however, is by a statement that the pleading is a counter-claim, or by a prayer for relief. (*Ib.* See *Allen v. Haskins*, 5 Duer, 332; *Merritt v. Millard*, 5 Bosw. 645; 10 id. 309.) An answer which contains no words that will justify the plaintiff in supposing that any personal judgment is sought against him, and in preparing for that emergency, is insufficient. (*Bates v. Rosekrans*, *supra*.)

A counter-claim must exist in favor of the defendant and against the plaintiff at the time the action was commenced. (*Rice v. O'Connor*, 10 Ab. 362; *Heidenheimer v. Wilson*, 31 Barb. 636.) An answer alleging that the plaintiff is indebted, &c., and that the sum claimed is now due, &c., is bad on demurrer. (*Ib.*) The allegations of a pleading, in the absence of any averment to the contrary, refer to the time it is verified or served. (*Prindle v. Caruthers*, 15 N. Y. 425.) An answer of set-off must allege not only that the plaintiff was indebted to the defendant, but that his indebtedness still exists. (*Dendy v. Powell*, 3 Mees. & Wels. 442.) Where the defendant sets up as a counter-claim a note made by the plaintiff payable to a third person, and indorsed to the defendant, the answer must aver such indorsement to have been made before the action was commenced. (*Van Valen v. Lapham*, 5 Duer, 683; S. C. 13 How. Pr. 240; *Chambers v. Lewis*, 11 Ab. 210; S. C. 2 Hilt. 591; 10 Ab. 206.) It is not enough for the answer to allege that the note is "a counter-claim and cause of action existing against the plaintiff at and before the commencement of the action." (*Ib.*)

A counter-claim includes only causes of action existing against the plaintiff on the record, and on which, under the old system, an action at law, or a suit in equity, might have been maintained against him. Hence, in an action against the maker of a negotiable note, by an indorsee, facts that admitted to be true, amount only to a

times, indeed, the court will, where from redundant expression or other verbal inaccuracy, a defence has been rendered inconsistent, when it

valid counter-claim against the payee and indorser, cannot be set up, for any purpose, in the answer of the defendant. (*Gleason v. Moen*, 2 Duer, 639.) But if the facts, although pleaded as a counter-claim, constitute a good defence by way of set-off, or recoupment, and the note was transferred under circumstances that rendered it subject to all existing equities between the maker and payee, they may be set up as a bar, in whole or in part, to the plaintiff's recovery. (Ib.) Each defence or counter-claim should be a complete single defence, of itself, without reference to others. (*Spencer v. Babcock*, 22 Barb. 326.) Where a counter-claim set up in an answer was embraced in five different specifications, numbered as five separate defences, neither of which alone, was a defence, it was held that the counter-claim was not properly stated. (Ib.) A defence cannot be made out, in pleading, by connecting two or more separate defences together, any more than it could formerly, by connecting together two or more special pleas, each insufficient of itself. (Ib.)

It has been held that in an action to recover for the price of personal property sold, an answer setting up a breach of warranty, in respect to the quality of such property, and claiming to recoupe to that extent, is a counter-claim. (*Lemon v. Trull*, 13 How. Pr. 243.) Yet in a later case (*Nichols v. Boerum*, 6 Ab. 290), where in an action upon a promissory note, against the maker, the defendant answered, setting up a failure of consideration, in that the goods sold by the plaintiff, in payment for which the note was given, were not of the quality warranted, and claimed damages for the breach of the warranty; it was decided that the defence set up by the answer did not constitute a counter-claim.

In an action upon a contract, the defendant may, under subdivision 2 of section 150 of the Code, set up, as a counter-claim, a judgment obtained by him against the plaintiff, in an action for a tort. (*Taylor v. Root*, 4 Keyes, 335.) A counter-claim may be interposed, although the claim mentioned in the complaint is purely of a common law nature, or for the recovery of money only. (*Hicksville & Cold Spring Branch R. R. Co. v. Long Island R. R. Co.* 48 Barb. 355.) Whether the facts alleged in an answer constitute an admissible counter-claim in the action, can only be determined by demurrer, or by objection on the trial. (*Collins v. Suau*, 7 Rob. 94.) A counter-claim may be pleaded in an action to recover the possession of personal property, where it arises out of the transaction set forth in the complaint. (*Brown v. Buckingham*, 21 How. Pr. 190; S. C. 11 Ab. 357.) The counter-claim authorized by the Code secures to the defendant the full relief which a separate action at law, or a bill in chancery, or a cross action would have secured him, on the same state of facts. (*Leavenworth v. Packer*, 52 Barb. 132; *Boston Silk & Woolen Mills v. Eull*, 37 How. 299; S. C. 6 Ab., N. S. 319; *Gleason v. Moen*, 2 Duer, 639; *Currie v. Cowles*, 6 Bosw. 452.)

The right of the plaintiff to claim, and of the defendant to counter-claim, must be reciprocal. (*Mayor, &c., of New York v. Parker Vein Steamship Co.* 12 Ab. 300; S. C. 21 How. Pr. 239; 8 Bosw. 300.) For where there is no claim on the part of the plaintiff, there cannot, strictly speaking, be a counter-claim. (*Bellinger v. Craigue*, 41 N. Y. 116; *Prouty v. Eaton*, 41 Barb. 409.) A counter-claim must contain not only the substance of what is necessary to sustain an action in favor of the defendant, against the plaintiff, but it must also operate in some way to defeat, in whole or in part, the plaintiff's right of recovery. (*Mattoon v. Baker*, 24 How. 329.) An action for selling pledged stock without notice to the pledgor, is on contract, and admits of a set-off. (*Seaman v. Reeve*, 15 Barb. 454.) So of an action for money lost on a bet. (*McDougall v. Walling*, 48 Barb. 361.) And in an action for rent, damages sustained by the defendant by reason of fraud on the part of the plaintiff, may be the subject of a counter-claim. (*Staples v. Anderson*, 3 Rob. 327.) In an action by a tenant, to annul, on the ground of fraud, an executory agreement for a lease, under which the plaintiff has occupied the premises, the defendant may counter-claim rent accrued by such occupancy. (*Mayor, &c. of New York v. Wood*, 4 Ab., N. S. 332.) The provision of the Code, § 71, against bringing suit upon a judgment, without leave of the court, does not prevent the use of a judgment as a defence, set-off, or counter-claim, without such leave. (*Wells v. Henshaw*, 3 Bosw. 625; *Clark v. Story*, 29 Barb. 295.) The recovery of a judgment on a promissory note does not extinguish the note, as to any of the parties to it who are not parties to the action; and such note is a good counter-claim, as against persons who are not parties to the action in which the judgment was obtained upon the note. (*Kelsey v. Bradbury*, 21 Barb. 531; S. C. 12 N. Y. Leg. Obs. 222.) But a claim merged in a judgment can-

was evidently not intended to be so, either reject the redundant expressions as surplusage, or direct them to be struck out. (*v*) But such in-

(*v*) *Ellis v. Saul*, 1 Anst. 332. 5 Price, 493. 1 id. 237. 1 Young & Coll. 145

not be used as evidence of indebtedness. (*Ives v. Goddard*, 1 Hilt. 434; *Lowell v. Lane*, 33 Barb. 292.) Where the matters in controversy were mutually submitted to arbitration, and bonds were executed and delivered, but, pending the arbitration, one of the parties revoked the submission, and commenced suit on such matters, it was held that the defendant might recover, by way of counter-claim, on the arbitration bond, the expenses of the attempted arbitration. (*Curtis v. Barnes*, 30 Barb. 225.) A demand that has been once set up in an action, as a counter-claim or set-off, and properly excluded, because not admissible as such, in the action, may, notwithstanding that fact, become the subject of a subsequent suit or counter-claim. (*Ives v. Goddard*, 1 Hilt. 434.) But where it has been so set up in a case where it was proper to be allowed, if proved, and the court or jury pass upon and disallow it, it cannot be the subject of another action between the same parties. (*Hatch v. Benton*, 6 Barb. 28.) An answer alleging that the plaintiff agreed to act as the defendant's agent in the purchase of bonds, and to account for all moneys coming to his hands, but that after receiving a specified sum, he would not account, &c., but appropriated the same to his own use, and demanding judgment for a specified sum, may be regarded as a cause of action on contract, and constitutes a proper counter-claim, in an action upon a promissory note. (*Coit v. Stewart*, 12 Ab., N. S. 216.)

It seems, however, there are many causes of action, as the word "action" is defined by the Code, that are no answer to a suit as counter-claims. (*Ives v. Miller*, 19 Barb. 193.) Thus, in an action upon a promissory note, the defendant, upon an answer alleging that the note was given after the dissolution of a partnership which had existed between the partners; that the firm was indebted to him in a sum named, and praying an account of the partnership transactions, cannot have the sum which on an accounting shall be found due to him, allowed as a counter-claim or set-off against the plaintiff. (Ib.) Nor can a joint debt be used as a counter-claim against an individual one. (*Campbell v. Genet*, 2 Hilt. 290. See also *Bates v. Rosekrans*, 37 N. Y. 409; *S. C.* 4 Ab., N. S. 276; *Compton v. Green*, 9 How. Pr. 228; *LaFarge v. Halsey*, 4 Ab. 397; *S. C.* 1 Bosw. 171; *East River Bank v. Rogers*, 7 Bosw. 493; *Newell v. Salmons*, 22 Barb. 647.) A claim of damages for conversion arises in tort, and cannot be made the subject of a counter-claim by waiving the tort. (*Mayor, &c., of New York v. The Parker Vein Steamship Co.* 12 Ab. 300; *S. C.* 21 How. Pr. 289; 8 Bosw. 300.) At least where the counter-claim is alleged in the answer as a tort. (Ib.) So where an officer of the state borrows money without authority, on the credit of the state, the lender requires no claim against the state for repayment, which could be made the subject of a set-off in an action brought by the state against him. (*The People v. Brandreth*, 3 Ab., N. S. 224; *S. C.* 34 How. 171.) Whether, in any case, an individual sued by the state can interpose a set-off or counter-claim? *Quere.* (Ib.)

A claim of the defendant not arising out of the contract or transaction set forth in the complaint, or connected with the subject of the action, but arising upon another wholly independent contract made with the plaintiff's assignor, is not the subject of a counter-claim. (*Mellbaine v. Egerton*, 2 Rob. 422.) The Code does not allow breaches of contracts with other parties to be set up as a defence by way of counter-claim. (Ib.) Where the action is brought by an assignee, the defendant cannot set up, as a counter-claim, a demand existing prior to the assignment, against the assignor, and in favor of himself. (Ib.) (*Dillaye v. Niles*, 4 Ab. 253; *Ferreira v. Depew*, id. 131; *Davidson v. Remington*, 12 How. Pr. 310; *Van De Sande v. Hall*, 13 id. 458; *Spencer v. Babcock*, 22 Barb. 327; *Duncan v. Stanton*, 30 id. 533; *Tyler v. Willis*, 33 id. 327; *S. C.* 12 Ab. 465; *Heidenheimer v. Wilson*, 31 id. 636.) In an action by the assignee of an unnegotiable chose in action, the defendant cannot avail himself of a demand against the plaintiff's assignor, as a set-off, unless he proves that such claim belonged to him before notice of the assignment. (*Solomon v. Holt*, 3 E. D. Smith, 139.) It seems that the demand must be due and payable before such notice. (Ib.) But see *Filkin v. Ferris*, (13 Barb. 582;) *Wells v. Stewart*, (3 id. 40;) *Smith v. Brinckerhoff*, (8 id. 519.) Whether a claim may be set off which did not exist against the assignee at the time of the assignment, but arose afterwards and was acquired by the defendant before notice of the assignment? *Quere.* (*Solomon v. Holt*, *supra.*) In an action brought by the assignee of a claim, the defendant cannot set-off a note of the assignor, unless the same was in existence and held by him

dulgence is confined to cases of verbal inaccuracy only, which would not have embarrassed the complainant in the conduct of his case.

at the time of the assignment. (*Martine v. Willis*, 2 E. D. Smith, 524; *Van Valen v. Lapham*, 5 Duer, 689; S. C. 13 How. Pr. 240.)

In an action by a wife to recover a debt as a part of her separate estate, a debt due from her husband to the defendant cannot be made the subject of a counter-claim. (*Paine v. Hunt*, 40 Barb. 75.)

Matter which shows that the plaintiff never had a cause of action is not a counter-claim; as, for example, usury, (*Pronty v. Eaton*, 11 Barb. 409;) or part payment in an action for work and labor, &c. (*Burke v. Thorne*, 44 id. 363.)

In an action for the foreclosure of a chattel mortgage, subsequent purchasers of the mortgaged property were joined as defendants, and were sought to be charged with a deficiency arising from their having consumed a part of it. *Held*, that such defendants could not avail themselves of a demand in favor of the mortgagor against the mortgagee, as a counter-claim. (*Ib. Beers v. Waterbury*, 8 Bosw. 396.) In an action against several defendants jointly liable, one of them cannot avail himself of a demand on contract, in his favor, individually, against the plaintiff. (*Peabody v. Bloomer*, 3 Ab. 353; S. C. 5 Duer, 678; 6 id. 53; *Mott v. Burnett*, 2 E. D. Smith, 50; *Pinkney v. Keyler*, 4 id. 469.)

When new matter set up in the answer merely tends to show that the plaintiff has no cause of action, or tends to defeat his recovery in whole or in part, such new matter does not constitute a counter-claim. (*Nichols v. Boerum*, 6 Ab. 290.) A reply is only called for where the new matter constitutes a cause of action in favor of the defendant against the plaintiff to the record, independent of the plaintiff's cause of action, and which would entitle the defendant to maintain an action against the plaintiff if the latter had brought no suit against the defendant. (*Ib.*) A demand arising on tort, *e. g.*, conversion, cannot be set up as a counter-claim to one arising on contract. (*Piser v. Stearns*, 1 Hilt. 86.) So in an action to recover the stipulated price for building a steam engine, &c., the defendants cannot recoupe the gains and profits which would have arisen from the use thereof had the same been delivered at the time agreed, and which gains, etc., the defendants have been prevented from receiving by the failure of the plaintiff to perform his contract within the time. (*Griffin v. Colver*, 22 Barb. 587; S. C. 16 N. Y. 489.) But they may recoupe the loss of the use of their machinery. (*Ib.*) In an action brought by the receiver of an insolvent insurance company, the defendant cannot set-off a claim he holds against the company, because the receiver does not represent the company but the creditors thereof, against whom the defendant has no claim. (*Osgood v. Ogden*, 4 Keyes, 70; *Larrence v. Nelson*, 21 N. Y. 158.) But in *Berry v. Brett*, (6 Bosw. 627,) it was held that the maker of a promissory note held by a corporation, and upon its insolvency, passing to the hands of a receiver, has the same right of set-off against such note in the hands of the receiver that he would have were it in the hands of the corporation itself.

In *Pardo v. Osgood*, (2 Ab., N. S. 365; S. C. 5 Rob. 348.) which was an action brought against the receivers of an insolvent insurance company to recover the amount of a loss upon a policy issued by the company before it became insolvent, it was held that the defendants could not set-off the claim of the company against the plaintiff upon his premium note.

In a foreclosure suit, defendants not liable for any deficiency cannot interpose a counter-claim arising out of a transaction not connected with the subject of the action. (*Agate v. King*, 17 Ab. 159.) And a purchaser of land subject to a mortgage cannot, in such an action, counter-claim by way of set-off or recoupment a fraud practiced upon him by a person other than the plaintiff, (*viz*; the mortgagor,) and after the mortgage was given. (*Reed v. Latson*, 15 Barb. 9. See also *National Fire Ins. Co. v. McKay*, 21 N. Y. 191; *Fowler v. Poling*, 2 Barb. 301; S. C. 6 id. 165.)

In an action on contract, for unliquidated damages, the defendant may set up as a counter-claim damages arising on contract, though not out of the same cause of action. (*Lignot v. Redding*, 4 E. D. Smith, 235.) A demand for money lost by betting is one arising on contract, and may be the subject of a counter-claim. (*McDougall v. Walling*, 48 Barb. 364.)

When counter-claims have been set up, but the complaint is dismissed on the trial on the defendant's motion, the plaintiff, after excepting to the dismissal of the complaint, has a right to insist that the defendant's claims shall be passed upon by the jury, so that he, after having made the issue, cannot withdraw it, and bring a new action thereon. (*Miller v. Freeborn*, 4 Rob. 603.) The pendency of an action for

But although the defendant cannot, by his answer, set up in opposition to the complainant's title two inconsistent defences in the alternative, he will not be precluded from denying the complainant's general

damages is no bar to the setting up of the same demand as a counter-claim, in an action afterwards brought against the plaintiff in the first suit by the defendant therein. (*Wilsie v. Northam*, 3 Bosw. 162.) An action for equitable relief is not barred because the plaintiff might have interposed the claim as a defence in a former suit. (*Siemon v. Schureck*, 29 N. Y. 598; S. C. 33 Barb. 9. See *Kerr v. Hays*, 35 N. 331.) Nor is an action on any claim thus barred. (*Lignot v. Redding*, 4 E. D. Smith, 285. See *Barth v. Burt*, 17 Ab. 349; S. C. 43 Barb. 628.)

The sufficiency of a counter-claim may be determined by the inquiry whether or not the substance of facts stated would constitute a cause of action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant? (*Vas sear v. Livingston*, 13 N. Y. 218; S. C. 4 Duer, 285; *McKensie v. Farrell*, 4 Bosw. 193.) When an answer may be construed to contain either of two defences, one of payment and the other a counter-claim, the latter requiring a reply, it will be held to constitute the former defence, on the principle that a pleading, in matter of substance, is to be taken most strongly against the pleader. (*Burke v. Thorne*, 44 Barb. 333.) Where the facts alleged may possibly constitute a counter-claim, but they are such as always constitute a flat bar at law to the plaintiff's right to recover, by showing, if true, that he never had any cause of action, they should be deemed to be set up as a defence merely, unless the answer expressly states that they are set up by way of counter-claim. (*Burrall v. DeGroot*, 5 Duer, 379. See *Bates v. Rosekrans*, 23 How. Pr. 98; S. C. 34 id. 626.) An answer intended as a counter-claim, which avers that all the matters therein set forth are connected with the subject of the plaintiff's action, does not oblige the court to consider them as so connected, but it will determine for itself, from the facts stated, whether or not they are so connected. (*Fellerman v. Dolan*, 7 Ab. 395, n.) So as to an averment that the alleged counter-claim arose out of the contract and transaction mentioned in the complaint. (*Brown v. Buckingham*, 21 How. Pr. 190; S. C. 11 Ab. 337.) For cases in which the cause of action has been held to arise out of, or be connected with, the contract or transaction set forth in the complaint, see *Burns v. Nevins*, (27 Barb. 493;) *Lyman v. Newman*, (29 id. 162;) *Bogardus v. Parker*, (7 How. Pr. 303;) *Askins v. Hearn*, (3 Ab. 184.) If a counter-claim consists of several distinct demands, each one need not be set up separately. The whole constitutes one counter-claim. (*Ramsey v. Smith*, 6 How. Pr. 420.) When a counter-claim contains irrelevant, redundant or indefinite matter, the remedy is by motion, and not by demurrer. (*Mattoon v. Baker*, 24 How. 329; *Currie v. Cowles*, 6 Bosw. 452.) In an action by several plaintiffs, the defendant may show that only one of them is the real party in interest, and then, as to that one, set up a counter-claim. (*Cowles v. Cowles*, 9 How. Pr. 331.) A counter-claim must always be founded upon an existing demand *in presenti*, and not on one that may be claimed *in futuro*. (*Martin v. Kunzmüller*, 37 N. Y. 896; S. C. 10 Bosw. 16; 4 Trans. App. 454.)

A counter-claim may be either for liquidated or unliquidated damages, if they arise upon contract. (*Schubart v. Harteau*, 34 Barb. 447.) Where a claim is prosecuted by a plaintiff against a defendant who has a claim against the plaintiff and others on contract, the defendant may set up the same as a counter-claim, and recover any balance against the plaintiff over the plaintiff's claim, unless the plaintiff replies to the counter-claim that there are other persons liable with him as partners. In such a case the counter-claim is good, so far as to be a set-off against the plaintiff's claim to that amount. (*Ib.*)

Where the plaintiff charges his co-trustees with breaches of trust, and demands that they be removed, the defendants may answer, by way of counter-claim, that the plaintiff has made breaches of said trust, and demand that he be removed and required to account. (*Vose v. Galpen*, 18 Ab. 95.)

In an action proper for a set-off or counter-claim against several defendants, severally liable, or jointly and severally liable, any one of them may avail himself of his set-off, or any number of the defendants to whom the set-off is jointly due may avail themselves of such set-off. (*Parsons v. Nash*, 8 How. Pr. 454; *Briggs v. Briggs*, 20 Barb. 477; S. C. 15 N. Y. 471.) A bank, holding a customer's note which it has discounted, and which has since been protested, may set it off against such customer's deposit. (*Robinson v. Howes*, 20 N. Y. 84.)

title, and also insisting that in case the complainant establishes his title he is precluded from recovering, by some other circumstance which would equally serve to preclude him or any other person in whom the title

A defendant is not bound to set up, by way of counter-claim, any demand he may have against the plaintiff; but may, at his option, bring a cross action for the same (*Peck v. Minot*, 4 Rob. 323; *Lignot v. Redding*, 4 E. D. Smith, 285; *Halsey v. Carter*, 1 Duer, 667; *Welch v. Hazelton*, 14 How. Pr. 97; *Gillespie v. Torrance*, 25 N. Y. 306; S. C. 36; 7 Ab. 462; *Lorraine v. Long*, 6 Cal. 452.) Where the plaintiff has, in a previous pending suit, set up his cause of action as a counter-claim against the same parties, he may, and should be, put to his election, on which he will rely his answer or his cross action. (*Collyer v. Collins*, 17 Ab. 468; *Fabricotti v. Lannitz*, 1 Code Rep., N. S. 121; S. C. 3 Sandf. 743; *Hammond v. Baker*, 1 Code Rep., N. S. 105; S. C. 3 Sandf. 704; *Wiltzie v. Northam*, 3 Bosw. 162. But see *Harris v. Hammond*, 18 How. Pr. 123; *Wright v. Delafield*, 11 id. 465.) But he is not otherwise barred by the pendency of the former action. (*Collyer v. Collins*, 17 Ab. 467.) A counter-claim is not a defence, and therefore cannot be struck out as sham and irrelevant. (*Collins v. Suau*, 7 Rob. 94.)

Section 153 of the Code authorizes the plaintiff, in all cases, to demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defence; and he may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims.

It has been held not to be a ground of demurrer that an answer alleges facts, as a counter-claim, which only constitute a defence. (*Wait v. Ferguson*, 14 Ab. 379.)

If the answer contains a statement of new matter constituting a counter-claim, and the plaintiff fails to reply or demur thereto, within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, &c. (Code, § 154.)

The only papers required for a motion under this section, are, the summons, complaint, answer and notice of motion. The motion clearly relates only to a case where the answer relies on new matter. (*Brown v. Spear*, 5 How. Pr. 146; S. C. 9 N. Y. Leg. Obs. 97; 3 Code Rep. 192.) The omission of a defendant to move for judgment, under this section, will not preclude him from taking advantage, on the trial, of admissions made by the pleadings. (*Bridge v. Payson*, 5 Sandf. 210.) In all cases, judgment can be rendered only by the court when sitting as such. (*Aymar v. Chace*, 12 Barb. 301; S. C. 1 Code Rep., N. S. 330.)

Equitable defences.] It has been already seen that section 150 of the Code allows equitable, as well as legal, defences to be made by answer. The equitable defence which may be set up seems to be of the same character with, and governed by the same rules, as the counter-claim allowed by the same section. (Van Sant. Eq. Pr. 210.) All matters are considered as equitable defences, which, before the Code, would have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. (*Sheehan v. Hamilton*, 3 Ab., N. S. 197; S. C. 2 Keyes, 304; *Dobson v. Pearce*, 12 N. Y. 156.) A defence purely equitable may be interposed to a cause of action strictly legal. (Ib.) Thus, in an action of ejectment, brought by a vendor or his grantee, to recover possession of land held by the defendant under an executory contract of sale, on the ground of default in payment according to the terms of the contract, an answer alleging that the time of payment had been extended by parol; that the defendant had tendered the amount of the same to the plaintiff before the commencement of the suit, &c., was held to be an equitable defence. (*Cythe v. La Fontain*, 51 Barb. 186.) So, in an action upon a promissory note brought by an assignee who was not a bona fide holder, the defendant may allege, in his answer, a verbal agreement accompanying and qualifying the delivery of the note, with a subsequent surrender of property to, and acceptance thereof by the payee, upon which a surrender of the note while in the hands of the payee, would have been compelled in equity, before the Code. (*Van Valkenburgh v. Stupplebeen*, 49 Barb. 99.)

An action for equitable relief is not barred by the neglect of the plaintiff to interpose the claim as a defence in a former suit. (*Siemon v. Schurck*, 29 N. Y. 598; S. C. 33 Barb. 9, sub nom. *Siemon v. Austin*.)

Equitable as well as legal demands may be set up as counter-claims. (*Bartlett v. Judd*, 23 Barb. 262; *Currie v. Cowles*, 6 Bosw. 452. See *Lemon v. Trull*, 13 How.

might be vested. (w) Nor is there any thing inconsistent in such a proceeding; for by denying the complainant's title, the defendant merely puts the complainant to prove his own case, to show his *prima facie*

(w) *Carte v. Ball*, 3 Atk. 496, 499.

Pr. 248.) Thus, a mistake in a contract, and a claim to have it reformed, may be set up as a counter-claim. (*Wemple v. Stewart*, 22 Barb. 154.) But in cases of an equitable nature, substantially the same limitation is applied as was applied in respect to filing cross bills in chancery; which were allowed only as to matters touching the matters in the original bill. (*Burns v. Nevins*, 27 Barb. 493.)

Yet it is not every equitable claim that may be set up as a defence. Thus it is held that in an action for damages for diverting a water course, the defendant cannot set up, either by way of equitable defence or counter-claim, the violation by the plaintiff of an agreement relative to the deepening of the channel, made four years prior to the alleged diversion of the water. (*Pattison v. Richards*, 22 Barb. 143.)

In *California*, the defendant may set up an equitable defence in an action at law; but if he relies on an equitable right of action as a defence, he must plead the same as fully as if he were bringing an action in equity. (*Carpenter v. The City of Oakland*, 30 Cal. 439.)

In that state, equitable defences may be interposed in the action of ejectment. But the defendant, in such cases, becomes an actor with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the court into a legal right in the premises, or such as will stop the plaintiff in the prosecution of the action. (2 *Estee's Pr.* 295; *Lestrade v. Murphy*, 19 Cal. 248; *Weber v. Marshall*, id. 447; *Downer v. Smith*, 24 id. 124; *Blum v. Robertson*, id. 146.) And he must inform the adverse party of the nature of the defence which he will be obliged to meet, with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity. (*Davis v. Davis*, 26 Cal. 38.) When an equitable answer is interposed to an action of ejectment, such answer, being a bill in equity, can only be put in where the parties to the action are such as would be required to a bill in equity seeking the same relief. (*Lestrade v. Barth*, 19 Cal. 660.) The equitable defence is first to be passed upon by the court, (*Ibid.*;) and until that is disposed of, the assertion of the legal remedy is in effect stayed. Upon the determination of the court upon the relief prayed by the answer, the necessity of proceeding with the action at law will depend. When it does proceed, the legal title will control its result. (*Estrada v. Murphy*, 19 Cal. 248; *Martin v. Zellerbach*, cited 2 *Estee's Pr.* 927.) In such suit, the court, sitting in equity, may direct, when proper, an issue to be framed upon the pleadings, and submitted to a jury, if questions of a purely legal character, in relation to the title, arise. (*Curtis v. Sutter*, 15 Cal. 259.) And it is irregular to submit to the jury all the legal and equitable defences together. (*Lestrade v. Barth*, 19 Cal. 660.)

The setting up of an equitable defence to a legal cause of action does not transform such causes of action into an equitable action, for the purpose of making it triable without a jury; but it must still be tried by jury. (*Van Sant. Eq. Pr.* 210.)

Separate statement and numbering of defences.] Each defence should be complete of itself, without reference to others. (*Baldwin v. U. S. Telegraph Co.* 6 Ab., N. S. 405; S. C. 54 Barb. 505; *Swift v. Kingsley*, 24 Barb. 541; *Ayres v. Covill*, 18 id. 260; *Hamer v. McFarlin*, 4 Denio, 511; *Spencer v. Babcock*, 22 Barb. 826; *Bridge v. Payson*, 5 Sandf. 210; *Sinclair v. Fitch*, 3 E. D. Smith, 677; *Loosey v. Orser*, 4 Bosw. 392; *Xenia Branch Bank v. Lee*, 2 id. 694; S. C. 7 Ab. 372; *Benedict v. Seymour*, 6 How. Pr. 298.) And stand by itself as completely as if it stood alone, and was the sole defence; (*Twemlow v. Askey*, 3 Mees. & Wels. 495; *Fisher v. Aide*, id. 486;) unless it in terms adopts or refers to the matter contained in some other answer. (*Baldwin v. U. S. Telegraph Co.*, *supra.*) And each defence should answer the cause of action to which it is addressed, and the whole of it. (*Brown v. Ryckman*, 12 How. Pr. 314; *Kneedler v. Sternberg*, 10 id. 68.) But to mark it as a separate defence no formal commencement or conclusion is necessary. (*Bridge v. Payson*, 5 Sandf. 210.) It should, however, indicate distinctly, by fit and appropriate words, where the defence commences, and where it concludes. (*Lippincott v. Goodwin*, 8 How. Pr. 242.) Commencing each defence, "and the defendant further says," is not sufficient. (1b.) But, to commence, "and for a further defence," is, it seems, sufficient. (*Benedict v. Seymour*, 6 How. Pr. 298.)

Although general and specific denials to the same part of a complaint are not per-

right, which he may have independently of the question whether a defendant may not establish a special case which may be equally valid against another, supposing such other to have the *prima facie* title, as it would be against the complainant in case he proves his *prima facie* title.(x)

Although in stating a defendant's case it is necessary to use such a degree of certainty as will inform the complainant of the nature of the case to be made against him, it is not necessary that the same degree of accuracy should be observed in an answer as is required in a bill.(y)

If the defence to be made to the bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea, or if it is [*139] *doubtful whether a plea will hold, the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar as if it had been pleaded to the bill.(z) Thus, it has been held that a defendant insisting upon the benefit of the statute of limitations by way of answer, may, at the hearing, have the like benefit of the stat-

(x) *Jesus College v. Gibbs*, 1 Young & Coll. 145.
(y) 2 Dan. 244.

(z) *Mitf.* 249.

mitted, yet an answer may contain a specific denial to one part of a complaint, and a general denial to the remainder. (*Blake v. Eldred*, 18 How. Pr. 240.) A defendant may plead one defence to one part of a cause of action, and another defence to other portions of the same cause of action. (*Longworthy v. Knapp*, 4 Ab. 115.)

Defences, separately pleaded, cannot be sustained nor defeated by connecting two or more of them together, any more than formerly special pleas could be by so connecting them. (*Spencer v. Babcock*, 22 Barb. 326; *Ayrault v. Chamberlain*, 33 id. 237; *Ritchie v. Garrison*, 10 Ab. 246, and note; *Landau v. Levy*, 1 Ab. 376; *Sinclair v. Fitch*, 3 E. D. Smith, 677.)

To avoid repetition, it seems that a defendant may aver, once for all, certain facts applicable to each of several defences or counter-claims, and having averred them in one defence, or by way of introduction to all, thereafter refer to them in any other defence, distinctly and intelligibly, so as to include them in it. (*Xenia Branch Bank v. Lee*, 7 Ab. 387; 2 Bosw. 694. See *Ayres v. Covill*, 18 Barb. 261; *Sinclair v. Fitch*, 3 E. D. Smith, 677.) Where, in one defence, the note sued on is described, reference to it in a subsequent defence, in the same answer, as the "said" note, sufficiently points out the note in suit. (*Williams v. Richmond*, 9 How. Pr. 523.) Where there are several separate defences set forth in one answer, an admission made in one is not available against other separate defences in the same answer. (*Swift v. Kingsley*, 24 Barb. 541; *Ayres v. Covill*, 18 id. 261.)

Rule 25 of the supreme court directs that in all cases of more than one distinct cause of action, defence, counter-claim or reply, the same shall not only be separately stated, but plainly numbered.

A failure to comply with this rule subjects every allegation which is not essential to a single cause of action to be stricken out, if objected to, as redundant. (*Benedict v. Seymour*, 6 How. Pr. 293; *Lippencott v. Goodwin*, 8 id. 242, 243, n; *Robinson v. Judd*, 9 id. 378, 332.) When distinct causes of action are not separately stated, or plainly numbered, the remedy is by motion to set aside the pleading. (*Dorman v. Kellam*, 14 How. Pr. 184; S. C. 4 Ab. 202; *Blanchard v. Straight*, 8 How. Pr. 85.) Or by motion to have the pleading made more definite and certain. (*Colton v. Jones*, 7 Rob. 164; *Wood v. Anthony*, 9 How. Pr. 78.) An objection to this defect cannot be raised by demurrer. (*Burr v. Comstock*, 33 N. Y. 21; S. C. 33 How. 332; *Colton v. Jones*, *supra*; *Dorman v. Kellam*, 14 How. Pr. 184; S. C. 4 Ab. 202.) Where a party intends to insist on this objection, he should return the pleading, with his objection specified thereon, or the objection will be deemed waived. (*Corbin v. George*, 2 Ab. 465; *Sawyer v. Schoonmaker*, 8 How. Pr. 198; *Strauss v. Parker*, 9 id. 342.)

nte as if he had pleaded it. (a) So also if a defendant can offer a matter of plea which would be a complete bar, but has no reason to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favorable to his case and which he could not offer together with a plea, he may set forth the whole by way of plea, or of answer to support a plea—as the expending a considerable sum of money in improvements with the knowledge of the complainant—it may be more prudent to set forth the whole by way of answer than to rely on the single defence by way of plea; unless it is material to prevent disclosure of any circumstances attending his title. (b) But it is only at the hearing of the cause that any such benefit can be insisted upon: when the defendant will be entitled to the same advantage of this mode of defence that he would have had if he had adopted the more concise mode of defence by demurring or pleading; and his right to costs in case of his success will not be affected by the course of proceeding which he has adopted, although it has occasioned more expense to the complainant than he would have incurred by simply demurring or pleading to the bill (c)

Schedules.] Where the bill requires the defendant to set forth a general account or to answer as to moneys received, or documents in his possession, it is the general practice to set forth the account or list of the sums or documents in one or more schedules annexed to the answer, which the defendant prays may be taken as part of his answer. It may also be resorted to by the defendant for the purpose of showing the nature of his own case, or of strengthening it, even though there is nothing in the bill itself, or in the interrogatories, which may render a schedule necessary. (d) But a defendant should be careful not to frame his schedule in a manner which may be burthensome and oppressive to the complainant; otherwise it will be deemed impertinent. Thus, where a bill was filed for an account, containing the following interrogatory, “whether any, and what sum of money was due from the house of *A. to the house of B., and how the defendant made [*140] out the same?” and the defendant, by his answer, set forth a long schedule, containing an account of all dealings and transactions between the two houses, Lord Eldon held the answer clearly impertinent, and that the defendant ought merely to have answered that such a sum was due, and that it was due upon the balance of an account. (e) So where a defendant, in his schedule, set out at length a bill of costs in relation to another bill delivered for the same business, it was held impertinent,

(a) Norton v. Turvill, 2 P. Wms. 144.

(b) Mitf. 249.

(c) Wray v. Hutchinson, 2 My. & Keen, 235. Milligan v. Mitchell, 1 My. & Craig, 433.

(d) 2 Dan. 262.

(e) French v. Jacko, 1 Mer. 357, (n.)

although the bill called upon the defendant to set forth how he computed and made out his demand, and all the particulars relating thereto, with interrogatories pointed to the particular items and to a minute comparison of the two bills of costs. (*f*) In like manner it seems to be held that in the case of an executor called upon to account for his disbursements it is not necessary to set out every particular item. (*g*)

Form of answer.] No particular form of words is necessary in an answer. If it be not evasive, and if the substance is preserved, it is sufficient. (*h*) It is headed by a title as follows: "The answer of C. D., the defendant, to the bill of complaint of A. B., complainant." If two or more defendants join in the same answer, it is entitled, "The joint and several answer of C. D. and E. F., defendants," &c.; unless it be the answer of a man and his wife, in which case it is called the joint answer.

Where any defect occurs in the title of an answer, so that it does not appear distinctly whose answer it is, or to what bill it is an answer, it will be a ground for taking it off the file for irregularity. (*i*)

An answer commences by reserving to the defendant all manner of advantage which he might take by exception to the bill, for the purpose of avoiding the conclusion that the defendant, submitting to answer the bill, must thereby be taken to admit every thing which he does not controvert in express terms. The answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow. (*k*) And it may be here remarked, that whatever a complainant is bound to state in his bill, the defendant may be required to admit or deny by his answer to the same. (*l*) And a defendant may set up, in his answer, matter which has occurred between the filing of the bill and the putting in of such answer. (*m*)

This part of the answer is succeeded by a general denial of that combination which is usually charged in the bill. And the answer concludes by a general traverse or denial of all the matters alleged in the bill. (*n*) (45) (46) (47) (48) (49.)

(*f*) *Alsager v. Johnson*, 4 Ves. 217.

(*g*) *Norway v. Rowe*, 1 Mer. 355.

(*h*) *Utica Ins. Co. v. Lynch*, 3 Paige, 210.

(*i*) *Pieters v. Thompson*, Coop. 249. *Griffiths v. Wood*, 11 Ves. 62.

(*k*) *Mitf. Eq. Pl.* 254.

(*l*) *Van Cortland v. Beekman*, 6 Paige, 492.

(*m*) *Lyon v. Brooks*, 2 Edw. 110.

(*n*) *Mitf.* 254.

(45) An answer under the Code need not have a formal conclusion; and no demand of judgment for relief is necessary, except when the defendant asks affirmative relief against the plaintiff. (*Bendit v. Annesley*, 42 Barb. 193; *S. C.* 27 How. 184; *Bridge v. Payson*, 5 Sandf. 210; *Averill v. Taylor*, 5 How. Pr. 476.) Nor is it ne-

An infant being entitled to every exception to a bill, in a suit against

cessary, after inserting in an answer a statement which shows that the plaintiff ought not to recover, to add the reasons why he should not. (Ib.)

(46) REDUNDANCY AND IRRELEVANCY.

If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby. (Code, § 160.)

New matter embraced in an answer as a defence, if sham or irrelevant, is to be stricken out on motion. (*Smith v. Countryman*, 30 N. Y. 655.)

Section 160 of the Code was intended as a substitute for exceptions for impertinence, as allowed under the former chancery practice. A whole pleading was never struck out for impertinence; nor will a whole answer or defence be stricken out for redundancy. The word "pleading" in § 160, is synonymous with "answer" or "defence." (*Blake v. Eldred*, 18 How. Pr. 240.) The rule is, that if an answer, a separate denial or defence, otherwise good, is loaded with unnecessary or redundant matter, a motion should be made to have the matter expunged under section 160. (Ib.) When every part of an answer is objected to as irrelevant and redundant, although by several exceptions, it must be regarded as an exception to the whole pleading, and an application to strike out, under § 160, cannot be entertained, because it would give to the motion the effect of a demurrer, or a decision under section 152. (Ib.) An entire pleading cannot be stricken out under section 160 (*Fasnecht v. Stehn*, 5 Ab., N. S. 338; S. C. 53 Barb. 650; *Collins v. Coghill*, 7 Rob. 81; *Benedict v. Duke*, 6 How. Pr. 352; *Nichols v. Jones*, id. 355; *Hull v. Smith*, 8 id. 149; S. C. 1 Duer, 649; *Howell v. Knickerbocker Life Insurance Co.* 24 How. 475; *Blake v. Eldred*, 18 id. 240.) A party seeking to have matter expunged must specify the parts deemed irrelevant or redundant. The court cannot be required to examine the whole pleading and select the parts to be removed. (*Blake v. Eldred*, 18 How. Pr. 240.)

Although matter which is irrelevant is also redundant, the converse is by no means true. A needless repetition of material averments is redundancy, although the facts averred, so far from being irrelevant, may constitute the whole cause of action. (*Bowman v. Sheldon*, 5 Sandf. 657, 660; S. C. 10 N. Y. Leg. Obs. 339.) By irrelevant or redundant matter, in section 160, is meant matter impertinently or unnecessarily stated in the cause of action in the complaint, or the defence, or a defence in the answer. (*Fasnecht v. Stehn*, 53 Barb. 651; S. C. 5 Ab., N. S. 338.)

Allegations in an answer seeking to set up equities against an indorser, before maturity, against an action by another holder, may be struck out as irrelevant. (*Arrangoiz v. Frazer*, 2 Hilt. 244.) Any matter, in a pleading, is irrelevant, if it have no bearing on the question in dispute, does not affect the subject matter of the controversy, and can in no way assist or affect the decision of the court. (*Fabricotti v. Launitz*, 3 Sandf. 743; S. C. 1 Code Rep., N. S. 121; *Stafford v. Mayor, &c. of Albany*, 6 John. 1; *Van Rensselaer v. Brice*, 4 Paige, 177; *Perrine v. Farr*, 2 Zab. 356; *Lee Bank v. Kitching*, 7 Bosw. 664; S. C. 11 Ab. 435; *Cahill v. Palmer*, 17 id. 196.) Matter cannot be stricken out as irrelevant, however, if it in any way affects the question of damages. (*Root v. Foster*, 9 How. Pr. 37.) If averments in any way tend to establish or assist in establishing a defence, they cannot be stricken out as irrelevant. (*Ingersoll v. Ingersoll*, 1 Code R. 102; *Averill v. Taylor*, 5 How. Pr. 476; S. C. 1 Code Rep., N. S. 213; *Minor v. Terry*, 6 How. Pr. 203.)

The fact that a defence arose after the action was commenced, is not a reason for striking it out for irrelevancy. (*Carpenter v. Bell*, 1 Rob. 711; S. C. 19 Ab. 258.) Motions to strike out of any pleading matter alleged to be irrelevant or redundant, must be noticed before demurring or answering the pleading, and within twenty days from the service thereof. (Rule 28 Supreme Court.) Every objection to pleadings must be made before trial, or notice of trial. A judge, on the trial, cannot strike out any part of the pleadings. (*Smith v. Countryman*, 30 N. Y. 655; *Kellogg v. Baker*, 15 Ab. 287.) A defence cannot be stricken out as irrelevant because it contains matters which may be proved under the general denial. (*Hollenbeck v. Clow*, 9 How. Pr. 289. But see *Benedict v. Seymour*, 6 id. 293, 304.) One of the best tests of the materiality of an allegation is, whether, in any aspect of the case, it can be material; if so, it cannot be stricken out. (*Cahill v. Palmer*, 17 Ab. 196.) If the plaintiff makes distinct and positive, though immaterial, allegations in his complaint, yet in a traversable form, and the defendant takes issue thereon, the plaintiff cannot move to strike out such parts of his adversary's pleadings as relate to the immaterial part of the complaint. (*King v. Utica Ins. Co.* 6 How. Pr. 435; *Doran v. Dinsmore*, 20 id. 503; S. C. 33 Barb. 86; 2 Code Rep. 67.) A defence that is good, standing alone, will not become irrelevant because united to another in the

him, without expressly saving it, the general saving at the commence-

same pleading. Thus, where two defences are set up, the first is not rendered irrelevant by the second. (*Townsend v. Platt*, 3 Ab. 325.) All matters pertaining to pretence and charge, which prevailed so extensively in chancery pleading prior to the Code, will be stricken out on motion, as irrelevant. (*Clark v. Harwood*, 8 How. Pr. 470.) In *Edgerton v. Smith*, (3 Duer, 614,) a complaint against an indorser alleged that the defendant had had due notice of dishonor. The answer, without denying this allegation, denied that the defendant had ever received such notice. *Held*, that this part of the answer must be stricken out as irrelevant, and tending to raise an immaterial issue. In *Townsend v. Platt*, (3 Ab. 325,) an action to recover the possession of personal property, the answer first denied the plaintiff's title, and then set up that the property was deposited by the plaintiff with the defendant to secure the payment of certain moneys that had been loaned to the plaintiff, and that were still due. *Held*, that no part of this answer could be stricken out as containing irrelevant matter.

If an objection which ought to be taken by demurrer—*e. g.* that a defect of parties appears on the face of the complaint—is taken only by an allegation in an answer, it will be deemed to have been waived; and the allegation may be struck out of the answer, on motion, as irrelevant. (*Gassett v. Crocker*, 10 Ab. 133.)

The rule in striking out redundant matter, under section 160, is, that unless it is clear that no evidence can properly be received, under the allegations objected to, it will be retained until the trial. (*Follett v. Jewitt*, 11 N. Y. Leg. Obs. 193.) In *Otis v. Ross*, (8 How. Pr. 195,) SHANKLAND, J., says: "I have doubts whether this section (160) has relation to defences which consist in bare denials of the plaintiff's allegations, and am inclined to think it should be limited in its application to defences of new matter contained in an answer." Mere prolixity does not furnish a sufficient ground for striking out matter objected to. (*Warin v. Strulker*, 11 N. Y. Leg. Obs. 94.) See also, *Lee Bank v. Kitching* (7 Bosw. 664), as to what answers, or defences forming parts of an answer, and what matter, in an answer, or defence forming part thereof, or of a defence therein, may be treated as irrelevant.

Where the notice of motion, under section 160, contains the general prayer for relief, the motion may be made under section 152, which will reach the whole answer, denial or separate defence, although verified. (*Blake v. Eldred*, 13 How. Pr. 240.)

An entire answer, to be irrelevant, must be not applicable or pertinent to the cause of action alleged, and not serving to support any defence, in whole or in part, to the action. (*Littlejohn v. Greely*, 13 Ab. 311.)

The court will not amend a pleading on the ground of redundancy. If it is objectionable on that account, the matter objected to must be clearly pointed out, by the party aggrieved, in his notice of motion, in order that the court may at once see what it is. (*Bryant v. Bryant*, 2 Rob. 612.)

The motion to strike out an irrelevant or sham answer must be made to the court, and not to a judge at chambers (except in the first district). It must be made on the usual notice of eight days, served on the opposite attorney, or upon an order to show cause. (*Van Sant. Eq. Pr.* 242.) If the motion is made on the ground that the answer is irrelevant, the pleadings themselves will show the irrelevancy, and the motion may be brought on upon the pleadings alone, on the service of a notice of motion. (*Id.* 243.) The notice of motion should specify the plaintiff's intention to apply to the court for the relief demanded in the complaint; so that if the answer is struck out, the plaintiff may proceed to judgment, as in other cases, for want of an answer. (*Ibid.*)

(47) INDEFINITENESS OR UNCERTAINTY.

When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain, by amendment. (Code, § 160.)

It is rarely necessary that allegations with regard to *quantity* be made, (or, if made, that they be strictly proved,) unless the subject of the averment be a record, a written instrument, or an express contract. (*Van Rensselaer v. Jones*, 2 Barb. 643.) But if the pleader omits the *christian names* of parties in his papers, (without the averment of an excuse, as that the name is not known to him and he cannot ascertain it,) the pleading will be indefinite and uncertain. (*Applemans v. Blanche*, 14 Mees. & Wels. 154; *Esdaile v. Maclean*, 15 id. 277.) The averment of excuse is not traversable, and it is necessary, in order to show that the pleadings have been made as certain as possible. (*Ib.*) *Prima facie*, a judgment in favor of a party belongs to him, whether it be for costs alone, or for debt, or damages and costs; and it might

ment, the denial of combination, and the concluding traverse or denial, are omitted in an answer by him. (o)

(o) Id. 314.

follow, under a rigid system of pleading, that this *prima facie* conclusion must continue until the pleader should show how, and by what means, a transfer of this right was made, so as to justify a different conclusion. Under such a system the answer would be frivolous, because it did not show facts sufficient to change the *prima facie* conclusion of law. The fault is uncertainty, not insufficiency; and the proper remedy is by motion to have it made more definite and certain. (*Martin v. Kanouse*, 11 How. Pr. 568; S. C. 2 Ab. 327. See also *Eno v. Woodworth*, 4 N. Y. 219, 253.)

If the time when an event happened is material to constitute a cause of action, it should be stated. The fact, without the time, would be insufficient to constitute the cause of action. But, if the time is immaterial, a demurrer will not lie for omitting to state it. The proper remedy is, to apply to the court to have the pleading made more definite and certain. (*People ex rel. Crane v. Ryder*, 12 N. Y. 433, 439; *Burns v. Mattison*, 5 Barb. 378.) The time stated in a pleading is, in many cases, not material. In other words, it may be departed from, and evidence given of the true time on the trial. But allegations in respect to the happening of an event, as are all other allegations, are evidence against the party making them, as his admissions. (*Andrews v. Chadbourne*, 19 Barb. 149.) If there be an averment that there was an offer of payment on the proper day, as required in a contract, and a different day be stated, under a *videlicet*, it is inconsistent with the previous allegation, and should be rejected as surplusage. (*Lester v. Jewett*, 11 N. Y. 460; *Vail v. Lewis*, 4 John. 450; *Gleason v. McVicker*, 7 Cowen, 42; *Lyon v. Clark*, 8 N. Y. 148; *Dubois v. Beaver*, 25 id. 123.) When it is sought to show that a particular allegation of fact, set forth in a pleading, occurred after some other specified event had occurred, it will be, in most cases, sufficient to state that such fact occurred after such other event. (*Martin v. Kanouse*, 2 Ab. 331; *Kellogg v. Baker*, 15 id. 287; *Brown v. Harmon*, 21 Barb. 510; *Beesley v. Dolley*, 6 Bing., N. C. 37.) Averments that "the complainants had not been in a situation to call the guardians, &c., to an account," (*Bertine v. Varian*, 1 Edw. 343;) and that "the plaintiff was not advised of fraud till long after," (*Jackson v. Johnson*, 5 Ala. Rep., N. S. 191;) have been held to be too indefinite to found an action upon.

It is a general rule of pleading that, if the matters alleged are local in their nature, the allegation of place, and proof of it, is material, and of the substance of the issue. (*Vermilya v. Beatty*, 6 Barb. 430; *Steph. Pl. 253*; *Beach v. Bay State Steamboat Co.* 18 How. Pr. 335; S. C. 30 Barb. 433; 10 Ab. 71.) The omission to allege a time and place in describing an act set forth in a pleading, is not an available objection. It cannot be demurred to, nor will it render the pleading void. (*Carpenter v. Brown*, 6 Barb. 150; *Beach v. Bay State Steamboat Co. supra*; *Ryalls v. Bromall*, 1 Exch. Ch. 734; S. C. 5 D. & L. 753.) If the matters in controversy are better known to the opposite party than to the pleader, less definiteness and certainty will be required. (*Steph. Pl. 370*.) An answer which alleges that a judgment, relied on by the plaintiff, was obtained by fraud, is sufficiently definite and certain. (*Culver v. Hollister*, 29 How. 479; S. C. 17 Ab. 405.)

If it is sought to make a pleading more definite and certain, or to strike from it any matter under this section, the remedy is not by demurrer, but by motion. (*Martin v. Kanouse*, 11 How. Pr. 567; S. C. 2 Ab. 327; *Graham v. Cammon*, 5 Duer, 637; S. C. 13 How. Pr. 360; *Harlow v. Hamilton*, 6 id. 475; *Nichols v. Jones*, id. 358; *Bement v. Wisner*, 1 Code Rep., N. S. 143; *Howell v. Frazer*, id. 270; S. C. 6 How. Pr. 221; *Seeley v. Engell*, 13 N. Y. 542; *Bank of British North America v. Suydam*, 6 How. Pr. 379; S. C. 1 Code Rep., N. S. 325; *Fry v. Bennett*, id. 283, 247; S. C. 5 Sandf. 54; 9 N. Y. Leg. Obs. 380; 6 N. Y. 209.)

A motion to strike out such parts of a pleading as may be objectionable on this account, is substituted, under the present practice, for the special demurrer which was in use prior to the Code. (*Kellogg v. Baker*, 15 Ab. 236; *Lee Bank v. Kitching*, 11 id. 435; S. C. 7 Bosw. 664.) Motions of this nature are not to be encouraged, unless it is manifest to the court that it would be to the prejudice of the party answering to suffer the objectionable matter to remain. (*Molony v. Dows*, 15 How. Pr. 261; S. C. 2 Hilt. 247.) Unless the opposite party is clearly aggrieved, or the record is manifestly encumbered, the matters will be allowed to remain. (*Clark v. Harwood*, 8 How. Pr. 470; *White v. Kidd*, 4 id. 68; S. C. 2 Code Rep. 47; *Hynds v. Griswold*, 4 How. Pr. 69; S. C. 2 Code Rep. 47; *Harlow v. Hamilton*, 6 How. Pr.

Engrossing.] The answer having been drawn up by the defendant's

475; *Brockleman v. Brandt*, 10 Ab. 141. But see *Carpenter v. West*, 5 How. Pr. 53; *Isaac v. Felloman*, 3 Ab. 464; *Rensselaer & Wash. Plank Road Co. v. Wetzel*, 6 How. Pr. 68; S. C. 1 Code Rep., N. S. 404; *Stewart v. Boulton*, 6 How. Pr. 71.)

The addition of the words "duly," "lawfully," "sufficiently," will not avail to render a fact more certain that has been imperfectly or insufficiently set forth in a pleading. (*Van Ness v. Hamilton*, 19 John. 349.) A motion to make a pleading more definite and certain by setting forth the contents of a written instrument relied on by the pleader, should not prevail where it appears that the instrument is lost, and the pleading apprises the adverse party of the nature and effect of the instrument. (*Kellogg v. Baker*, 15 Ab. 236.) Although parties are bound to answer positively as to the facts within their own knowledge, they are not presumed to recollect the date or contents of written instruments not in their possession or control. (Ib.)

An order requiring a pleading to be made more definite and certain may be appealed from. (*Arrieta v. Morrissey*, 1 Ab., N. S. 433.) Upon such an appeal the proper method of suspending the operation of the order pending the appeal is by a stay of proceedings, and not by an extension of the time for an amendment. (*Culver v. Hollister*, 17 Ab. 405.) The precise parts of the pleading objected to must be pointed out by the papers upon which the motion is founded. (*Bryant v. Bryant*, 2 Rob. 612; *Benedict v. Dale*, 6 How. Pr. 352; *Blake v. Eldred*, 18 id. 240.)

Motions to correct a pleading, on the ground of its being "so indefinite or uncertain that the precise nature of the charge or defence is not apparent," must be noticed before demurring or answering the pleading, and within twenty days from the service thereof. (Rule 28, Supreme Court; *New York Ice Company v. The North Western Ins. Company*, 12 Ab. 74; S. C. 21 How. Pr. 234.) It must also be made before the cause has been noticed for trial. (*Kellogg v. Baker*, 15 Ab. 287.) After an amended answer has been served, the plaintiff has twenty days in which to move to have it made more definite and certain. (*Walker v. Granite Bank*, 1 Ab., N. S. 406.)

It is not necessary for the moving party to show, affirmatively, that his motion is in time. If the notice is not given within the twenty days, the adverse party must show the fact in the same way that he establishes any matter of defence not apparent in the moving papers. (*Barber v. Bennett*, 4 Sandf. 705. But see *Rogers v. Rathbone*, 6 How. Pr. 67; S. C. 1 Code Rep., N. S. 404, *contra*.)

If an answer is ambiguous, and does not sufficiently disclose the particulars of a transaction relied on as a defence, the plaintiff's remedy is by motion, under section 160 of the Code, to make the answer more definite and certain. He cannot accept the answer, and go to trial upon it, and then interpose the objection, for the first time, that it is not sufficiently descriptive of the particulars relied on. (*Farmers' & Citizens' Bank v. Sherman*, 33 N. Y. 69.)

(48) SHAM DEFENCES.

Sham and irrelevant answers and defences may be stricken out, on motion, and upon such terms as the court may in their discretion impose. (Code, § 152; *Smith v. Countryman*, 30 N. Y. 655.)

This section, it has been held, confers no new power, but is merely declaratory of that power which the court formerly possessed, to prevent the perversion of the forms of presenting defences. (*Manufacturers' Bank of Rochester v. Hitchcock*, 14 How. Pr. 406.) It does not authorize the striking out of the whole or part of an answer, as redundant. (*Fasnacht v. Stehn*, 5 Ab., N. S. 338; S. C. 53 Barb. 650.) Nor part of an entire answer, or separate defence, as sham. The whole must be struck out, or none. (*Winslow v. Ferguson*, 1 Lans. 436. See *Lockwood v. Salhenger*, 18 Ab. 136.) A sham answer is one that is false in fact, (*Littlejohn v. Greeley*, 22 How. 345; *Leach v. Boynton*, 3 Ab. 1; *Brown v. Jamison*, 3 Sandf. 732; *Kreitz v. Frost*, 5 Ab., N. S. 279,) or one which sets up a defence that has not only no foundation in fact, but which, it is manifest, was interposed for the purpose of vexation or delay. (*Hadden v. The New York Silk Manuf. Co.* 1 Daly, 355.) But an answer will not be adjudged to be sham simply upon an affidavit that it is false; for this would be trying the merits of the defence upon affidavits. The court must be satisfied, from an inspection of the pleading, or from circumstances brought to its knowledge, that the object of the pleader was either to delay or annoy the plaintiff; or else to trifle with the court, by getting it to pass upon legal quibbles, or engage in a futile investigation. (Ibid.)

When a motion is made to strike out an answer (whether verified or unverified) setting up new matter, as sham, and the motion is not opposed, or is not met by affid-

solicitor, or counsel, is read to, or by, the defendant or person who is to

vits showing that it was put in in good faith, together with an affidavit of merits, it should be granted. But where the defendant substantially re-affirms the truth of his answer, the answer should stand. (*Farmers' & Mechanics' Bank of Rochester v. Smith*, 15 How. Pr. 329; *People v. McCumber*, 18 N. Y. 315.) Where, on a motion to strike out as sham, a defence good on its face, admissions on the part of the plaintiff are positively sworn to, which are neither contradicted, qualified or questioned, and which tend to sustain the defence, the motion will be denied. (*Hadden v. N. Y. Silk Manuf. Co.*, *supra*.)

Sham answers and defences are such as are good in form, but false in fact, and pleaded in bad faith. Such answers, when consisting of affirmative defences, should be stricken out. (*Gastorfs v. Taafe*, 18 Cal. 335.) So an answer which simply denies a legal conclusion will be struck out as sham. (*Wedderspoon v. Rogers*, 32 id. 569.) Where the complaint, in an action on a promissory note, executed by two defendants, averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, but did not deny that they executed the note, held that it was the denial of an immaterial averment. (*Whitehall v. Thomas*, 9 Cal. 499.) An answer may be struck out as sham, if it is untrue in fact, although the defendant believed the allegations to be true. His ignorance of its untruthfulness is immaterial. (*Roome v. Nicholson*, 8 Ab., N. S. 343; S. C. 1 Sweeney, 525.) To strike out an answer as sham it is not enough that the court should perceive but little prospect of a result favorable to the defendant, or even that the plaintiff's ultimate success appears sure. The answer must be false in the sense of being a mere pretence, set up in bad faith, and without color of fact. (*Kiefer v. Thomas*, 6 Ab., N. S. 242.) Falsity is one of the principal elements of a sham answer. (*Winslow v. Ferguson*, 1 Lans. 436; *Nichols v. Jones*, 6 How. Pr. 355; *Ostrom v. Bizby*, 9 id. 57; *Brown v. Jamison*, 1 Code Rep., N. S. 156; S. C. 3 Sandf. 732; *Walker v. Hewitt*, 11 How. Pr. 395; *Hull v. Smith*, 8 id. 149; S. C. 1 Duer, 649.) And its falsity must appear decisively. (*Morey v. Safe Deposit Co.* 7 Ab., N. S. 199; *DeForest v. Baker*, 1 id. 34; S. C. 1 Rob. 700; *Lockwood v. Salthenger*, 18 Ab. 135.) When its falsity does appear, a defence may be struck out on that ground alone. (*McCarty v. O'Donnell*, 7 Rob. 431; *People v. McCumber*, 15 How. Pr. 186; S. C. 18 N. Y. 325; *Webb v. Van Zandt*, 16 Ab. 190; *Manufacturers' Bank of Rochester v. Hitchcock*, 14 How. Pr. 406.)

An answer may also be sham if it does not set up a defence. (*Kreitz v. Frost*, 5 Ab., N. S. 277.) And although good in form, it may be sham. (*Brown v. Jamison*, 3 Sandf. 732; S. C. 1 Code Rep., N. S. 156.) An unverified false answer is sham. (*Sluck v. Colton*, 2 E. D. Smith, 398.) Where the defendant merely "says that he denies," &c., it is a sham defence; it being no denial, but a negative pregnant. (*Blake v. Eldred*, 13 How. Pr. 240.) But an answer so framed as to be demurrable for defect in substance, but which states facts that would, if properly averred, constitute a good defence, will not be struck out as sham, irrelevant or frivolous. (*Alfred v. Watkins*, 1 Code Rep., N. S. 343; *Struver v. Ocean Ins. Co.* 2 Hilt. 475; S. C. 9 Ab. 23.)

An answer denying a material allegation in the complaint may be stricken out as sham, although duly verified. (*The People v. McCumber*, 18 N. Y. 315; S. C. 27 Barb. 632; 15 How. Pr. 186; *Clafin v. Griffin*, 8 Bosw. 639; *Agawam Bank v. Egerton*, 10 id. 669; *Corbett v. Eno*, 22 How. 8; S. C. 13 Ab. 65; *Elizabethport Manuf. Co. v. Campbell*, 13 Ab. 86. See *Lawrence v. Derby*, 24 How. 134; *Butterfield v. Macomber*, 22 id. 150; *Struver v. Ocean Ins. Co.* 2 Hilt. 475; S. C. 9 Ab. 23; *Lund v. Seamen's Bank for Savings*, 37 Barb. 129; S. C. 23 How. 258; *Conklin v. Vandervoort*, 7 id. 483; *Mier v. Cartledge*, 4 id. 115; S. C. 8 Barb. 75; 2 Code Rep. 125.) But in *Mussina v. Stillman* (13 Ab. 93), the court refused to strike out a general denial as false.

In an action on a note, against the defendants as partners, an answer merely denying that they made the note, admits the partnership; and on proof that one of them made the note in the firm name, it will be struck out as sham. (*Fairchild v. Atushmore*, 8 Bosw. 698.) In *Beebe v. Marvin* (17 Ab. 194), in an action on a foreign judgment, an answer denying knowledge, &c., sufficient to form a belief, as to the recovery of the judgment, was struck out as sham, on proof that the defendant appeared in the original action, and a certified copy of the judgment record was produced. In *Collins v. Swan* (7 Rob. 623), in an action brought by the creditors of a corporation, under the act of 1848, against a stockholder, an answer alleging a contract between third parties, made before the company existed, but for its benefit, was held sham and irrelevant. In *Bailey v. Lane* (21 How. Pr. 475; S. C. 13 Ab. 354), a

swear to it, and if found to be correct in point of fact, it is engrossed

defence of usury was stricken out as sham, it appearing on the motion that the alleged excessive interest was taken by mistake.

In an action for services, or for goods sold, the allegation of the value thereof is material, and an answer embracing a denial of such allegation cannot be stricken out as sham. (*Gregory v. Wright*, 11 Ab. 417.) Where a defendant moved for leave to put in an amended answer, and, on motion, served a copy of the proposed answer, to which no objection was made, it was held that the plaintiff was precluded from moving to strike it out as false, after leave had been given to the defendant to serve such answer. (*Mussina v. Stillman*, 13 Ab. 93.) Where an answer, duly verified, states a sufficient defence, on the defendant's information and belief, it should not be struck out as sham. (*Miller v. Hughes*, 21 How. 442; S. C. 18 Ab. 93, n.)

An answer, the falsity of which is apparent, is sham, irrespective of its form as affirmative or negative, or its scope, as assuming to put in issue the whole or a part of the material allegations in the complaint. (*The People v. McCumber*, 18 N. Y. 315; S. C. 27 Barb. 632; 15 How. Pr. 186.) A motion to strike out one of several defences as sham may be united with an application for judgment, on account of the frivolousness of the other defences, under § 247 of the Code. (Ib.)

A counter-claim is not a defence, and therefore cannot be struck out as sham and irrelevant. (*Collins v. Suau*, 7 Rob. 94.)

The motion to strike out a sham or irrelevant answer must be made to the court and not to a judge at chambers (except in the first district). It must be made on the usual notice of eight days, served on the opposite attorney; or on an order to show cause. (*Van Sant. Eq. Pr. 242.*) If the motion is made on the ground that the answer is sham, it must be supported by affidavits showing clearly and incontrovertibly the fact of the falsity of the answer. (Id. 243.) The notice of motion should state the plaintiff's intention to apply to the court for the relief demanded in the complaint; so that if the answer is struck out, the plaintiff may proceed to judgment as in other cases, for want of an answer. (Ib.) When the affidavits in support of a motion to strike out as sham are on information and belief, they should give the source of such information. (*Corbett v. Eno*, 13 Ab. 65.) It seems that on such a motion the answer must be shown to be false by an affidavit other than the verification of the complaint. (*White v. Bennett*, 7 How. Pr. 59; *Kellogg v. Baker*, 15 Ab. 237.) And that where an absolute averment in the complaint is supported by an affidavit of positive knowledge, and the allegation in the answer is merely of want of information sufficient to form a belief, the defendant is bound, on a motion to strike out the answer as sham, to support it by the oath of a party having positive knowledge. (*People v. McCumber*, 15 How. Pr. 186; S. C. 18 N. Y. 316.)

A motion to strike out a joint answer as sham, may be granted as to some of the defendants, and not as to the others. (*Collins v. Coggill*, 7 Rob. 81.) The denial of a motion to strike out an answer as frivolous, does not prevent a motion to strike it out as sham. (*Krietz v. Frost*, 5 Ab., N. S. 277.) A notice of motion to strike out several defences as sham and frivolous, should properly specify which defences are deemed as sham, and which as frivolous. (*Bailey v. Lane*, 13 Ab. 354; S. C. 21 How. Pr. 475.) But need not, necessarily. (Ib.) It is no objection to a motion to strike out an answer as sham, that the plaintiff has obtained an order for time to reply, (*Miln v. Vose*, 4 Sandf. 660;) or has served notice of trial. (*Beebe v. Marvin*, 17 Ab. 194.) On a motion to strike out a pleading as sham, if the affidavit of the moving party avers facts which avoid the defence set up in the pleading, the defendant need not disprove them when they are such as are not presumed to be within his knowledge. (*Wigman v. Hicks*, 6 Ab. 17.) It seems that after an answer has been struck out as sham or irrelevant, the defendant may have leave to put in a new answer. (*Burrall v. Rowen*, 21 How. Pr. 373.) When an answer has been struck out as sham and irrelevant, the proper method of obtaining judgment is to proceed as though no answer had been put in. (*DeForest v. Baker*, 1 Ab., N. S. 34; S. C. 1 Rob. 700; *Aymar v. Chase*, 1 Code Rep., N. S. 141.)

From an order made at a special term, striking out an answer as sham or irrelevant, an appeal lies to the general term. But there is no mode in which the question arising upon an answer alleged to be sham or irrelevant, can be taken to the court of Appeals. (*Briggs v. Bergen*, 23 N. Y. 162.)

(49) FRIVOLOUS ANSWER.

If an answer be frivolous, the plaintiff, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon; and judgment may be given accordingly. (Code, § 247.)

or copied fairly; for the purpose of being signed, sworn to, filed and

A frivolous answer is one which, if true, does not contain *any defence* to any part of the plaintiff's cause of action. (*Brown v. Jenison*, 3 Sandf. 732; *Leach v. Boynton*, 3 Ab. 1.) Its insufficiency as a defence must be so glaring that the court can determine it upon a bare inspection, without argument. (*Leach v. Boynton*, 3 Ab. 1; *Nichols v. Jones*, 6 How. Pr. 355.) It differs from a *sham* answer in this: one is always assumed to be true, and the other must always be proved to be false. (Ib. *Nichols v. Jones*, 6 How. Pr. 355.) If an answer is palpably insufficient, a motion for judgment on the ground of its frivolousness should be made. (Ib. *Andrews v. Storms*, 5 Sandf. 609.) A frivolous answer is one which denies no material averment in the complaint, and sets up no defence. (*Hull v. Smith*, 8 How. Pr. 149; S. C. 1 Duer, 649.) If a pleading traverses a material allegation in the complaint, or sets up matter which, if true, would constitute a defence to the action, it cannot be called frivolous. (*Davis v. Potter*, 4 How. Pr. 155; S. C. 2 Code Rep. 99; *Temple v. Murray*, 6 How. Pr. 329, 331; *Beach v. Gallup*, 2 Code Rep. 66; *Metropolitan Bank v. Lord*, 4 Duer, 632; S. C. 1 Ab. 185; *Caswell v. Bushnell*, 14 Barb. 393.) An affidavit of verity, under the Code, has no tendency to make that material which was palpably frivolous. (*Reed v. Latson*, 15 Barb. 17.) It is barely possible that a verification will save a pleading from the allegation of falsity; but it can have no such potency as to protect it from the judgment of the court when asked to pronounce it frivolous. (*Thorn v. New York Central Mills*, 10 How. Pr. 19, 25; *Sherman v. N. Y. Central Mills*, 1 Ab. 187.) Vagueness, in pleading, is not frivolousness; it is to be corrected by amendment, and not visited by judgment. (*Kelly v. Barnett*, 16 How. Pr. 137.)

The following are reasons for holding a pleading frivolous: 1. That it is put in merely for purposes of delay; or, 2. That the grounds stated in it are clearly untenable. (*Sixpenny Savings Bank v. Sloan*, 12 How. Pr. 543, 544; S. C. 2 Ab. 414.) A decision in point, adverse to the sufficiency of a pleading, is also held good ground for treating it as frivolous. (*People v. McCumber*, 15 How. Pr. 186, 192; S. C. 27 Barb. 632; 18 N. Y. 315; *Bank of Wilmington v. Burnes*, 4 Ab. 227; *Strong v. Stevens*, 4 Duer, 668; *Langdale v. McLean*, 10 Jurist, 642.) The fact that the defendants deny, in their answer, any knowledge or information sufficient to form a belief, of allegations in the complaint which are presumptively within their personal knowledge, will not render the answer frivolous. (*Leach v. Boynton*, 3 Ab. 1.)

Under the former practice sham and frivolous answers were frequently confounded, but they are carefully distinguished by the Code. The distinction is that which is stated in *Brown v. Jamison*, 3 Sandf. 732. (*Hull v. Smith*, 8 How. Pr. 149.)

Where an action was commenced on a promissory note against both maker and payee, an answer by the payee, that he indorsed the note for the accommodation of his maker, and that that fact was known to the plaintiff when he received it, was held frivolous in *Pettigrew v. Chave*, (2 Hilt. 546.) And in a like action an answer which set up a parol agreement between the parties, with no consideration, and which was inconsistent with the tenor of the note, was held frivolous. (*Elizabethport Manuf. Co. v. Campbell*, 13 Ab. 87. See *Phoenix Bank of N. Y. v. Donnell*, 40 N. Y. 410, 414; *Bailey v. Lane*, 13 Ab. 354.) So an answer alleging that there was a failure to present the note for payment at the time it became due, and at the place where it was made payable, was held frivolous in *Tompkins v. Acer*, (10 How. Pr. 309.) In *Thorn v. N. Y. Central Mills*, (2 Sandf. 262.) the following answer was held frivolous, although verified: "This defendant (a corporation) has no knowledge or information sufficient to form a belief that it did, at the time for that purpose stated in the complaint, by its authorized agent make its promissory note, by the name and for the amount, and as in this respect set forth in said complaint, or that it is indebted to the said plaintiffs upon such a note as is in the said complaint mentioned." So of a denial in the answer that the plaintiff is the lawful owner and holder of the note in suit, and which does not allege the title to be in some third person, or of an allegation that when the note was given it was agreed that it should be renewed upon request. (*Fleury v. Roget*, 5 Sandf. 646.) A denial in an answer that the plaintiff was the lawful owner of the note sued on, or that the defendant was indebted to him thereon, raises no issue of fact whatever, but is merely a denial of a conclusion of law, and it will be stricken out as frivolous. (*Catlin v. Gunter*, 1 Duer, 255; *Pierson v. Cooley*, 1 Code Rep. 91; *McMurray v. Gifford*, 5 How. Pr. 14. See *DeSantes v. Searle*, 11 id. 477; *Ferner v. Williams*, 14 Ab. 215; *Chadwick v. Booth*, 13 id. 249; S. C. 22 How. 23; *Strong v. Stevens*, 4 Duer, 663; *McKnight v. Hunt*, 3 id. 615; *Higgins v. Freeman*, 2 id. 650.) So an answer which sets up as a defence that the note in suit was made as a memorandum note, and was not to be

served. The draft is preserved in the office of the solicitor for the defendant.

negotiated, is frivolous; (*Plant v. Schuyler*, 4 Ab., N. S. 146; S. C. 7 Rob. 271;) or an answer by a married woman that the mortgage in suit was not acknowledged by her on a separate examination; (*Cramer v. Comstock*, 11 How. Pr. 486. See also *Fireman's Ins. Co. of Albany v. Bay*, 4 Barb. 407; S. C. 4 N. Y. 15;) or an answer setting up as a defence a levy under a foreign attachment. (*Hecker v. Mitchell*, 5 Ab. 453; S. C. 6 Duer, 687.) So in an action commenced against the sureties in an undertaking on appeal, it is a frivolous answer to say that the appellant owned real property, and that the execution was returned by the sheriff before the expiration of sixty days, at the respondent's request, and without an attempt to collect the judgment out of such real estate. (*Wood v. Derriekson*, 1 Hilt. 410.) So where the answer, without denying either the delivery of the goods by the plaintiff, or his agency, or the promise to pay the plaintiff, merely averred that such goods belonged to A., and not to the plaintiff, and that A., and not the plaintiff, sold them to the defendant. (*Reilly v. Cook*, 22 How. Pr. 93; S. C. 13 Ab. 255.) In *The Mechanics' Bank of New York v. Webb*, (21 How. Pr. 451; S. C. 14 Ab. 72, n,) an answer alleging that the court had no jurisdiction of the action; that at the time of the commencement thereof the defendant was, and ever since had been, envoy extraordinary, &c., of the United States to Brazil, duly appointed and commissioned as such, and that, by the constitution of the United States, the courts of the United States alone have exclusive cognizance and jurisdiction in all cases affecting ambassadors, public ministers and consuls, was held frivolous.

In respect to matters palpably redundant or frivolous, the court will strike them out, of course. (*Anonymous*, 2 Sandf. 682.) The motive with which an answer is put in, or its truth or falsity, is not the test on a motion for judgment on account of its frivolousness. Does it constitute a good defence on its face? If it does, the motion will be denied. (*Hecker v. Mitchell*, 5 Ab. 453; S. C. 6 Duer, 687.)

In an action against a married woman, seeking to charge her separate estate, an answer averring that she has no separate estate is not frivolous. (*Aitken v. Clark*, 15 Ab. 319.) So where the plaintiff sues in a representative capacity, and the complaint alleges that the defendant is indebted to him, &c., an answer denying any knowledge or information sufficient to form a belief whether the defendant is so indebted to the plaintiff, is not frivolous. (*Morrow v. Gougan*, 3 Ab. 328.) And where the answer avers that the plaintiff discounted the drafts sued on at an usurious rate of interest, contrary to the statute, and then specifies the amount of interest taken, this, though it may or may not be an insufficient averment of a corrupt intent, is not so palpably defective in this respect as to authorize a judgment for the plaintiff for frivolousness. (*The National Bank of the Metropolis v. Orcutt*, 48 Barb. 256.) So an answer denying knowledge or information sufficient to form a belief as to all the material allegations of the complaint, is not frivolous. (*Richter v. McMurray*, 15 Ab. 346.) And in an action on a promissory note, where the complaint alleges that the plaintiff is the owner and holder of such note, an answer denying that the plaintiff is the owner and holder, and alleging that a third person is the real party in interest, and the owner and holder, is not frivolous. (*Tamiser v. Cassard*, 17 Ab. 187. See also *Arrangoiz v. Frazer*, 2 Hilt. 244; *Kamlah v. Salter*, 6 Ab. 226; S. C. 1 Hilt. 558; *Duncan v. Lawrence*, 6 Ab. 304; S. C. 3 Bosw. 103.)

The motion for judgment on a frivolous answer may be made to a judge of the court, at chambers, on a previous notice of five days; or, on like notice, it may be made to the court. The motion is made on the pleadings alone, and the mere service of notice of motion on the opposite attorney is all that is necessary. (*Van Sant. Eq. Pr. 245.*) The notice of motion is, that the plaintiff will apply for judgment on account of the frivolousness of the answer, and will ask for the relief demanded in the complaint; not that the plaintiff will move to strike out the answer (Ib.) If the motion is granted, the plaintiff is entitled to an order for judgment. This order will be in substance the same as is granted at special term, on application for judgment, as for want of an action. If a reference is necessary to take proof of any fact, or to take and state an account before final judgment is entered, the order will provide for such reference. (Ib.; *King v. Stafford*, 5 How. Pr. 30.)

Section 247 of the Code, which authorizes judgment on a frivolous demurrer or answer, does not, in terms, give the court authority to allow the defendant to answer over, on terms, as in case of striking out a defence as sham or irrelevant. But, although the power of the court to allow this to be done has been disputed, (*Sherman v. New York Central Mills*, 1 Ab. 190,) yet it is not uncommon, in practice, to per-

Answers and copies thereof are required, by a rule of the court, to be fairly and legibly written; and if not so written, the register, assistant register and clerks are prohibited from filing such as may be offered to them for that purpose. (p) (50)

Numbering and marking folios.] The rule last referred to also requires that the solicitor drawing the answer shall number and mark each folio (i. e. 100 words) in the margin thereof; and all copies, either for the parties or the court, must be numbered or marked in the margin, so as to conform to the draft and to each other. As we have before remarked, in reference to bills of complaint, it is not necessary to number the *pages*, in addition to numbering the folios, of an answer. As the word "folio" was formerly used to denote a page, it may still be conveniently used for that purpose. (51)

(p) Rule 95.

mit it. (*Fales v. Hicks*, 12 How. Pr. 155; *Van Sant. Eq. Pr. 247, 248.*) The court will usually, on the defendant producing an affidavit of merits, give him an opportunity to come in and defend, in which case the order is not that the defendant may answer within a certain time, but that the plaintiff have judgment, unless the defendant, within a certain time, give notice of a motion for leave to answer, accompanying such notice of motion with a copy of his intended answer. (*Van Sant. Eq. Pr. 243.*) The proposed answer must also be accompanied by a positive affidavit of merits, or, if it be on belief, stating the grounds for such belief. And to enable the defendant to make this motion, the order for judgment should be without prejudice to his right to move the court to put in such answer, and may be upon such terms as to costs, &c., as the court shall think proper to impose. (*ib.*; *Marquisel v. Brigham*, 12 How. Pr. 400; *Fleury v. Roget*, 5 Sandf. 646; *Brown v. Ward*, 3 Duer, 660.)

It seems that a plaintiff cannot move for judgment, under section 247 of the Code, unless the answer, as an entirety, is frivolous. If it contains several defences, some well pleaded and some insufficient, the latter should be demurred to, or a motion made to strike them out. (*Van Valen v. Lapham*, 13 How. Pr. 240.) But if parts only are bad, relief is to be had by a motion of a different character, under sections 152 or 160. Although there may be no objection to combining both of these applications in one motion, yet in that case whether judgment on the whole answer can be granted must depend on whether the parts of the pleading objected to are stricken out, and if they are, whether the whole answer, as it then remains, be frivolous. (*Lockwood v. Salhenger*, 13 Ab. Pr. 136.) In *Hamilton v. Hough*, (13 How. Pr. 14,) where the answer set up four defences, two of which tendered issues with the complaint, and two of which, in hypothetically admitting the averments of the complaint, averred matter in evidence, it was held, first, that the two hypothetical defences must be stricken out; and, second, that as there was enough left in the answer to put the plaintiff to proof of his case, it was unnecessary to allow an amendment.

(50) All the pleadings and other proceedings in a cause, and copies thereof, must be fairly and legibly written; otherwise the clerks are forbidden to file the same, nor will the court hear any motion or application founded thereon. The party on whom the paper is served will be deemed to have waived the objection, however, unless within twenty-four hours after the receipt thereof he returns the papers to the party serving the same, with a statement of the particular objection to its receipt. (Rule 26, Supreme Court.)

When the papers upon which a motion is made are defaced with interlineations and erasures to such an extent that the court ought not to receive or act upon them, the motion will be denied, with costs. (*Henry v. Bow*, 20 How. Pr. 215; *Johnson v. Casey*, 3 Rob. 710; S. C. 23 How. 492.)

(51) Any pleading, &c., exceeding two folios in length, must be distinctly numbered, and marked at each folio in the margin thereof; and all copies, either for the parties or the court, must be numbered or marked in the margin, so as to conform to

Signing.] The answer must be actually signed by the defendant putting it in, although an answer on oath is waived; unless an order has been obtained allowing it to be taken without signature. (q) (52)

(q) *Denison v. Bassford*, 7 Paige, 370. 2 Atk. 289.

the original draft, and to each other. If not so folioed, the clerks shall not file the same, nor will the court hear any motion or application founded thereon. But unless the party on whom the pleading, &c., is served, shall, within twenty-four hours after the receipt thereof, return the same to the party serving it, with a statement of the particular objection to its receipt, he will be deemed to have waived the objection. (Rule 26, Supreme Court.)

It is not necessary to be particular to mark precisely the hundredth word, but the folios should be regular, and at about that interval. (2 Till. & Shear. Pr. 4, 34. See 2 R. S. 275, § 9.)

When either party receives a pleading not properly folioed, he should return it at once, as an unreasonable delay in this respect will be construed as a waiver of the irregularity. (*Strauss v. Parker*, 9 How. Pr. 342; *Chatham Bank v. Van Veghten*, 5 Duer, 628.) He should, at the same time, explicitly state his objections. (*Che-mung Canal Bank v. Judson*, 10 How. Pr. 133; *Broadway Bank v. Danforth*, 7 id. 264.) He should seek his remedy by motion to set aside the pleading, and not by demurrer. (*Dorman v. Kellam*, 14 How. Pr. 184; S. C. 4 Ab. 202; *Bass v. Comstock*, 33 N. Y. 21; S. C. 36 How. 332.) But if the moving papers contain the same defects objected to, the motion will be denied. (*Sawyer v. Schoonmaker*, 8 How. Pr. 193.)

When papers are to be returned because not properly folioed, if there is no attorney's name on them, they are to be returned to the party. If the party is a municipal corporation, having a counsel chosen under a statute, they should be returned to him. (*Taylor v. The Mayor, &c. of New York*, 11 Ab. 255.)

(52) Every pleading in a court of record must be subscribed by the party or his attorney. (Code of New York, § 156; Code of Minnesota, § 77; of Wisconsin, § 62; Rev. St. of 1858, p. 723, § 18; Code of Kansas, § 115; of Kentucky, § 142; of Ohio, § 105; 2 Rev. Stat. of Indiana, p. 43, § 73; 8 Ind. 354; California Pr. Act, § 51.)

Where a party, or his attorney, has omitted to subscribe a pleading, notice of the defect should be given and the pleading promptly returned. (*Ehle v. Haller*, 4 Bosw. 661; S. C. 10 Ab. 287, *sub nom. Ehle v. Huller*.) In *Hubbell v. Livingston*, (1 Code Rep. 63,) it was held to be a sufficient subscription to a pleading where the defendant signed the verification.

A party verifying a pleading must subscribe his name to such pleading, or to the affidavit appended. (*Laimbeer v. Allen*, 2 Sandf. 643; S. C. 2 Code Rep. 15.) But an answer regular in all respects except in the omission of the signature of the party to its verification, should not be disregarded, until notice is given of the defect and an opportunity afforded to correct it. (*Gilmore v. Hempstead*, 4 How. Pr. 153.) An agent with a power of attorney, but who has not been admitted as an attorney, cannot subscribe a pleading for either party. (*Weir v. Slocum*, 3 How. Pr. 397; S. C. 1 Code Rep. 105, *sub nom. Weare v. Slocum*; *Dixey v. Pollock*, 8 Cal. 570.) The attorney or guardian who conducts a suit where an infant is a party, may sign the pleadings. (*Hill v. Thaxter*, 3 How. 407; S. C. 2 Code Rep. 3; *Anable v. Anable*, 24 How. 92.)

Where papers are to be returned, for irregularity, if there is no attorney's name on them, they are to be returned to the party. If the party is a municipal corporation, having a counsel chosen under a statute, they should be returned to him. (*Taylor v. The Mayor, &c. of New York*, 11 Ab. 255.)

In Michigan, it has been held, that an answer must be signed by the defendant, though the oath be waived. (*Kimball v. Ward*, Walk. Ch. 439.) See also Rule 7 of Maine Chancery Practice. But it is not necessary, in all cases, that a defendant should write his own name to an answer. (*Supervisors, &c. v. Mississippi, &c. R. R. Co.* 21 Ill. 338; *Hatch v. Eustaphiere*, 1 Clarke. 63.)

The answer of a corporation should be signed by the principal officer. In case of a bank, a secretary or cashier frequently signs it also. (1 Hoff. Ch. Pr. 239; *Supervisors, &c. v. Mississippi, &c. R. R. Co.* 21 Ill. 333.)

Where an answer is put in by guardian or committee, the signature of such guardian or committee only, is required; and where a guardian is also a defendant and puts in an answer in that character, as well as in that of guardian, he need only affix his signature to the answer once. (1 Dan. Ch. Pr. 3d Am. ed. 745; *Anon.* 2 Jac. & W. 553.)

The court has sometimes, under special circumstances, directed the clerk to receive an answer, though it has not been signed by the defendant; as where the defendant went abroad forgetting or not having had time to put in his answer. (*r*) So where a defendant had gone or was *resident abroad, and had given a general power of attorney to [*142] defend suits, &c. (*s*) So where the signature is waived by the complainant, the answer may be filed without it. (*t*) And the filing of a replication is evidence of such waiver. (*u*) But even where the signature is waived, a special order of the court allowing it to be dispensed with, is necessary. (*v*) To obtain such an order, where the defendant is abroad, the court requires his written consent, or the evidence of a power from the defendant to his attorney, or solicitor, to put in an answer for him. (*w*)

The engrossment is to be signed, and not the draft; the object in requiring the signature being to identify the instrument, to which, when sworn to, the defendant has given the sanction of his oath, in order to render a conviction for perjury more easy. (*x*)

In a case where an answer was put in without the defendant's signature, it was ordered to be taken off the file for irregularity; and as there was no suggestion that there was any defence to the suit, the answer having evidently been put in for mere delay, it was made a part of the order that the complainant's bill be taken as confessed for want of an answer. (*y*)

Signature of counsel.] An answer must be signed by counsel; (*z*) (53) unless taken by commissioners upon a commission issued out of the court, in which case the signature of counsel is not required, (*a*) the commissioners being responsible for the propriety of its contents, as it is supposed to be taken by them from the mouth of the defendant. (*b*) The signature of counsel is usually attached to the engrossed copy which is filed. The consequence of not procuring the signature of counsel will be, that the answer will be taken off the file on application

(*r*) — v. Lake, 6 Ves. 171. — v. Gwillim, id. 235. Dumond v. Magee, 2 John. Ch. Rep. 240.

(*s*) Bayley v. DeWalkiers, 10 Ves. 441. Harding v. Harding, 12 id. 159. Dumond v. Magee, *supra*.

(*t*) Fulton Bank v. Beach, 2 Paige, 307. S. C., 6 Wend. 36.

(*u*) Id. ib.

(*v*) Denison v. Bassford, 7 Paige, 370.

(*x*) Id. ib. 1 Newl. 181.

(*y*) Wall v. Stubbs, 2 Ves. & B. 358. Brown v. Bruce, 2 Mer. 1.

(*a*) Barley v. Pearson, 3 Atk. 440.

(*w*) Codner v. Hersey, 18 Ves. 463. 1 Newl. 181.

(*b*) Denison v. Bassford, *supra*.

(*b*) Mitf. Pl. 255.

(53) *Davis v. Davidson*, (4 McLean, 133;) *Bishop v. Wells*, (cited 5 Beav. 83, n.; 1 Dan. Ch. Pr. 744.) But an omission of the solicitor or counsel to sign an answer, will not affect the validity of the decree. (*Sears v. Hyer*, 1 Paige, 483.)

There seems to be nothing in the Code requiring signature by counsel, except the provision in section 156, as to signature by attorney, which may have been intended to include counsel.

by the complainant. (c) But the court will not allow such a course to be adopted where the interest of the plaintiff may be prejudiced by the proceeding. (d)

Swearing to.] It is a general rule, that answers must be put in upon oath. (54) But by consent of parties, and an order of court first ob-

(c) 2 Ves. & B. 358.

(d) Bull v. Griffin, 2 Anst. 563.

(54) VERIFICATION; WHEN NECESSARY; WHEN IT MAY BE OMITTED; EFFECT OF.

When any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (Code, § 156.)

By section 157 of the Code, the verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony, and no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading. And by the act of 1854, (Laws of 1854, ch. 75, § 1,) it is provided that "the verification of any pleading, in any court of record in this state, may be omitted in all cases where the party called upon to verify would be privileged from testifying, as a witness, to the truth of any matter denied by such pleading."

If a verified complaint has been served, the answer must be verified, except in the cases mentioned in section 157, and in the act of 1854. If the complaint has not been verified, the defendant may, if he choose, verify his answer, and the effect will be that if the answer sets up a counter-claim so as to require a reply, the reply must be verified. (Code, § 156; *Levi v. Jacquays*, 4 How. Pr. 126; *Van Sant. Eq. Pr. 219.*) If the complaint is not verified, or the verification is imperfect, the defendant may answer without verification. (*Quin v. Tilton*, 2 Duer, 645; *Fitch v. Bigelow*, 5 How. Pr. 237.)

The privilege which will excuse a party from testifying as a witness. (and therefore from verifying his answer,) extends to the following cases: 1. Where the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge. If the fact to which he is interrogated forms but one link in the chain of testimony which is to convict him, he is privileged, and need not explain how he might be criminated by the answer. If the prosecution to which he might be exposed is barred by lapse of time, the privilege ceases, and the witness must answer. So if the prosecution be under a foreign law. 2. Where the answer will subject him to a civil action, or pecuniary loss, or charge him with a debt, or would establish facts which would work a forfeiture of a debt he claims to be due him, or subject him to a forfeiture of his estate. (*Voorhies' Code*, 5th ed. 184; *Henry v. Bank of Salina*, 1 N. Y. 86; S. C. 5 Denio, 503; *King of the two Sicilies v. Wilcox*, 15 Jurist, 214; *People v. Gay*, 7 N. Y. 332; *Van Sant. Eq. Pr. 219*.) If the answer merely has a tendency to degrade the character of the defendant, he is not privileged from verifying, except as to collateral matter. (*The People v. Gay*, *supra*.)

Where a verified complaint alleges matter to the truth of which the defendant, if a witness, would be privileged from testifying, an answer denying such allegations may be served without being verified. (*Moloney v. Dows*, 2 Hilt. 247.) If the right to serve an unverified answer be disputed, the question may be brought before the court for determination by a motion for judgment as upon a failure to answer. (Ib.) On such a motion the defendant is not required to show that the direct effect of admitting the truth of the matter charged would be to subject him to punishment or liability. It is sufficient that it might have that tendency. Nor is it essential to be shown how it would or might subject him to prosecution or punishment. (Ib.) The inquiry is excluded when it appears that the object is to procure an admission of the party that he has been guilty of an act punishable as a crime, unless an indictment for it would be barred by the statute of limitations; when, if the matter is material, the party may be required to answer. (Ib.) It seems that if a witness or party has been pardoned for an offence, he is privileged from answering respecting it. So held where the defendant, without leave of the court, served an unverified answer containing a general denial of a sworn complaint, charging the defendant with having committed a series of crimes; the action being to recover damages for the injuries to the plaintiff, which were alleged to be the direct result of the crimes specified. (Ib.)

The criterion by which to determine whether a party may omit to verify his pleading, is to inquire, not whether the pleading may be used against him in a criminal

prosecution, but whether, if called as a witness, to testify to the same matter contained in the pleading, he would be excused from answering. If there is more than one party in the action and one of them would be privileged from testifying, although the others might not be, the answer need not be verified. If any part of the pleading would excuse a party from testifying as a witness, the rule is the same. (*Clapper v. Fitzpatrick*, 3 How. Pr. 314; S. C. 1 Code Rep. 69.) The rule is well settled that a witness is not required to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose himself to any penalty or forfeiture; or where, by answering, a single link will be added to a chain of testimony tending to such a result. Where any such state of facts exists, the pleading need not be verified. (*Henry v. Bank of Salina*, 1 N. Y. 89.)

Where it is evident from the pleading to be answered that an admission of the truth of its allegations might subject the party answering to a prosecution for felony, or might lead to such a result, his general affidavit to that effect should be received in the place of a verification of the answer; and he need not state the particular facts and circumstances in his affidavit, which lead him to that conclusion. (*Springstead v. Robinson*, 8 How. Pr. 41.) If the complaint shows that the defendant would be privileged from testifying as a witness in the matter, the answer may be served without a verification, and need not contain any affidavit stating the grounds for so doing. (*Wheeler v. Dixon*, 14 How. Pr. 151; *Clapper v. Fitzpatrick*, 3 id. 314; S. C. 1 Code Rep. 69.)

Where the action is for a divorce on the ground of adultery, and the complaint is verified, the decisions are conflicting as to whether the answer need be verified. In two cases (*Anable v. Anable*, 24 How. Pr. 92, and *Sweet v. Sweet*, 15 id. 169,) it has been held that the answer ought to be verified; while, in a later case (*Olney v. Olney*, 7 Ab. 350), the contrary was decided. (See 2 R. S. 144, § 33.)

Where there are more defendants than one, each must verify his answer, notwithstanding they have a common defence, whether it be put in unitedly or separately. If only one defendant verify, the answer is good as to him, and cannot be returned. Prompt notice must be given, in that case, by the plaintiff's attorney, that he insists upon an answer verified by all the defendants. He cannot insist on any defect in the verification, after having kept the answer forty days, without notice. (*Hull v. Ball*, 14 How. Pr. 305.)

In *Maryland*, defendants may answer jointly, or jointly and severally, or separately, but in either case each defendant must swear to his answer, or it will be no answer as to him. (*Binney's Case*, 2 Bland. 99.) So in *Maine*. (Rule 7 of Chancery Practice.)

In *New Hampshire*, answers, unless required by the bill to be under oath, need not be sworn to; and they will then be regarded only as pleadings, and no exception for insufficiency can be taken thereto. (Rule 9 of Chancery Practice.)

In *California*, when the complaint is verified, the answer must be verified also, (Cal. Pr. Act, § 51;) except when the admission of the truth of the complaint might subject the party to prosecution for felony or misdemeanor. (Id. § 52.) Whenever the defendant would be excused from testifying as a witness to the truth of any matter denied by the answer, he need not verify the answer. (*Drum v. Whiting*, 9 Cal. 422.) When the state, or the people of the state, or any state officer, is a party, the pleading need not, in any case, be verified. (Laws of Cal. 1863, 4, p. 261.) Nor in actions prosecuted by the attorney-general on behalf of the state. (Pr. Act, § 55.) The defendant may be allowed to verify his answer before, or at the trial. (*Angier v. Masterson*, 6 Cal. 61; *Arrington v. Tupper*, 10 id. 464; *Lattimer v. Ryan*, 20 id. 628.) By verification of the complaint the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes, bills of exchange, &c., by requiring a sworn answer. (*Brooks v. Chilton*, 6 Cal. 640.) An unverified answer to a verified complaint may be stricken out, on motion. (*Drum v. Whiting*, *supra*.) A verified answer, which in any part, contains a distinct denial of a fact material to the plaintiff's recovery, cannot, whatever its defects, be treated as a nullity, so as to entitle the plaintiff to judgment on the pleadings. (*Ghirardelli v. McDermott*, 22 Cal. 539.)

In *Kentucky*, the answer must be verified by the affidavit of the party. (Code § 142.) The answer of a corporation may be verified by any officer or agent on whom the summons has been served, or by its attorney in the action. (Myers' Code, 44.) When a party is mentally incapable of taking an oath, or physically unable to attend before an officer to do so, his agent or attorney may make it. (Id. Amendment to § 611.) A party whose pleading is verified by an agent or attorney may be required to verify in person, upon the opposite party filing an affidavit that he does not believe the party whose agent verifies can truthfully verify the pleading himself.

tained, an answer may be taken without oath. (e) (55) If the parties agree, however, that the answer be put in this manner, it is a matter of course for *the court so to order. (f) The order for this purpose should be applied for by the defendant, on filing the written consent of the complainant's solicitor. (g) If applied for on the part of the defendant, it cannot be obtained without such consent. (h) But when it is applied for by the complainant, the defendant's consent is not required; (i) unless the defendant is abroad, in which case the court requires the consent of counsel, and to be satisfied that the person instructing the counsel to consent is properly authorized by the party. (k)

Waiver of oath.] The filing of a replication by the complainant will be considered as evidence of a waiver of the oath of the defendant. (l)

(e) *Fulton Bank v. Beach*, 2 Paige, 307. 6 Wend. 42, S. C. *Hindle*, 223. 1 Fowl. Ex. Pr. 426.

(f) *Id. ib.*

(g) *Id. ib.*

(h) *Id. ib.* v. Lake, 6 Ves. 171. — v. Gwillim, *id.* 235. 2 John. Ch. Rep. 210.

(i) *Cordner v. Hersey*, 18 Ves. 468.

(k) *Bailey v. De Walkiers*, 10 Ves. 441. 18 *id.* 468.

(l) 2 Paige, 308.

(*Ibid.*) A verification is not required to the answer of a guardian or committee defending for an infant, or person of unsound mind, or imprisoned. Nor in any case where the admission of the truth of the allegations of the petition or answer might subject the party to a criminal or penal prosecution; nor to defences founded on the written obligation, release, or written acknowledgment of the plaintiff, unless the writing on which the action or defence is founded is lost, mutilated or destroyed. (Code, § 143.) Each of several joint defendants may be required to verify their answer upon the plaintiff filing an affidavit that he does not believe that those who have not verified can truthfully do so. (*Id.* Amendment to § 760.)

In *Minnesota*, when any pleading in a case shall be verified, all subsequent pleadings, except demurrers, must be verified also. (Public Statutes of 1859, p. 542, § 73.)

In *Indiana*, the answer, in general, need not be verified by oath; and if so verified has no greater effect than if without oath, except in the following cases: Where a writing purporting to have been executed by one of the parties is the foundation of, or is referred to in, any pleading, it may be read in evidence on the trial, against such party, without proving its execution, unless denied by a pleading under oath, or by affidavit before the commencement of the trial. (2 R. S. 44, § 80; *Laws of 1853*, p. 102; 11 Ind. 409; *Bick Civ. Pr.* 88.)

In *Ohio*, every pleading of fact must be verified by the affidavit of the party, his agent or attorney. (Seney's Code, p. 149, § 103.) A pleading so verified shall not be used against a party in any criminal prosecution, or action or proceeding for a penalty or forfeiture, as proof of a fact admitted or alleged in such pleading; and such verification shall not make other or greater proof necessary on the side of the adverse party. (*Ibid.*) A verification shall not be required to the answer of a guardian defending for an infant, or person of unsound mind, or person imprisoned; nor in any case where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution. (*Id.* p. 150, § 107.) The verification of the pleading does not apply to the amount claimed, except in actions founded on contract, express or implied, for the payment of money only. (*Id.* 152, § 112.)

By the Chancery Code of *Illinois*, every answer is required to be verified by an oath or affirmation. (Statutes of 1858, vol. I, p. 141, § 20.)

In *Kansas*, the provisions of the Code, in respect to verification, are the same as those of Ohio. (Code, §§ 115, 116, 117, 122.)

In *Wisconsin*, when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (Code, § 62.) The verification may be omitted, however, when an admission of the truth of the allegations might subject the parties to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading. (*Id.* § 63.)

(55) *Contee v. Dawson*, 2 Bland. 264; *Billingslea v. Gilbert*, 1 *id.* 567. But the rule is otherwise in *New Jersey*. (*Trumbull v. Gibbons*, Halst. Dig. 172,) and in *Maryland*. (*Nesbitt v. Dellam*, 7 Gill & John. 494.)

The statute also authorizes an express waiver of the oath, by the complainant in his bill, in case he is unwilling to permit the defendant to be a witness in his own favor, by the forms of pleading. Thus it is provided, that when a bill is filed for any purpose other than discovery, the complainant may waive the necessity of the defendant's answer being on oath; and in such a case the answer may be put in without oath and will have no other or greater force as evidence than the bill. (*m*) (56) If the complainant waives an answer on oath, under this section of the statute, he must waive it as to the whole bill. And after the defendant has answered the original bill on oath, the complainant cannot, by an amendment, waive the necessity of an answer on oath. (*n*) If the complainant waives the necessity of an answer on the oath of the defendant, it must be distinctly stated in the bill. (*o*) If an oath is waived, the answer may be excepted to for scandal or impertinence, but not for insufficiency. (*p*) But all material allegations in the bill which are not answered and admitted, may be proved by the complainant in the same manner as if they were distinctly put in issue by the answer; and if no replication is filed, the matters of defence set up in the answer will, on the hearing, be considered as admitted by the complainant, although the answer is not on oath. (*q*)

Where the defendants are not jointly interested in the claim made against them by the bill, the complainant may waive an answer on oath as to some of such defendants only. (*r*)

If a preliminary injunction or *ne exeat* is prayed for in the bill, the *defendant may put in his answer on oath for the purpose of [*144] moving to dissolve the injunction or discharge the *ne exeat*, although

(*m*) 2 R. S. 175, § 49, (orig. § 44.)

(*n*) *Burra v. Looker*, 4 Paige, 227.

(*o*) Rule 40.

(*p*) *Ibid.* 2 Fow. Ex. Pr. 11.

(*q*) *Ibid.*

(*r*) *Bulkley v. Van Wyck*, 5 Paige, 536. *Morse v. Hovey*, 1 Barb. Ch. 404.

(56) In *Massachusetts*, also, it is provided by statute that an answer shall be supported by oath, unless waived by the adverse party. (Gen. Statutes, ch. 113, § 5.) And the rule of court is, that "when a bill shall be filed other than for discovery only, the plaintiff may waive the necessity of the answer being made on the oath of the defendant; and in such cases the answer may be made without oath, and shall have no other or greater force, as evidence, than the bill. No exceptions for insufficiency can be taken to such answer." (Rule 5.)

In *New Hampshire*, answers need not be sworn to unless an oath is required by the bill. If not sworn to, they will be regarded only as pleadings, and no exception for insufficiency can be taken thereto. (Rule 9 of Chancery Practice.)

In *Illinois*, the Chancery Code provides that when a bill shall be filed in the court of chancery, other than for discovery only, the complainant may waive the necessity of the answer being made on the oath of the defendant; and in such cases, the answer may be made without oath, and shall have no other or greater force, as evidence, than the bill. (Statutes of 1858, vol. 1, p. 141, § 21.)

In *Michigan*, when a bill shall be filed in chancery, other than for discovery only, the complainant may waive the answer being made on the oath of the defendant; and in such cases, the answer may be made without oath, and will have no other or greater force, as evidence, than the bill. (Compiled Laws of 1857, vol. 2, p. 1011, § 31.)

an answer on oath is waived by the complainant in his bill. But the answer in such a case will have no other or greater force, as evidence, than the bill. (s) And notwithstanding such waiver of an oath, the answer *must* be sworn to if the defendant wishes to dissolve the injunction on the ground that the equity of the bill is fully denied. (t)

And it may be here observed, that if the complainant waives an answer on oath, he cannot apply to have the answer taken off the file, on the ground that the defendant knows it to be untrue. His proper course, in such a case, is, at the hearing, to ask to have the defendant charged personally with the costs to which he has improperly subjected the complainant by such false pleading. (u)

Form of oath.] The 18th rule of the court specifies the form of the oath to be administered to the defendant on swearing to the answer. (v) (57)

(s) Rule 36.

(u) Denison v. Bassford, 7 Paige, 370

(t) Dougrey v. Topping, 4 Paige, 94.

(v) See also ante, 44.

(57) VERIFICATION; MODE OF.

The verification of a pleading must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters, he believes it to be true. And it must be by the affidavit of the party; or, if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. (Code, § 157.)

The affidavit may also be made by the *agent* or *attorney*, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney: or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. (Ibid.)

When the pleading is verified by *any other person than the party*, he shall set forth in the affidavit his knowledge, or the grounds of his belief, on the subject, and the reasons why it is not made by the party. (Ibid.)

When a *corporation* is a party, the verification may be made by *any officer* thereof. (Ibid.)

When the *state*, or any *officer thereof* in its behalf, is a party, the verification may be made by any person acquainted with the facts. (Ibid.)

1. *Verification by the party.*] When an action is prosecuted or defended for the immediate benefit of one who is not a party on the record, but who is the party in interest, a pleading may be verified by him. (*Taber v. Gardner*, 6 Ab., N. S. 147.) The affiant need not state, in his affidavit, that he has read the pleading before verification. (*Patterson v. Ely*, 19 Cal. 28.) The words "except as to those matters therein stated, upon information and belief, and as to those matters he believes it to be true," may be omitted in a verification, if the affiant states that it is true, to his own knowledge, and he makes the allegations positively, and not upon information and belief. (*Kinkaid v. Kipp*, 1 Duer, 692; S. C. 11 N. Y. Leg. Obs. 313; *Ross v. Longmuir*, 15 Ab. 326; S. C. 24 How. 49.) The present statutory form of affidavit (Code, § 157), does not necessarily imply that it appears in the pleading what matters are stated on personal knowledge, and what on information and belief. (*Truscott v. Dole*, 7 How. Pr. 221.) The statute, as to everything material, must be strictly followed; and parties will not be permitted to evade it by qualifications or reservations of any kind. (Per JOHNSON, J., in *Waggoner v. Brown*, 8 How. Pr. 212.) But in *Railway v. Mather*, (5 Sandf. 655,) DUER, J., says: (OAKLEY, Ch. J. concurring,) "I am far from admitting that the form of verification prescribed in § 157 of the Code must be literally followed."

An affidavit will not be vitiated because the party swears that the facts set forth in

The oath, when administered to a person professing the christian religion, is upon the Holy Evangelists; the witness laying his hand

it "were true," in the past tense; nor will the substitution of the word "facts" for "matters" make it void. (*Whelpley v. Van Epps*, 9 Paige, 332.)

Where a defendant has answered jointly and severally, he cannot swear to a want of sufficient information to form a belief on the part of a co-defendant; but where the defendants answered jointly, "as to each and every allegation of the complaint, that they have no knowledge or information thereof sufficient to form a belief," and the verification was as follows: "A. B. and C. D., being severally duly sworn, say, each for himself, that the foregoing answer is true, of his own knowledge, except so far as the same alleges a want of sufficient information to form a belief on the part of the other defendant; and that, as to such allegations, he believes the same to be true," this was held sufficient. (*Kinkaid v. Kipp*, 1 Duer, 632; S. C. 11 N. Y. Leg. Obs. 313. See *Patterson v. Ely*, 19 Cal. 23.) The proper method, however, in such a case, is for the defendants to say, in the answer: "These defendants severally say, each for himself, that he has no knowledge or information thereof sufficient to form a belief." (Ibid.) It seems that where an affidavit is made by one of several parties united in interest, he need not swear that he is acquainted with the facts. (*Southworth v. Curtis*, 6 How. Pr. 273. *Contra*, *Kelly v. Bowman*, N. Y. Trans. July 18, 1861.) Where husband and wife are jointly liable, a verification by the husband alone is sufficient. (*Hartley v. James*, 18 Ab. 299.)

If the defendants are not united in interest, but put in a joint answer, the answer should be verified by all. Each defendant not united in interest must defend for himself, and the verification, if not made by all, is, in such case, defective. (*Hull v. Ball*, 14 How. Pr. 395; *Reed v. Butler*, 2 Hilt. 533.) Separate answers on the part of separate defendants, not united in interest, must be separately verified by each defendant. (*Alfred v. Watkins*, 1 Code Rep., N. S. 343; *Andrews v. Storms*, 5 Sandf. 699; *Gray v. Kendall*, 5 Bosw. 633; S. C. 10 Ab. 70.) In an action against husband and wife, where her interest is separate and distinct from her husband's, a joint answer must be verified by both. (*Reed v. Butler*, 2 Hilt. 533; *Youngs v. Seely*, 12 How. Pr. 395; *Harlay v. Ritter*, 18 id. 147; S. C. 9 Ab. 400.)

2. *Verification by agent or attorney.*] When a party is not within the county in which the attorney resides, the attorney may verify a pleading notwithstanding the foundation of the action or defense is not a written instrument in the possession of the attorney, and though all the material allegations of the pleading may not be within the personal knowledge of the attorney. When this is the case, the verification must set forth the attorney's knowledge, or his reasons for belief in the matter; and also the reason why the party does not make the affidavit himself. (*Stannard v. Mattice*, 7 How. Pr. 4; *Roscoe v. Maison*, id. 112; *Fitch v. Bigelow*, 5 id. 237; S. C. 3 Code Rep. 216; *Dixwell v. Wordsworth*, 2 Code Rep. 1; *Treadwell v. Fussett*, 10 How. Pr. 184; *Hubbard v. National Protection Ins. Co.* 11 id. 149; *Bank of State of Maine v. Buel*, 14 id. 311; *Boston Locomotive Works v. Wright*, 15 id. 253; *Soutter v. Mather*, 14 Ab. 440; *Contra*, *Smith v. Rosenthal*, 11 How. Pr. 442; *Myers v. Gerrits*, 13 Ab. 106.)

Where the complaint averred a contract with A., as the agent of the defendants, and A. verified the answer, and recited in the affidavit his agency for the defendants in making the contract; it was held that the affidavit was inadmissible as evidence of A.'s agency for the defendants in making the contract. (*Bowen v. Powell*, 1 Laus. 1.) Where the verification is by attorney, the omission to state the reasons why the oath is not made by the party, is error, and the verification will be held insufficient. (*Fitch v. Bigelow*, 5 How. Pr. 237; S. C. 3 Code Rep. 216.)

In every case where the verification is not made by the party, the agent or attorney making it, so far as he speaks of his own knowledge, must state what knowledge he has; and when he speaks of his belief, he must state the grounds of such belief. The Code expressly requires this, and it cannot be dispensed with. (*Treadwell v. Fussett*, 10 How. Pr. 184.) In the verification of an answer by an agent of the defendant, in an action on a written instrument, where the allegations of the answer are stated positively and without qualification, it is not necessary that the agent should state his knowledge, or the grounds of his belief, in the verification. (*Ross v. Longmuir*, 24 How. 49; S. C. 15 Ab. 326; *Gourney v. Wersland*, 3 Duer, 613.) In *Wilkin v. Gilman*, (13 How. Pr. 225), the verification was made by the defendant's attorney, for the reason that the defendant resided in the city of New York, and the attorney in the county of Sullivan; and stated "that deponent's knowledge of all the material allegations in the answer is founded upon communications made to him by the

upon and kissing the gospels; except in cases where a different form of oath, or an affirmation, is authorized to be used by the statute. (x) But (z) 2 R. S. 407, § 103, 4, 5, (orig. § 83, 84, 85.)

defendant, through his son, and that the answer is true to deponent's own knowledge, except," &c. It was held that the verification was sufficient, but that the affiant should have stated his *information* instead of *knowledge*.

An attorney may verify an answer on behalf of his non-resident client, although it appears that the client has a resident agent, and that it is through him that the attorney has received his information. And where it appears that the party has more than one agent, it is not necessary that the agent who knows most about the matter should make the verification. (*Drevert v. Appsert*, 2 Ab. 165.)

The affidavit of the attorney is allowable in two cases: first, when the action or defence is founded on a written instrument in his possession; and second, when all the material allegations of the pleading are within his personal knowledge. He need only bring himself within one of these provisions, and either will satisfy the statute (*Mason v. Brown*, 6 How. Pr. 434.) In such a case it is not necessary to show that the attorney has personal knowledge of all the material allegations of the pleading. (Ib.) But where the defence is not founded upon a written instrument for the payment of money only, in the possession of the attorney, he must have personal knowledge of all the material allegations of the answer, to enable him to verify it. (*Hunt v. Meacham*, 6 How. Pr. 400.) If written instruments for the payment of money only, are in the attorney's hands, that fact, alone, will authorize him to make the verification. (*Treadwell v. Fussett*, 10 How. Pr. 134.) And this is so even though the party be in the same county. (*Wheeler v. Chesley*, 14 Ab. 441.)

3. *Verification by a corporation.*] If a summons is served on an agent of a corporation, who, by reason of his being an officer in it, is authorized to verify the answer, no grounds of belief need be stated in such case, as the agent's verification is that of the corporation. (*Glaubenslee v. Hamburg & American Packet Co.* 9 Ab. 104.)

4. *Effect of omission to verify; or of defective verification.*] If a defendant either omit to verify his answer, or verify it defectively, in a case in which a verified answer is required, the plaintiff may return it and proceed as for want of an answer. (Van Sant. Eq. Pr. 221; *Strout v. Curran*, 7 How. Pr. 35.) It should, however, be returned immediately, and the defect pointed out, and if the defect is not remedied, the plaintiff may move for judgment as in case of default in answering. (Ibid.; Van Sant. Pl. 589.) Where an answer was kept nineteen days and then returned because the verification was defective and the plaintiff moved for judgment, an objection that the answer was not sooner returned and the defect pointed out, was held well taken. (*White v. Cummings*, 1 Code Rep., N. S. 107.) In *Wilkin v. Gilman*, (13 How. Pr. 225,) it is said that the practice of moving to set aside an answer for want of a sufficient verification is not to be commended, although it may not be improper; and that where the verification is so clearly defective that the attorney is willing to take the risk of treating it as insufficient, the better practice is promptly to return the answer with the reasons for not receiving it. And that if it be *doubtful* whether the verification is sufficient or not, it is better, generally, to make no question about it and treat it as sufficient.

If only one of several defendants verifies, the answer is good as to him, and cannot be returned. Prompt notice must be given in that case by the plaintiff's attorney that he insists upon an answer verified by all the defendants. After having kept the answer forty days, without notice, he cannot insist on any defect in the verification. (*Hull v. Bull*, 14 How. Pr. 305.)

Service of a copy of both the answer and verification must be made. If there is any omission, it may be assumed that the original is in all respects like the copy; and if it is defective, the adverse party may move to set aside the pleading. To omit the name of the officer before whom the answer was sworn to, is a fatal defect. (*Graham v. McCoun*, 5 How. Pr. 353; S. C. 1 Code Rep., N. S. 43; *Hughes v. Wood*, 5 Duer, 603, (n.); *Trowbridge v. Didier*, 4 id. 448; *Littlejohn v. Munn*, 3 Paige, 280.) So the omission in a copy of the complaint served, of the name of the officer before whom the verification was made, is a fatal defect, and the defendant may answer without verifying his pleading. (*Hughes v. Wood*, *supra*; *Williams v. Riel*, 5 Duer, 601; S. C. 11 How. Pr. 374.)

Where the complaint is not verified, or the verification is imperfect, the pleading will not be irregular. In either case the defendant may answer without verification

it is to be observed, that persons who do not believe the christian oath must, from necessity, be put to swear according to their own notion of

And the regularity of a subsequent judgment will not be affected by the irregularity of the verification of the complaint. (*Quinn v. Tilton*, 2 Duer, 613; *Fitch v. Bigelow*, 5 How. Pr. 237; S. C. 3 Code Rep. 216; *Mason v. Brown*, 6 id. 431; *Lane v. Morse*, id. 334; *Stannard v. Mattice*, 7 id. 4; *Treadwell v. Fassett*, 10 id. 134; *Wagoner v. Brown*, 8 id. 212; *Strauss v. Parker*, 9 id. 342; *Williams v. Riel*, 11 id. 374; S. C. 5 Duer, 601; *Webb v. Clarke*, 2 Sandf. 649.)

Whether or not a verification is sufficient, should be tested by a motion for judgment for want of an answer. (*Molony v. Dows*, 2 Hilt. 247; S. C. 15 How. Pr. 261.)

In *Minnesota*, the affidavit of the party must state that the pleading is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true. When a pleading is verified, it must be by the affidavit of the party, unless he be absent from the county where the attorney resides, or, from some cause, unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney or other person except the party, he must set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reason why it is not made by the party. But when the action or defence is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney, the affidavit of the agent or attorney to the fact of such possession, shall be a sufficient verification. When a corporation is a party, the verification may be made by any officer thereof; and when the *United States*, or any officer thereof, in its behalf, is a party, the verification may be made by any person acquainted with the facts. (Public Statutes of 1859, p. 542, § 73.)

In *Ohio*, when a corporation is a party, the verification may be made by an officer thereof, its agent or attorney; and when the state, or any officer thereof, in its belief, is a party, the verification may be made by any person acquainted with the facts, the attorney prosecuting or defending the action, the prosecuting attorney, or attorney-general. (Seney's Code, p. 149, § 106.) If there be several persons united in interest and pleading together, the affidavit may be made by any one of them. (Id. 151, § 108.) The affidavit is sufficient if it state that the affiant believes the facts stated in the pleading to be true. (Ib. § 109.) In all cases where the party pleading is a non-resident of the county in which the action is brought, or if he is absent from the county where the pleading is filed, an affidavit made before filing the pleading, stating the substance of the facts afterwards inserted in the pleading, will be a sufficient verification. Such affidavit must be filed with the pleading intended to be verified thereby. (Ib. § 110.)

When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only. 1. When the facts are within the personal knowledge of the agent or attorney: 2. When the plaintiff is an infant, or of unsound mind, or imprisoned: 3. When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney: 4. When the party is not a resident of, or is absent from the county. (Id. p. 152, § 113.)

In *Kansas*, every pleading of fact must be verified by the affidavit of the party, his agent or attorney. A pleading so verified cannot be used against the party, in any criminal prosecution, or action, or proceedings for a penalty or forfeiture, as proof of a fact admitted or alleged in such pleading; and such verification shall not make other or greater proof necessary on the side of the adverse party. (Code, § 116.) A verification is not required to the answer of a guardian defending for an infant, or person of unsound mind, or a person imprisoned; nor in any case where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution. (Ibid. § 117.) If there be several persons united in interest and pleading together, the affidavit may be made by any one of such parties. (Ibid. § 118.) The affidavit will be sufficient if it state that the affiant believes the facts stated in the pleading to be true. (Ibid. § 119.) In all cases where the party pleading is a non-resident of the county in which the action is brought, or if he is absent from the county where the pleading is filed, an affidavit made before filing the pleading, stating the substance of the facts afterwards inserted in the pleading shall be a sufficient verification. Such affidavit must be filed with the pleading. (Id. § 120.) It must be signed by the party making the same; and the officer before

an oath. (y) Therefore, a Jew may be sworn upon the Pentateuch, with his hat on; (z) and a heathen may be sworn in the manner most binding on his conscience. In a case where the defendant to a cross bill was resident in the East Indies, and professed the Gentoo religion, the court directed a commission to the East Indies, and empowered the commissioners to administer the oath in a manner which should seem to them the most solemn; and if they administered any other oath than the christian, to certify to the court what was done by them. (a)

Jurat.] As in the case of a bill, the substance of the oath administered to the defendant on swearing to his answer, must be stated in the jurat, or certificate of the officer; (b) which jurat is attached to the foot [*145] *of the answer, immediately after the signatures of the party and of his solicitor and counsel; and it is customary to write it upon the left side of the paper. (58)

(y) *Omychund v. Barker*, 1 Atk. 21, 46.

(z) *Hinde*, 228. But see *Fryatt v. Lindo*, 3 Edw. Ch. Rep. 211, note a, from which it appears that the Jews consider any form of oath directed by the laws of the country in which they reside, binding on them as much as if taken under the ancient law.

(a) *Ramkissenseat v. Barker*, 1 Atk. 19.

(b) Rule 18. *Hinde's Ch.* 227.

whom the same was taken, must certify that it was sworn to, or affirmed, before him and signed in his presence. The certificate of such officer, signed officially by him, shall be evidence that the affidavit was duly made; that the name of the officer was written by himself, and that he was such officer. (Ib. § 121.) When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only in the cases specified in the Code of Ohio, *supra*. (Ib. § 122.)

In *Wisconsin*, the verification of a pleading must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by the affidavit of the party, or, if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney; or if all material allegations of the pleadings be within the personal knowledge of the agent or attorney. (Code, § 63.) When the pleading is verified by any other person than the party, he must set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. (Ib.) When a *corporation* is a party, the verification may be made by any officer thereof; and when the *state*, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. (Ibid.)

In *Kentucky*, the answer must be verified by the affidavit of the party, to the effect that he believes the statements thereof to be true. (Code, § 142.) It has been held that one object of the above section was to appeal to the conscience, and deprive parties of the benefit of facts to the truth of which they are not willing to swear. (*Gregory v. McFarland*, 1 Duv. 59.)

In *California*, a pleading must be verified by the affidavit of the party, and if he be absent from the county, then by his attorney or other person having a knowledge of the facts. (Cal. Pr. Act, § 55.) The same provision is also to be found in the Codes of *Oregon*, (§ 79,) *Nevada*, (§ 55,) *Idaho*, (§ 55,) and *Arizona*, (§ 55.) See also, *Humphreys v. McCall*, (9 Cal. 59;) *Ely v. Frisbie*, (17 id. 250;) *Patterson v. Ely*, (19 id. 28.)

(58) The *jurat* to a bill is not rendered defective by the want of a statement of the county where the bill was sworn to. (*Barnard v. Darling*, 1 Barb. Ch. 218.) If the officer before whom the bill is sworn to is only authorized to administer the oath within the city where he resides, the legal presumption, in case the county is left

If there are many defendants who are sworn at the same time, one jurat will be sufficient. But if the defendants are sworn at different times, there must be separate jurats for each defendant or each set of defendants swearing. (c)

It has been decided that the jurat to an answer may be in the past tense, stating that at the time specified, the defendant appeared before the officer and swore that the matters stated in the answer *were true*. And that the jurat will also be in compliance with the 18th rule, although it states that the defendant swore the *facts* stated in the answer were true; instead of swearing as to the truth of the *matters* stated therein. (d)

In a case recently before the vice-chancellor of the first circuit the bill prayed that the defendants, being Jews, might swear to their answer according to their creed, and it set forth the oath and ceremony by which it was to be done. The jurat to their answer was in the ordinary form; by which the commissioners certified that the defendants had been "duly sworn." A motion to strike the answer off the file was refused by his honor, there being no proof to show that the defendants were not sworn according to their creed, and the officer having certified that they were *duly* sworn. (e)

Before whom an answer may be sworn.] An answer may be sworn to before any officer authorized to take affidavits to be read in the court of chancery, or before a commissioner specially authorized by the court to take such answer. (f) The officers authorized by law to take affidavits are the following: Judges of courts of record, circuit judges, supreme court commissioners, clerks of courts of record, masters and examiners in chancery, and the register and assistant register of that court, (g) commissioners to take affidavits to be read in the court of chancery, (h) commissioners of deeds in cities, and justices of the peace. (i) (59)

(c) 2 Dan. 278. Hinde, 227. 1 Smith, 246.

(e) Fryatt v. Lindo, 3 Edw. 239.

(g) 2 R. S. 284, §§ 50, 51, (orig. §§ 49, 50.)

(d) Whelpley v. Van Epps, 9 Paige, 332.

(f) Rule 41.

(h) 1 id. 95, § 1, sub. 3. (i) Laws of 1840, p. 187.

blank, is that he has not violated his duty by administering the oath elsewhere. (Ibid.) Doubtless the same rule applies to answers.

It is a universal principle, in all courts, that *jurats* and affidavits, when contrary to practice, are open to objection in any stage of a cause. This does not depend upon any objection which the parties in a particular cause may waive, but upon the general rule that the document itself shall not be brought forward at all, if in any respect objectionable with reference to the rule of the court. (1 Dan. Ch. Pr., 3d Am. ed. 755.) No act, therefore, of the plaintiff can waive an irregularity in the *jurat*. (*Pilkington v. Himsworth*, 1 Young & Col. 612.)

(59) VERIFICATION; BEFORE WHOM TO BE MADE.

Whenever any oath or affidavit is or may be required or authorized by law, in any cause, matter or proceeding, the same may be taken before any judge of any court of record, any justice of the peace in towns, commissioner of deeds, or clerk of an

If the defendant resides out of this state, the answer may be sworn to and authenticated in the manner prescribed by law for taking affidavits, out of this state, to be used in judicial proceedings here. (*k*) The [*146] statute *upon which this rule is founded provides that, in order to entitle the affidavits of any person residing in another state of the union or in any foreign country, to be read or received in judicial proceedings here, it must be authenticated as follows: It must be certified by some judge of a court having a seal, to have been subscribed and taken before him, specifying the time and place where taken. And the genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof. (*l*)

By the second section of the act of 1840, page 235, commissioners appointed by the governor of this state, under that act, are authorized to administer an oath or affirmation, with the same effect as if taken by an officer authorized to administer oaths, resident in this state; provided that wilful false swearing in taking any such oath or affirmation,

(*k*) Rule 41.

(*l*) 2 R. S. 39 § 6, 33, (orig. § 25.)

court of record. (3 R. S. 5th ed. p. 474, § 38.) And when certified by any such officer to have been taken before him, may be read and used in any court of law or equity, of record or not of record, within this state, and before any officer, judicial, executive or administrative, before whom any such cause, matter or proceeding may be pending. And affidavits to be read in the supreme court may be also taken by any commissioner appointed for that purpose by a justice of the said court. (*Ibid.*)

It is never proper for the party to swear to the verification of a pleading before his own attorney; but it seems it may be taken before the law partner, or clerk, of such attorney, or before counsel. (*Gilmore v. Hempstead*, 4 How. Pr. 153; *Anonymous*, id. 290.)

A party verifying a pleading must subscribe his name to such pleading, or to the affidavit appended. (*Laimbeer v. Allen*, 2 Sandf. 648; S. C. 2 Code Rep. 15.) An answer, regular in all respects, except in the omission of the signature of the party to its verification, should not be disregarded, until notice is given of the defect, and an opportunity afforded to correct it. (*Gilmore v. Hempstead*, 4 How. Pr. 153.)

In the equity courts of the *United States*, every defendant may swear to his answer before any justice or judge of any court of the *United States*; or before any commissioner appointed by any circuit court to take testimony or depositions; or before any master in chancery appointed by any circuit court; or before any judge of any court of a state or territory. (59th Equity Rule, U. S. Courts.)

In *Massachusetts*, the defendant's answer may be sworn to before any justice of the peace of the county where the defendant may be; and in such case it shall be sealed up by the justice, and returned, into the clerk's office; and the answer may be then opened by the clerk, for the inspection of the plaintiff. (Rule 12 of the Rules for Practice in Chancery.)

In *Kansas*, the affidavit verifying pleadings may be made before any person before whom a deposition might be taken. (Code, § 121.)

In *Illinois*, by the Chancery Code, the answer must be verified by an oath or affirmation taken before, and certified by, a judge or justice of the peace in the state, or the clerk of the court in which the action is pending, or before a judge or justice of the peace or other person authorized to administer an oath in the state, territory, kingdom or empire, in which the defendant may be, or reside; the official character of such officer, if out of the state of Illinois, being attested by the seal of some court of record within such state, territory, kingdom or empire. (Statutes of 1858, vol. I, p. 141, § 20.)

would, by the laws of the state wherein the same shall be made, be deemed perjury. (60)

(60) VERIFICATION OUT OF THE STATE.

By the act of 1863 (Laws of 1863, ch. 246, § 1), the acknowledgment or proof of any deed, or other written instrument, required to be proven or acknowledged in order to entitle the same to be recorded, or read in evidence, in this state, by any person being in *any foreign country*, may be made before any vice-consul, or commercial agent, of the United States government, resident in any foreign port or country, and when certified by him, under his seal of office, or under the seal of the consulate to which he is attached, to have been made before him by the party executing the same, and that the said party is known or proven to him to be the same person who is described in and who executed the same, shall be as valid and effectual as if taken before one of the justices of the supreme court of the state.

By section 3, every person who, in foreign countries, is authorized by law to take and certify the acknowledgment and proof of deeds, shall also have power to administer oaths and affirmations to be read in evidence, and used, in any of the courts of this state, or otherwise.

In the *City Bank v. Lumley*, (23 How. Pr. 401,) BRADY, J., says: "The jurat to the affidavit is in the usual form. It states that the deposition was subscribed and sworn to in the presence of the vice-consul, and he so certifies under his seal of office. It is sufficient; and so far as the act of 1854. (Laws of 1854, p. 475,) provides to the contrary, it must be regarded as abrogated.

By the act of 1869, (Laws of 1869, ch. 133, § 1,) it is enacted that, in cases where by law, the affidavit of any person residing in *another state*, or in *any territory* of the United States, is required, or may be received in judicial proceedings in this state, the same may be taken and certified by any officer authorized by the laws of such state or territory to administer oaths and take and certify affidavits to be used in the courts of record of such state or territory.

By section 2, to entitle such oath or affidavit to be read in the courts of this state, there shall be stated in the body of such affidavit the name, residence, age and occupation of the deponent or affiant; and there shall be attached to the jurat or affidavit a certificate under the name and official seal of the clerk, register, prothonotary, or other officer authorized by the laws of such other state to make such certificate, of the county in which the officer taking and certifying such an affidavit resided, specifying that such officer was at the time of taking such oath or affidavit, duly authorized to take the same; and that such clerk, &c., is well acquainted with the handwriting of such officer, and verily believes that the signature to such jurat or certificate is genuine, and that such oath or affidavit purports to be taken, in all respects, as required by the laws of such state or territory. And such oath or affidavit, so taken and certified, may be read in any court, or before any officer, in any suit or proceeding in this state, with like force and effect as if such oath or affidavit had been taken before any officer authorized by law to take affidavits in this state, to be read in courts of record.

By chapter 270 of the Laws of 1850, as amended by chapter 788 of the Laws of 1857, the governor is authorized to appoint commissioners in the other states of the union, and in the District of Columbia, who may administer oaths or affirmations; which, when certified by them under their seals and authenticated by the secretary of state, may be read with the same effect as if made by an officer within this state. (3 Rev. St. 5th ed. 47, §§ 8 to 12.)

In order to authenticate affidavits taken in another state pursuant to 2 R. S. 393, § 25, it is not necessary to follow the letter of the statute. A substantial compliance with its provisions is sufficient. (*The Manufacturers' & Mechanics' Bank of Philadelphia v. Cowden*, 3 Hill, 461.)

As to the authentication of affidavits, &c., taken in other states, or foreign countries, the statutory provisions are as follows: In cases where by law the affidavit of any person residing in another state of the United States or in any foreign country, is required or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows: 1. It must be certified by some judge of a court having a seal, to have been subscribed and taken before him, specifying the time and place where taken. 2. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof. (3 Rev. St. 5th ed. p. 677, § 25.)

Endorsing.] The answer having been sworn to, should next be endorsed. This is done by writing upon the back, the title of the cause, specifying before whom the cause is pending, and the following underneath—"Copy answer of def't C. D.," or, "of C. D. one of the defendants—E. F. Def't's Sol'r." Upon the copy to be served, add "For G. H. Esq, Comp'ts Sol'r." (61)

Filing.] If the bill is filed before the chancellor, the answer, if put in while the cause remains before him, must be filed with the register or assistant register. If put in after the cause is referred to a vice-chancellor for his decision, the answer may be filed in the office of the clerk residing in the circuit of such vice-chancellor. (m) (62)

(m) Rule 8.

(61) Every pleading must be indorsed with the title of the cause; if not so indorsed, the clerks are prohibited from filing the same, and the court will not hear any motion or application founded thereon. And unless the party on whom the pleading is served shall within twenty-four hours after receiving it return the same to the party serving it, with a statement of the particular objection to its receipt, he will be deemed to have waived the objection (Rule 26 of Supreme Court.)

On process or papers to be served, the attorney, besides subscribing or indorsing his name, must add thereto his place of business. If he omits or neglects to do so, papers may be served on him at his place of residence, through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence, and paying postage thereon. If neither place of business nor residence can be found, service may be made by filing the papers with the clerk. (Rule 13 of Supreme Court.) This rule applies to a party who prosecutes or defends in person, whether he be an attorney or not. (Ib.)

When papers are to be returned for irregularity, if there is no attorney's name on them, they are to be returned to the party. If the party is a municipal corporation having a counsel chosen under a statute, they are to be returned to him. (*Taylor v. The Mayor, &c., of New York*, 11 Ab. 255.)

(62) FILING ANSWER.

By rule 3 of the supreme court, papers are required to be filed in the county specified in the complaint as the place of trial. In case the place of trial is changed, the papers then on file, and those afterwards filed, must be filed in the clerk's office of the county specified in the order; and all other papers in the cause must be filed in the county so specified.

The clerks of the several counties of the state are clerks of the supreme court, (Const. Art. VI, § 20,) and with them all the pleadings and proceedings in an action are to be filed.

The Code, (§ 416,) requires the summons and the several pleadings in the action, to be filed with the clerk within ten days after the service thereof, respectively; or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

It is said by Mr. Van Santvoord, (Eq. Pr. 115, 222.) that unless such an order be served, the filing of an answer is usually dispensed with in practice.

When a party files a pleading in obedience to an order, under section 416, he is not bound to notify the party obtaining the order. (*Duoy v. Hoyt*, 1 Code Rep., N. S. 286.)

Rule 13 of the supreme court directs that when an attorney shall omit to sign or indorse his name and place of business on papers served, service may be made on him by filing the papers with the clerk, in case neither the residence or place of business of such attorney can be found.

The court will permit a party to file a pleading after the time limited therefor in an order to file it, if the omission be explained: as, if a copy was inadvertently filed instead of the original. (*Short v. May*, 2 Sandf. 639.)

The court may, in its discretion, receive or reject an answer filed after the regular

An answer is not strictly considered such until filed; and it ought not to be filed until the costs of a contempt for not answering are paid. It is said to be frequently the practice, however, to file the answer before

time for answering has passed; and the motion for leave to file it, and the decision, should appear in the record. (*Lindsey v. Stevens*, 5 Dana, 185. See *Scales v. Nichols*, 3 Hayw. 230; *Fisher v. Fisher*, 4 Hen. & Munf. 454.)

The circuit courts of the *United States*, as courts of equity, are to be deemed always open, for the purpose of filing bills, answers and other pleadings, &c. (Equity Rule 1.)

By rule 11 of the supreme court the several clerks of the court are required to keep in their respective offices a book properly indexed, in which shall be entered the title of all civil actions and special proceedings, with proper entries under each, denoting the papers filed, and the orders made, &c., with the dates, &c. A similar rule is in force in *New Jersey*. (Chancery Rule 2, § 8.)

In *Massachusetts*, "if the defendant shall not appear and file his answer within one month after the day of appearance, the plaintiff may enter an order to take his bill for confessed, and the matter thereof shall be decreed accordingly, unless good cause be shown to the contrary." (Rule 9 of the Rules for Practice in Chancery.)

In *California*, when any of the matters enumerated in section 40 of the Practice Act, (N. Y. Code, § 147,) do not appear upon the face of the complaint, the objection may be taken by answer; and the demurrer to the complaint having been disposed of, the defendant may make his answer, filing the original with the clerk of the court in which the action is brought, and serving a copy upon the adverse party, or his attorney, if within the county. (2 *Estee's Prac.* 645; Cal. Pr. Act, § 33; *Oliphant v. Whitney*, 34 Cal. 25.) An answer filed without leave of the court, after the time for answering has expired, but before default has been entered, is not a nullity, but, at most, an irregularity. (*Bowers v. Dickerson*, 18 Cal. 420.) The court, in its discretion, may strike out or retain it, or permit another to be filed; but the plaintiff cannot, as of right, have such answer stricken out. For these purposes the defendant is not in default until his default has been actually entered, in accordance with the statute. (*Ibid.*)

In *Illinois*, by the Chancery Code, the defendant must file his answer at the time to which the process or summons shall be returnable, or the bill may be taken as confessed. (Statutes of 1853, vol. 1, p. 140, § 18.)

In *Wisconsin*, every pleading must be filed with the clerk of the court within the time fixed by law for serving the same—i. e., within twenty days after service of a copy of the complaint. (Code, § 62; Rev. Stat. of 1858, p. 723, § 13.)

In *Kansas*, the answer must be filed within twenty days after the day on which the summons is returnable. (Code, § 113.)

In *Michigan*, answers must be filed in the office of the register with whom the bill or petition was filed, unless otherwise directed by rule or order of the court, and within such time and under such regulations as shall be by general rule directed. (Compiled Laws of 1857, vol. 2, p. 1013, § 45.)

In *Kentucky*, in equitable cases, the answer must be filed on the third day of the term: 1. Where the summons has been served twenty days before the commencement of the term, in the county in which the action is brought, or an adjoining county. 2. Where it has been served thirty days elsewhere in the state, or sixty days out of the state; or, 3. Where the defendant has been constructively summoned thirty days. (Code, § 137.) Where the service of the summons was before the commencement of the term, but not the length of time mentioned in section 137, the answer must be filed in thirty days after the service. (*Id.* § 138.) Where an answer is filed in vacation, the party answering may file a demurrer with the answer. (*Id.* § 141, as amended in 1866.)

In *Ohio*, the answer of the defendant must be filed on or before the third Saturday after the return day of the summons or service by publication. (Sency's Code, § 103.)

In *Indiana*, the answer must be filed with the clerk. It is usually filed in open court, the attention of the court being called thereto, so that the proper minute of the filing may be made in the judge's docket. (*Bicknell's Civil Prac.* 90.)

In *Missouri*, the defendant has six days to answer, but he may file his answer at any time within that period, and, if filed within that time, the plaintiff must reply within two days, unless the court, for good cause, extend the time. (*Beach v. Curle*, 15 Mo. 105.)

the costs of a contempt have been paid; and in such case the complainant should be careful not to take an office copy of the answer, or do any other act which may be construed into an acceptance of the answer; for if he does, he will waive the contempt. (*n*)

Serving.] The answer having been filed, a fair copy must be served upon the complainant's solicitor endorsed as above mentioned.

Time for answering.] (63) The defendant's answer must be put in [*147] within *forty days after service of a copy of the bill and notice of the order to answer. (*o*) (64) But if the defendant is unable to pre-
(*n*) 2 Dan. 295. 1 id. 664. 11 Ves. 202. 6 Sim. 619. (*o*) Rule 24.

(63) SERVING ANSWER.

A copy of the answer must be served on the plaintiff's attorney within twenty days, (or forty if the complaint has been served by mail,) after service of the complaint. If the last day be Sunday, the defendant will have the whole of the following day. (Code, § 143, 412; Van Sant. Eq. Pr. 222.) The service may be personal, or by mail, and in the usual mode of serving notices and other papers in the progress of a suit, as prescribed by the Code, sections 409, 410, and 411. (*Ibid.*)

The same rules govern as in case of the service of a copy of the complaint on the defendant's attorney after notice of appearance.

In general, it is not necessary for one defendant to serve a copy of his answer on his co-defendants, except, perhaps, in cases where he seeks affirmative relief both against the plaintiff and his co-defendants; or where he sets up against them a conflicting claim upon grounds not attempted to be brought in issue by the complaint itself. (Van Sant. Eq. Pr. 223.) Such affirmative relief, it has been held, will not be granted to one of the defendants, and against another who makes default and has not been served with a copy of the answer, or a cross-complaint. (*Tracy v. New York Steam Faucet Co.* 1 E. D. Smith, 356.) Hence, in such cases, it is the safest course for the defendant who claims such equities to serve his co-defendant with a copy of his answer, unless he prefers to proceed by cross-complaint. (Van Sant. Eq. Pr. 223.)

Rules 13 of the supreme court requires an attorney, upon process or papers to be served, besides subscribing or indorsing his name, to add thereto his place of business; otherwise papers may be served on him at his place of residence, through the mail, &c. If neither place of business nor residence can be found, service may be made by filing the papers with the clerk.

When service is made by mail, it must be double the time required in cases of personal service, except service of notice of trial. (Code, § 412.)

A defendant has the whole of the last day, specified in the order to answer, in which to serve his answer. (*Hoxie v. Scott*, 1 Clarke, 457.) And under the former chancery practice, after the time for answering had expired, the defendant might serve an answer at any time before an order to take the bill as confessed, was actually entered with the clerk. (*Ibid.*)

In *Michigan*, it is the duty of the defendant, after appearance, to serve on the complainant copies of all pleadings and proceedings filed on the part of the defendant. (Compiled Laws of 1857, vol. 2, p. 1013, § 47.) If the complainant or defendant has appeared by a solicitor, the service of the pleadings or proceedings must be on such solicitor. (*Ib.* § 48.)

When the summons designates the place where the answer is to be served on the plaintiff's attorney, the defendant is not, in any case, bound to serve his answer elsewhere, by mail or otherwise. (*Lord v. Vandenburg*, 15 How. Pr. 333; S. C. 6 Duer, 703.) If the place so specified is the attorney's office, but not his residence, the office being closed, an endeavor to serve at the office within the time, followed by an actual service within a reasonable time afterwards, when the office is open, will be regarded as a sufficient service. In such a case, an answer being disregarded and judgment entered, the judgment was set aside, with costs. (*Ibid.*) A party is not bound to make an impracticable service. (*Ibid.*)

(64) TIME FOR ANSWERING.

The answer must be served within twenty days after the service of a copy of the complaint, if the latter be served personally; (Code, § 143;) or, if the complaint was

pare his answer within that time, the time will be extended by the court

served by mail, within forty days. (Id. § 412.) In computing the time, the first day is excluded and the last included. (Id. § 407.) If the last day is Sunday, it is to be excluded. (Ib.)

A defendant must answer the complaint within the twenty days prescribed by statute. He has not a right to answer after the expiration of the twenty days, although judgment is not yet taken. (*Mandeville v. Winne*, 5 How. Pr. 461.)

No default is required to be entered at the expiration of that time, as was formerly the practice. The default is now deemed to be taken, at the end of the twenty days, as effectually as if a rule for that purpose was entered. (Ibid.)

An answer served after the time to answer has expired, until the time has been extended, is irregular. (*Dudley v. Hubbard*, 2 Code Rep. 70.) And the court of common pleas of New York has repeatedly held that the service of a pleading after the time allowed by law, although before the adverse party has acted upon the default, is not good. (*McGown v. Leavenworth*, 2 E. D. Smith, 24.)

If the plaintiff intends to avail himself of an irregularity in the service, he should decline to receive the answer, or return it within a reasonable time—i. e., the same day, or the day after, specifying his objections, (*Philips v. Prescott*, 9 How. Pr. 433,) and take judgment as for want of an answer. (*Strout v. Curran*, 7 How. Pr. 33; *Jacobs v. Marshall*, 6 Duer, 639.) In *McGown v. Leavenworth*, (2 E. D. Smith, 31,) it is said "where a paper is served upon a party who declines to receive it, he is required to return it within a reasonable time. This has never been limited to a shorter period than the same day; and to return a paper within two hours after the receipt of it is within all the rules of diligence ever required in such cases."

The agent employed by the defendant's attorney to make the service is a proper person by whom to return the answer, with the reasons for its rejection. Nor can the defendant's attorney, by sending the answer to the plaintiff's attorney a second time, make it the duty of the latter to return it a second time. (*Strout v. Curran*, 7 How. Pr. 33.) In *Jacques v. Greenwood*, (1 Ab. 230,) where two joint defendants served a joint answer after the time of one of them had expired, and the plaintiff's attorney returned it, and waited until the other defendant's time expired, and then entered judgment, it was held regular.

A defendant who defends separately, and sets up a claim adverse to that of a co-defendant, is not bound to serve his answer upon such co-defendant, if the title by which he claims is set forth in the complaint. (*Bogardus v. Parker*, 7 How. Pr. 305; *Leavitt v. Fisher*, 4 Duer, 2.)

An answer served before receiving a copy of the complaint, is irregular. (*Philips v. Prescott*, 9 How. Pr. 430.)

In *California*, the time for answering is as follows: 1. If service of the summons is had in the county where the action is brought, within ten days after such service. 2. If the defendant is served out of the county in which the action is brought, but in the district, twenty days. 3. If served any where else in the state, forty days. (2 *Estee's Prac.* 509, 645; *Cal. Pr. Act*, § 25.) If the service is made by publication, the defendant has forty days to answer after the period for publication expires. (*Cal. Pr. Act*, §§ 30, 31.) When a demurrer is interposed and overruled, the court may allow the defendant to answer, imposing terms in its discretion. (*Cal. Pr. Act*, §§ 42, 67; *Manmus v. Hamblon*, cited 2 *Estes's Pr.* 645.) In such a case the question of time to answer, and the terms, are chiefly regulated by the rules and discretion of the court, (*Thornton v. Borland*, 12 Cal. 433,) in which the cause is pending. (*Cal. Pr. Act*, § 43; *People v. Rains*, 23 Cal. 125.) For, if the demurrer is deemed frivolous, terms will be imposed before leave to answer is given. Such a rule is required to prevent a demurrer from becoming a means of delay only; and if the court does not fix the time within which an answer must be filed, the defendant should answer within the same time as in case of a service of a copy of the original complaint. (*People v. Rains*, *supra*.)

In reference to the time within which the answer must be filed, courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government, and of the local divisions of the country into states, counties, cities, towns, &c. (*People v. Smith*, 1 Cal. 9.)

In *Kentucky*, in an action prosecuted by equitable proceedings, the defence must be filed on the third day of the term: 1. Where the summons has been served twenty days before the commencement of the term, in the county in which the action is brought, or in an adjoining county; 2. Where it has been served thirty days elsewhere in the state; or 3. Where the defendant has been constructively summoned thirty days. (*Code of Practice*, § 137.)

on a special application for that purpose, on reasonable grounds being shown. (p) (65) In order to obtain such an extension of the time, a (p) Rule 126.

In *Ohio*, the answer of the defendant must be filed on or before the third Saturday after the return day of the summons, or service by publication. (Seney's Code, p. 147, § 103.) The defendant has the usual time for answering after every material amendment, whether that amendment is made under sections 134 and 135 of the Code, or in term time, on leave obtained from the court. (*Mather v. Gallia Furnace Co.* 1 West. Law Monthly, 351.) When service is by publication, the defendant must answer on the third Saturday next after the day of the last publication of the notice. (Nash, Plead. and Prac. 100.)

In *Indiana*, if the defendant appears to the action, the court, on the plaintiff's motion, will order the defendant to answer the complaint. The order is entered on the record, and is either general, in which case the defendant must answer on or before the next calling of the cause, or special, fixing a time when the answer shall be filed. (2 Rev. St. 42, § 68; Bicknell's Civil Prac. 82.) Upon a failure to answer, the court will enter a judgment by default, substantially a judgment by *nil dicit*; unless, for good cause shown, further time be given for pleading, on payment of costs. (2 R. S. § 69.) A defendant may be ordered to plead at the next calling of the cause, or by a given day of the same term, or of the next term, but cannot be ordered to plead by a given day in vacation. If such an order be made, its effect will be to give the party time until the calling of the cause at the next term. (Bick. Civ. Pr. 83; 4 Bld. 466; 9 Ind. 304.)

In *Minnesota*, in all actions in the district court, the defendant is required to answer the complaint in twenty days after service of the summons; and if the answer is not made and served within that time, or such further time as may be allowed according to law, the plaintiff may proceed to take judgment against the defendant. (Public Stat. p. 630, § 48.)

In *Kansas*, an answer must be filed within twenty days after the day on which the summons is returnable. (Code, § 113.)

In *Wisconsin*, the answer must be served within twenty days after service of a copy of the complaint. (Code, § 48.) If the complaint be amended, the defendant must answer it within twenty days after service of a copy of amended answer. (Id. § 51.)

In *Illinois*, every defendant duly summoned must file his answer at the time to which the process or summons is returnable, or the bill may be taken as confessed. (Chancery Code, § 18; Statutes of 1858, vol. I, p. 140.)

(65) EXTENDING TIME TO ANSWER.

Section 405 of the Code provides that the time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court, or if the action be in the supreme court, by a county judge. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded. (See also, Code, § 174.)

This is the authority under which the time to answer may be extended. And it has been held that an order extending the time to answer, is an extension of the time to demur. (*Brodhead v. Brodhead*, 4 How. Pr. 305.)

The only way in which an extension of time can be procured is by an express order to that effect, founded upon proper affidavits. (*Platt v. Townsend*, 3 Ab. 9.)

Rule 30 of the supreme court provides that no order extending the time to answer shall be granted unless the party applying therefor shall present to the justice or judge to whom the application is made, an affidavit of merits, or proof that it has been filed; or an affidavit of the attorney or counsel retained to defend the action, that from the statement of the case in the action, made to him by the defendant, he verily believes that the defendant has a good and substantial defence, upon the merits, to the cause of action set forth in the complaint, or to some part thereof. And the affidavit must state whether any extension of time to answer or demur has been granted, by stipulation or order. (Id.)

An enlargement of the time to answer or demur, not supported by an affidavit of merits, nor by an affidavit of the attorney or counsel retained to defend, stating that, from the statement of the case made to him by the defendant, he verily believes the defendant has a good and substantial defence, on the merits, to the cause of action set forth in the complaint, or to some part thereof, may be disregarded. (*Ellis v. Van Ness*, 14 How. Pr. 313.) Rule 30, which directs that if an enlargement of time

motion must be made upon an affidavit showing the necessity for further time. And further time to answer, not exceeding sixty days, in case of a resident defendant,* and not exceeding six months, in case of a non-resident of the state, may also be granted by a vice-chancellor or injunction master, on application and sufficient cause shown to him by affidavit, on such terms and conditions as he may direct. But no order

has already been obtained, by order, or by consent of parties, that fact must be stated in the affidavit, and section 405 of the Code, operate together, and full effect must be given to both. (*Ibid.*)

An order extending the time to answer supersedes a motion already noticed to strike out portions of the complaint. It also operates as a bar to a future motion; unless, by the terms of the order, the right to make the motion, already noticed, is given. (*Marry v. James*, 34 How. 253.)

Where an order extending the time to answer is procured without an affidavit of merits, or any such affidavit of an attorney or counsel, as is required by this rule, the order is irregular; and the plaintiff may avail himself of such irregularity, on a question of substituted service, although he might not be permitted to disregard the order if served personally. (*Graham v. Pinckney*, 7 Rob. 147; *Ellis v. Van Ness*, 14 How. Pr. 313.)

An affidavit of merits will be disregarded when further time to answer is asked on the part of a defendant who has been guilty of gross laches. (*Hays v. Berryman*, 6 Bosw. 679.)

The order, if granted by a judge out of court, without previous notice, cannot be to stay proceedings for a longer time than twenty days. If the defendant requires a longer time he should obtain an order to show cause why the time to answer, &c., should not be extended for the requisite period, specifying it, and that the proceedings be, in the meantime, stayed. On proof of the service of the order to show cause, the judge, at the time fixed in the order to show cause, if no sufficient cause be shown against it, will grant the absolute order. (*Van Sant. Eq. Pr.* 175.) Or, the defendant may obtain his first order, *ex parte*, and, at the expiration of the twenty days, apply, on a sufficient affidavit, for another order. (*Ibid.*) Every affidavit on which to apply for an extension of time, must conform substantially, to rule 30. If an order has been improvidently granted on a defective affidavit which is served with the order, the court or judge granting such order will set it aside or vacate it without notice. (*Id.* 176.) And so, also, if after one extension of time an order be made on an affidavit not stating the fact of the first extension, by stipulation or order, it will be vacated without notice. (*Ibid.*) If the affidavit, or a copy, be not served with the order, it is unnecessary to get it vacated. In such a case the order is a nullity and may be disregarded, (*Code*, § 405.) and the plaintiff may proceed as though no order had been served. He should, however, immediately return the order, or give notice of his intention to disregard it. (*Van Sant. Eq. Pr.* 177.)

After the amendment of a pleading, the time to answer it is the same number of days from the date of its service as after service of the original pleading; that is, twenty days, if the service of the amended pleading has been personal, and forty days if by mail. (*Ib.*)

If the defendant has inadvertently allowed the time to expire without putting in a defence, he is not allowed, as a matter of course, to put in an answer or demur at any time before judgment; but if he desires to answer he must apply to the court by motion and on notice for leave to do so. (*Van Sant. Eq. Pr.* 178; *Petries v. Fitzgerald*, 2 Ab., N. S. 354.) By section 174 of the Code, the court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made after the time limited by that act, or by an order, enlarge such time. It may, also, in its discretion and upon terms, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.

By section 135 of the Code, a defendant against whom publication has been ordered, or his representatives, on application and sufficient cause shown at any time before judgment, may be allowed to defend the action; and (except in an action for divorce) may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just.

extending the time to answer can be granted by an injunction master, or by a vice-chancellor out of court after the time for answering has expired, or where time has before been granted by order of the court, or by a vice-chancellor or master, or by the agreement of the complainant. (q) This rule does not authorize a vice-chancellor or injunction master to grant a chamber order giving the defendant time to demur. And if a defendant puts in a demurrer after an order for further time to answer, it is irregular. (r) A chamber order, made by a vice-chancellor, giving

(q) Rule 125.

(r) *Burrall v. Raineteaux*, 2 Paige, 331.

A defendant against whom publication is ordered, has the right to appear and defend, of his own accord, and without any leave of the court, at any time within twenty days after the time for publication has expired. But if he wishes to come in, more than twenty days after that time, but before judgment actually entered, he must, as in other cases, make his affidavit, and show "sufficient cause." (*Van Sant*. Eq. Pr. 178, 179.)

Section 174 applies not only to a personal service of the summons but to a service by publication. On an application under it, the affidavit must show the mistake, or other excuse offered; and in addition there must be an affidavit of merits, or the substance of the answer or defence must be stated. (Id. 180.)

It seems to be always in the sound discretion of the court to grant or refuse an application of this kind. (See *Mann v. Provost*, 3 Ab. 446; *Lynde v. Verity*, 3 How. Pr. 350; *Grant v. McCaughlin*, 4 id. 216; *Montgomery v. Ellis*, 6 id. 326.) And a reasonable excuse will, at all times, be sufficient, and sometimes even a slight excuse to let in a party to defend, on terms, (*Allen v. Ackley*, 4 How. Pr. 5,) unless an unconscientious defence is sought to be set up; in which case the court will not relieve the party in default, (*King v. Merchants' Exchange Co.* 2 Sandf. 693,) except upon the terms that such defence, *e. g.*, usury, or the statute of limitations, be not set up in the answer. (*Allen v. Ackley*, *supra*.) If the defendant fails to answer in the time specified in the summons, it is not an unsound exercise of discretion in the court to refuse him leave to file an answer which does not show a meritorious defence. (*Hallowell v. Page*, 24 Mo. 590; *Page v. Page*, id. 595; *Newson's adm'r v. Run*, 18 Ohio Rep. 240.)

An order staying the plaintiff's proceedings will not extend the time for the defendant to answer. That time is fixed by statute and can only be enlarged by consent or by an order for that purpose. (*McGown v. Leavenworth*, 2 E. D. Smith, 24.) Nor does an order for a bill of particulars, accompanied by a stay of proceedings, enlarge the time to answer. (*Platt v. Townsend*, 3 Ab. 9; S. C. 5 Duer, 663.) When proceedings are stayed until the decision of an appeal, such stay does not extend the time to answer beyond the time when the appeal is decided. (*Petrie v. Fitzgerald*, 2 Ab., N. S. 354.)

In cases where service by mail may be made, an order extending time to answer, mailed on the last day, is sufficient to prevent the plaintiff from entering a regular judgment as upon failure to answer. (*Schuhardt v. Roth*, 10 Ab. 203.) Though defendants show no excuse for not earlier attending to the putting in of an answer, and there is some color for supposing their object to have been delay, yet when they are strictly regular in the service of an order extending the time to answer, they are entitled to the benefit of the order. (Ibid.)

Additional time to answer, granted by order, does not commence to run until the expiration of the time so extended. Thus, where the time to answer would expire on the 8th of October, and on the 1st of October an order was granted allowing twenty days' additional time to answer, it was held that the time to answer was thereby extended until the 28th of October. (*Schenck v. McKie*, 4 How. Pr. 246; S. C. 3 Code Rep. 24.)

Where a stipulation enlarges the time to answer, and also gives the right to make such application as shall be advised, it reserves the right to move to strike out portions of the complaint. (*Lackey v. Vanderbilt*, 10 How. Pr. 155.) But an order extending the time to answer operates as a waiver of all objection to the complaint by the party obtaining it, and as a bar to a future motion for any alteration of the complaint by the party obtaining it, unless the right to make such motion is reserved.

further time to answer, but not entered in the minutes of the court, is a mere nullity, when not authorized by the above rule. (s) The defendant is not entitled to an *ex parte* order for further time to answer, beyond the time prescribed in the order of the court, upon overruling a plea or demurrer. (t) Therefore, where a demurrer has been overruled on argument and the defendant ordered to put in his answer in twenty days and pay the costs, or that the bill be taken as confessed, an *ex parte* order extending the time to answer is irregular. (u)

An order for further time is usually applied for *ex parte*. But where the application is made after the time has expired, or after a former order for time, notice of it should be given. (v)

By the Irish practice, a notice of an application for time to answer, and an affidavit filed in support of it, prevent all further proceedings by the complainant until the motion is disposed of by the court. (w)

A defendant who wishes further time to put in his answer, must make

(s) Hunt v. Wallis, 6 id. 371.

(t) Trim v. Baker, Tur. & Russ. 253.

(u) Hurd v. Haynes, in chan. July 8th, 1842.

(v) 1 Hoff. Ch. Pr. 229. 13 Ves. 66. 19 id. 112.

(w) Ormsby v. Palmer, 1 Hogan, 191.

So where the extension is granted by the adverse party. (*Bowman v. Sheldon*, 5 Sandf. 657; S. C. 10 N. Y. Leg. Obs. 339.)

Where an order overruling a demurrer requires the defendant to put in his answer in a specified time, and pay the costs, or that the bill be taken as confessed against him, a subsequent *ex parte* order extending the time to answer is irregular. (*Hurd v. Haynes*, 9 Paige, 604.)

In *Kansas*, the court, or any judge thereof, in vacation may, in his discretion, and upon such terms as may be just, allow an answer to be put in after the time limited by the Code. (Code, § 114.)

In *Illinois*, if the defendant fails to file his answer at the time the process or summons is returnable, the bill may be taken for confessed; but, for good cause shown, the court may extend the time for answering, and the court may thereupon enter an interlocutory decree, which may be made absolute at the next term, and carried into effect as other final decrees. If the defendant shall appear at the next term, and offer to file his answer, the court may permit him to do so, upon his showing sufficient cause, and paying the costs. (Chancery Code, § 18; Statutes of 1858, vol. 1, p. 140.)

In *Kentucky*, the court may, for good cause shown, extend the time for filing an answer to some subsequent day in that or the next succeeding term, upon payment of costs; (Code, § 140;) or allow an answer to be made after the time limited by the Code has expired. (Id. § 161.)

In *Ohio*, the court, or the judge thereof in vacation, for good cause shown, may extend the time for filing an answer, upon such terms as may be just. (Seney's Code, § 104.) It is said that the time for answering ought not to be extended without notice, where it will operate as a continuance of the cause. The unexpected absence of a party or counsel at the time for filing the answer, or where papers, without which the party cannot answer, cannot yet be obtained, would be good ground for extending the time. (Nash's Plead. & Prac. 100.)

In *Wisconsin*, under section 303 of the Code, the time for answering may be enlarged by a judge of the court, or court commissioner, or by a county judge, upon an affidavit showing grounds therefor. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

In *Minnesota*, the answer must be made and served within twenty days after service of the summons, or such further time as may be allowed by law. (Public Statutes, 1859, p. 630, § 48.)

[*148] *his application before an attachment has been issued against him, for want of answer; otherwise he will be in contempt and will not be allowed to make it. (x)

Having thus gone through with an answer in its most usual shape, and considered its nature and uses, its form, the engrossing of it, the numbering and marking of the folios, signing, swearing to, endorsing, filing and serving, and the time within which it must be put in; we now propose to direct the reader's attention to the practice in relation to answers in certain special cases, and upon some particular points not before adverted to.

Answer by attorney.] An answer by an attorney in fact will in some cases be allowed to be put in; as where the defendant has gone, or is resident abroad, and has given a general power of attorney to defend suits, &c. (y) But this cannot be done under a general power of attorney to act relative to the management of an estate, even in a suit which relates to the estate. (z) By the English practice the answer in such cases is put in without any signature, and the power of attorney is recited in the order; (a) but by the practice in this state the answer is signed by the attorney, and a copy of the power is annexed thereto. (b)

Answer of an infant.] Where an infant is defendant, a guardian *ad litem* must be appointed for him, by whom an answer for the infant must be put in. The manner of procuring the appointment of the guardian *ad litem* has been already pointed out, ante p. 83. (66)

In most cases the guardian puts in a mere general answer, submitting the rights of the infant to the court. But he is bound to ascertain what are the legal and equitable rights of his ward; and if a special answer is necessary or advisable for the purpose of bringing such rights before the court, it is his duty to put in such an answer. If the infant is a mere nominal party, or has no defence against the complainant's claim, and no equitable rights as against his co-defendants, which render a special answer necessary, the general answer will be sufficient. (c)

It is the duty of the court to see that the rights of an infant are not prejudiced or abandoned by the answer of his guardian. (d)

The answer, in cases where an oath is necessary, is to be sworn to by

(x) *Taylor v. Fisher*, 6 Sim. 566.

(y) *Bayley v. De Walkiers*, 10 Ves. 441. *Harding v. Harding*, 12 id. 159. 2 Johns. Ch. Rep. 240.

(z) *Rogers v. Cruger*, 7 John. 558.

(a) 10 Ves. 441.

(b) *Diamond v. Magee*, 2 John. Ch. Rep. 240. This was a suit in which a discovery was not desired.

(c) *Knickerbacker v. De Freest*, 2 Paige, 304.

(d) *Barret v. Oliver*, 7 Gill & John. 111.

(66) In the *United States courts*, guardians *ad litem*, to defend a suit, may be appointed by the court, or by any judge thereof, for infants, or other persons who are under guardianship, or otherwise incapable to sue for themselves. (Equity Rule 57.)

*the guardian, and is termed his answer, and not that of the [*149] infant. (e) For which reason the infant is not bound by such answer, and it cannot be read against him; as the infant may know nothing of the contents of the answer put in for him, or may be of such tender years as not to be able to judge of it. (f) Therefore it would be useless; and occasion unnecessary expense to call upon an infant to put in a full answer to the complainant's bill. It is accordingly held, that exceptions will not lie to the answer of an infant, for insufficiency. (l) But after he becomes of age he may, by supplemental bill, be compelled to answer, and make a discovery. (m)

If the guardian is a co-defendant, he need only sign a joint answer once; as the caption expresses it to be the answer of the guardian in both capacities. (n)

The general saving at the beginning, together with the denial of combination, at the conclusion, common to all other answers, are omitted in an answer put in for an infant by his guardian; for he is entitled to the benefit of every exception which can be taken to a bill, without expressly making it; and he is considered incapable of the combination charged. The general traverse is also left out of an infant defendant's answer, because it cannot be excepted to for insufficiency. (o)

Although an infant cannot be called upon to put in a full answer to the complainant's bill, yet he may state in his answer anything which he means to prove, in the way of defence. (p)

Where a general answer has been put in for an infant defendant by his guardian *ad litem*, the infant, upon his becoming of age, and before decree, is entitled, as a matter of right, to an order allowing him to put in a new answer, upon his showing, to the satisfaction of the court, that a new or further answer is necessary to protect his rights. (q) But he is entitled to the benefit of this privilege only for the protection of his own rights, and not as a means of injuring the case of his adversary without benefiting his own. (qq)

*An infant wishing to make a new defence must apply to [*150] the court as early as possible after attaining the age of twenty-one; for if he is guilty of any *laches*, his application will be refused. (r) Nor

(e) *Wrottesley v. Bendish*, 3 P. Wms. 237. *Rogers v. Cruger*, 7 John. 581. *Carth.* 79. 3 Mod. 258. 2 Swanst. 375. 2 Stark. 386. *Hinde*, 241. 1 Dan. 233, 235.

(f) *Id. ib.* *Stephenson v. Stephenson*, 6 Paige. 353.

(l) *Strudwick v. Pargiter*, Bunb. 338. *Copeland v. Wheeler*, 4 Bro. C. C. 256. 13 Ves. 274.

(m) *Marquis of Waterford v. Knight*, 9 Bligh. 307.

(n) *Anon.* 2 Jac. & W. 553. 2 Ves. & B. 553.

(o) *Mittf.* 254.

(p) Per Lord Ch. Baron Richards in *Att'y Gen. v. Lambirth*, 5 Price, 398.

(q) *Stephenson v. Stephenson*, 6 Paige, 353. *James v. James*, 4 id. 115. *Kelsall v. Kelsall*, 2 My. & Keen, 409.

(qq) *Malone v. O'Connor*, 2 Dru. & Walsh, 491.

(r) *Mason v. Dabow et al.* 2 Hayw. 178.

will it be granted on his coming of age, without an affidavit that he can now make a better defence than that previously put in. (*s*)

An infant may also apply to put in a better answer at any time during the suit, and before coming of age, provided there is a foundation for it upon the merits. (*t*) And he may, by petition merely, stay proceedings in the cause until he is prepared with his answer. (*u*)

The answer of an infant by his guardian *ad litem* is considered a pleading merely, and not an examination for the purpose of discovery. It is not evidence in his favor, therefore, although it is responsive to the bill and sworn to by the guardian *ad litem*. (*v*) Nor, as has been already stated, can it be read against him. (*w*) And a complainant cannot, by any form of pleading, compel an infant to become a witness against himself. (*ww*)

The other formalities in taking the answer of an infant are the same, *mutatis mutandis*, with those observed in putting in the answer of a party under no incapacity. (*x*)

Answer of a married woman.] It is a general rule that in a suit against husband and wife, the husband must procure the joint answer of himself and wife to be put in, or the bill may be taken as confessed against both. (*xx*)(67) And if either party wishes to answer separately, an order should be first obtained allowing it. (*y*) But where the wife lives separate from her husband, and is not under his control, the court will, upon motion, accompanied by an affidavit verifying the circumstances, give the husband leave to put in a separate answer. (*z*) Upon the same principle, process of contempt will be stayed against the husband, for want of his wife's answer, on his making an affidavit that she has left him and that he has no power over her. (*a*) In a case where the husband, who had put in a separate answer, moved that he [*151] might be at liberty to answer separately from his wife, and that he might not be liable to process on account of his wife not putting in an answer, on an affidavit that his wife lived separate and apart from him, and that he had no control or influence over her, the court held that, as he had already put in a separate answer, there was no ne-

(*s*) *Bennett v. Leigh*, 1 Dick. 89. *Cecil v. Lord Salisbury*, 2 Vern. 224.

(*t*) *Bennett v. Lee*, 2 Atk. 487, 529. *Savage v. Carroll*, 1 Ball & B. 549. 1 Fowl. Exch. Pr. 170.

(*u*) *Shield's heirs v. Bryant*, 2 Marsh. Rep. 344.

(*v*) *Bulkley v. Van Wyck*, 5 Paige, 53. *Stephenson v. Stephenson*, 6 Paige, 353.

(*w*) *Stephenson v. Stephenson*, supra.

(*ww*) *Bulkley v. Van Wyck*, supra.

(*x*) *Hinde*, 242.

(*xx*) *Bilton v. Bennett and wife*, 4 Sim. 17. See *Leavitt v. Cruger and wife*, 1 Paige, 421.

(*y*) *Id.* ib.

(*z*) *Chambers v. Bull*, 1 Anst. 269. *Garey v. Whittingham*, 1 Sim. & Stu. 163.

(*a*) *Leithly v. Taylor*, 1 Dick. 373. *Lloyd v. Basnet*, *id.* 143.

(67) In an action against husband and wife, where the action concerns the separate estate of the wife, she may answer separately, as a matter of course. (*Harlay v. Ritter*, 18 How. Pr. 147; S. C. 9 Ab. 400.)

cessity for that part of the motion which related to the answer, but made the order as to the latter part. (*b*)

Under ordinary circumstances, however, a husband cannot answer separately from his wife without the sanction of an order for that purpose; and if he does so, his answer, by the English practice, will be treated as a nullity and the bill may be taken as confessed. (*c*) By our practice, putting in such an answer is only considered an irregularity; and the court, on motion, in such a case, will order the answer to be taken from the files. (*cc*) But as long as it remains upon the file, it cannot be treated as a nullity, by the opposite party.

If a wife appears and afterwards absconds, process will be stayed against the husband and liberty given to sue out a sequestration against the wife. (*d*)

And if a married woman obstinately refuses to join in a defence with her husband, the husband may in like manner be allowed to defend himself, and the complainant must proceed separately against the wife. (*e*)

As the husband may in certain cases be allowed to answer separately from the wife, so the wife may, upon her own application to the court, and for good cause shown, obtain an order to put in her answer independently of her husband. (68) Therefore, if she cannot, in conscience

(*b*) *Berry v. Cane*, 3 Mad. 472. (c) *Bilton v. Bennett*, 4 Sim. 17.
 (*cc*) *Leavitt v. Cruger*, 1 Paige, 421. (d) *Samson v. Overton*, 1 Dick. 133.
 (*e*) *Paine v. —*, 1 Ch. Cas. 296. *Chambers v. Bull*, 1 Aust. 269. *Bunb*. 17. 1 Dick. 13. *Leavitt v. Cruger*, 1 Paige, 421.

(68) When a married woman is a party, her husband must be joined with her; except that when the action concerns her separate property she may sue alone, and when the action is between herself and her husband, she may sue or be sued alone. In no case need she prosecute or defend by a guardian or next friend. (Code, § 114.)

In *Kentucky*, if a husband and wife are sued together, the wife may defend for her own right; and, if the husband neglects to defend, for his also. (Code of Civ. Prac. § 50.) And, where a husband, being a father, has deserted his family, the wife, being a mother, may prosecute or defend in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had. (Ib. § 51.)

It has been held that where husband and wife are sued jointly, the wife will be allowed to defend separately when she alleges an equitable right to an allowance out of the property sought to be subjected. (*Ferris v. Parsons*, cited *Myers' Code*, p. 294.)

Section 29 of the *Ohio Code* is the same as section 50 of the *Kentucky Code*, *supra*. It has been decided, that under section 29, the wife may defend in her own right, in cases where her separate rights as distinct from those of her husband, are recognized and passed upon by courts. Her inchoate right of dower in premises mortgaged by her and her husband; her interests and rights in her separate property, and in the property which came to the husband by her; are all the subject of frequent adjudication, and in such cases she may defend in her own right. (*Coolidge and wife v. Paris*, 8 Ohio St. Rep. 594.) But where the action involves no separate right of the wife, and no order or judgment can be rendered, except a joint one, affecting both jointly, section 29 does not apply. In *Grath v. Wirthwein* (1 Handy, 19), it is held that a mere contingent right of the wife to dower is no ground for joining her

consent to such an answer as is drawn up by her husband, she is not obliged to submit to it, but upon application to the court she may be considered as a separate person, and will be allowed to answer separately from her husband. And if a husband insists that his wife shall put in an answer contrary to what she believes to be the fact, and by menaces prevails upon her to do so, this is an abuse of the process of the court, and he may be punished for the contempt. (*f*)

The cases in which a woman usually obtains an order to answer separately from her husband, are those in which she claims an adverse interest—where husband and wife are made defendants in right of the wife—where she lives separate from him, or disapproves of the defence he intends to make—or where the husband is out of the jurisdiction. (*g*) [152] So *where she denies the marriage with her alleged husband, she will be allowed to put in a separate answer, but without prejudice to any question as to the validity of the marriage. (*h*)

As a general rule, if a *feme covert* wishes to answer separately, she must apply to the court, upon motion or petition, for an order permitting it; and if her separate answer is put in without such an order, it may be taken off the file. (*i*)

But if her separate answer be put in without such an order, and the same be a fair and honest answer and deliberately put in, with the consent of the husband, and the complainant accepts of it and replies to it, the court will not, on the motion of the wife, or her executors, set

(*f*) Ex parte Halsom, 2 Atk. 50.

(*g*) Anon. 2 Eq. Ca. Abr. 65. 1 Dan. 210. 1 Smith. 253. Where the husband is out of the jurisdiction, the complainant may sometimes *compel* the wife to answer separately. 1 Smith, 254. (n. 1.)

(*h*) Wybourn v. Blount, 1 Dick. 155.

(*i*) Perine v. Swaine, 1 John. Ch. Rep. 24. Prac. Reg. 53.

with her husband in an action for the specific performance of a contract for the sale of real estate.

In *California*, if husband and wife be sued together, the wife may defend for her own right. (Cal. Pr. Act, § 8.) So also in *Iowa* (Laws of Iowa, § 2, 774). *Idaho* (Laws of Idaho, § 8). *Arizona* (Code, § 8;) and *Nevada* (Code, § 8). In *California*, the wife may appear in, and defend, an action separately from her husband. (*Alderson v. Bell*, 9 Cal. 315; approved in *Leonard v. Townsend*, 26 id. 445.) Where the defence of the wife is a special one, she can defend for her own right as well when sued jointly together, as if the trial were separate. (*Deuprez v. Deuprez*, 5 Cal. 587.) To enable her to defend in her own right, she must possess, as defendant, the rights of a *feme sole*. (*Alderson v. Bell*, 9 Cal. 315; *Leonard v. Townsend*, 26 id. 445.)

In *Minnesota*, when the action is between husband and wife, the wife may be sued alone. But when her husband is not joined with her she must prosecute or defend by her next friend or guardian, except in actions between herself and her husband. (Pub. Stat. of 1859, p. 535, § 80.)

In *Kansas*, any woman may, while married, sue and be sued, in all matters having relation to her property, person or reputation, in the same manner as if she were sole. (Comp. Laws of 1862, p. 699.)

In *Indiana*, when husband and wife are jointly sued, and the action relates to the wife's separate property, she may defend in her own right, and if he neglects to defend, she may defend in his right also. (2 R. S. 29, § 9.)

it aside. (*k*) So if a husband files a bill against his wife, he admits her to be a *feme sole*, and she must put in her answer as such; and no order is necessary to warrant her in so doing. (*l*) And if she does not put in her answer, in such a case, the husband may obtain an order to compel her to do so. (*m*)

A married woman obtaining an order to answer separately, becomes a substantial party to the suit, is entitled to the usual time to put in her answer from the date of the order, and is not bound by any order obtained by her husband on behalf of himself and her. (*n*) Upon obtaining an order to answer separately, she renders herself liable to process of contempt in case she does not put in her answer pursuant to the order. (*o*)

The application for an order that the wife answer separately, may be made either by the wife herself, or by the complainant, or the husband. (*p*) The application by whomsoever made, should be upon notice. (*q*)

Where husband and wife are defendants, it is necessary that the wife as well as the husband should put in a full answer. But she will not be compelled to answer to any thing which may expose her to a forfeiture. (*r*) Nor is she obliged to discover whether she has a separate estate; unless the bill is so framed as to warrant the court in making a *decree against such separate estate. (*s*)(69) Neither will [*153] she be compelled to make a discovery which may expose her husband to a charge of felony; and if called upon by the bill to do so, she may demur. (*t*)

The answer of the wife cannot be used as evidence against her husband. Therefore where a bill was filed before the statute of frauds, against husband and wife, to discover a trust in a matter in which she was concerned as executrix, and they disagreed in their defence and put in separate answers, the husband denying and the wife admitting the trust; at the hearing, the complainant having proved the trust by one witness only, insisted on the wife's confession in her answer; but

(*k*) *Duke of Chandos v. Talbot*, 2 P. Wms. 371.

(*l*) *Ex parte Strangeways*, 3 Atk. 478.

(*m*) *Ainslie v. Medlicott*, 13 Ves. 266.

(*n*) *Jackson v. Haworth*, 1 Sim. & Sta. 161.

(*o*) *Powell v. Prentice*, Ridgw. P. C. 258.

(*p*) *Dick*, 155. 1 Ves. sen. 383. 1 Smith, 254, n. (1.)

(*q*) *Gary v. Whittingham*, 1 Sim. & Sta. 163.

(*r*) *Wrottesley v. Bendish*, 3 Peer Wms. 235.

(*s*) *Francis v. Wigzell*, 1 Mad. 258.

(*t*) *Cartwright v. Green*, 8 Yes. 405.

(69) Where the complaint, in an action to charge the separate estate of a married woman, alleges her coverture, an answer denying that she is a married woman, or has a separate estate, is insufficient since the law of 1830. (*Aitken v. Clark*, 16 Ab. 328, n.)

it was held that her answer could not bind her husband, and the bill was dismissed. (*u*) In *Rutter v. Baldwin*, (*v*) the court agreed clearly that a wife can never be permitted to answer or to give evidence in any way to charge her husband; and that where a man marries a widow, executrix, &c., her evidence shall not be allowed to charge her second husband. (*w*) But in that case the wife having held herself out as a *feme sole*, and treated with the complainant and other parties to the cause who were ignorant of her marriage, in that character; and it having been proven that on some occasions the husband had given in to the concealment of the marriage, the court allowed the answer of the wife to be read as evidence against him.

But the separate answer of a married woman may be read against herself, notwithstanding her coverture. (*x*)(70)

And where husband and wife are defendants in a suit relating to the personal property of the wife, and they put in a joint answer, it may be read against them for the purpose of fixing them with the admissions contained in it; but where the subject matter relates to the inheritance of the wife, it cannot; (*y*) such joint answer being considered the answer of the husband alone. (*yy*) And where the husband does not answer, the answer of the wife, in a case relating to her inheritance, is no answer; and if the husband will not appear, no decree can be had against her for her inheritance. (*z*)

If the wife is absent from the state, the husband may, on application to the court, have an order for time to issue a commission to obtain [*154] her *oath to the answer; and if she refuses to answer, the bill may be taken as confessed against her. (*a*)

Where the complainant seeks relief out of the separate estate of the wife, however, the subpœna must be served upon her personally; and she may put in a separate answer; the husband in such a case being considered only a nominal party. And if the wife is absent, a publication of the order to appear, under the statute, must be resorted to, against her. (*b*)

(*u*) Anon. 2 Ch. Ca. 39. 5 Ves. 322. 15 id. 159.

(*v*) 1 Eq. Ca. Abr. 227.

(*w*) Vide *Cole v. Gray*, 2 Vern. 79.

(*x*) *Codrington v. Earl of Shelburne*, 2 Dick. 475. *Le Neve v. Neve*, 3 Atk. 648.

(*y*) *Evans v. Cogan*, 2 Peer Wms. 449. *Merest v. Hodgson*, 9 Price, 563. 2 My. & Keen. 678.

(*yy*) *Elston v. Wood*, 2 My. & Keen, 678.

(*z*) *Ward v. Meath*, 2 Ch. Ca. 173. 1 Eq. Ca. Abr. 65.

(*a*) *Leavitt v. Cruger*, 1 Paige, 421.

(*b*) *Ferguson v. Smith*, 2 John. Ch. 139. 1 Paige, 422. 1 Hoff. Ch. Fr. 232.

(70) In an action relating to the separate estate of the wife, her answer, jointly with her husband, admitting the allegations of the complaint, will not warrant a decree against her without proof. (Bick. Civ. Pr. 484; 8 Bld. 189.) And if, in such a case, she makes default, there can be no decree against her without proof. (3 Ind. 436.)

A joint answer of husband and wife must be sworn to by both, unless the complainant consents to receive such answer upon the oath of the husband only. (c)(71)(72)

Answer of an idiot or lunatic.] The answer of an idiot or lunatic is similar to that of an infant, and should be sworn to by his committee, in the same manner as the answer of an infant is verified by his guardian *ad litem*. (73)

Whenever a suit is brought against an idiot or lunatic respecting his estate, his committee, if he has one, is a necessary party to the suit. (d)

(c) *New York Chemical Company v. Flowers et ux.*, 6 Paige, 654.

(d) *Mif. Eq. Pl. 4.*

(71) *Leavitt v. Cruger*, (1 Paige, 422.) In *Reed v. Butler and wife* (2 Hilt. 589), an action brought by the plaintiff as receiver in supplementary proceedings instituted by a judgment creditor of the defendant, Thomas Butler, to set aside a conveyance of certain property to the defendant Harriet, his wife, on the ground that it was purchased and paid for by him, and with his money, and therefore the conveyance to the wife was void as to the husband's creditors, the defendants answered jointly denying that the property was purchased and paid for by the husband, and claiming the property as the separate estate of the wife. And she alone verified the answer. It was held the answer was not sufficiently verified. That if it was relied upon as the answer of both, it must be verified by both, because they were not united in interest—which is the only case under the Code where a joint answer can be verified by one of the parties only.

In *Youngs v. Seeley* (12 How. Pr. 335), it was also held that in an action against husband and wife, where her interest is separate, the answer must be verified by both, if relied on as the answer of both.

(72) In *Ohio*, when the action is between husband and wife, the wife may sue or be sued alone; but in every such action, other than for a divorce or alimony, she must prosecute or defend by her next friend. (Civ. Code, § 28.)

(73) When a person of weak or unsound mind, not so found by inquisition, makes default in appearing or answering, the plaintiff may have a guardian assigned to him for those purposes; and the recent orders in England concerning the answers of infants, apply in general to persons of unsound mind not found so by inquisition. (1 Dan. Ch. Pr. 3d Am. ed. 766.) The appointment is made upon petition on behalf of the person of unsound mind, supported by an affidavit stating the particular circumstances of the party and the necessity for a guardian. (*Ibid.*; *Piddocke v. Smith*, 9 Hare, 395.)

Superannuated persons, on proof of imbecility, may appear and answer by guardian. (*Matter of Barber*, 2 John. Ch. 235. See *Murkle v. Murkle*, 4 id. 163.)

In *Kentucky*, it is provided by the Code that it shall be the duty of the committee of a person of unsound mind to file an answer denying the material allegations of the petition which are prejudicial to such defendant. (Code, § 131.) The *Ohio* Code contains the same provision. (Code, § 100.) The answer of a guardian defending for a person of unsound mind need not be verified. (*Id.* § 107.)

In *California*, upon petition under oath, by any relative or friend of any insane person, or any person who, by old age or other cause is mentally incompetent, the probate judge shall, after hearing and examination, appoint a guardian of his person and estate. (Gen. Laws of Cal. §§ 3, 373, 4.) And every such guardian shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend. (*Id.* § 3, 377.)

In *Alabama*, a person may sue an adult lunatic for necessities furnished him, and is entitled to proceed in the case upon the appointment of an attorney for the defendant, although there is no guardian *ad litem*. (*Ex parte Northington*, 37 Ala. 496.)

In *Indiana*, it is the duty of the committee of a person of unsound mind to file an answer denying the material allegations of the complaint prejudicial to such defendant, without oath. (2 Rev. St. 42, § 65; *Bicknell's Civ. Pr.* p. 503.) When it is suggested to the court that the defendant is an adult lunatic without a guardian, it has been the practice under the Revised Statutes of 1852, without objection, to have a guardian *ad litem*, or committee, appointed by the court to represent him. (*Bick. Civ. Pr.* 504.) A guardian, in general, cannot be sued alone, but the person of unsound mind must be made defendant with him. (*Id.* 25, 26.)

And by the English practice the committee applies by motion or petition, to be appointed guardian of the idiot or lunatic, to answer and defend the suit; which is generally ordered of course. (*e*) If it happens, however, that the idiot or lunatic has no committee, or the committee has an interest opposite to that of the idiot or lunatic, an order may be obtained for appointing another person as guardian, to defend the suit for him. (*f*) And where the defendant is represented to be in a state of incapacity, the court will not permit his answer to be received without oath and signature; though he is a mere trustee and without interest; but will appoint a guardian by whom he may answer. (*g*)

Answer of a foreigner.] In the case of a foreigner not sufficiently versed in the English language to answer in that tongue, an order of course must be obtained, upon motion or petition, for an interpreter; and the answer being engrossed in the foreign language, a translation thereof must be made by the interpreter, and annexed. The foreigner must be sworn to his answer, in order to which, the interpreter attending is previously sworn to interpret truly, and conveys to the defendant the language of the oath. At the same time he swears to the translation as true and just to the best of his ability; and the jurat is adapted thereto. (*h*)

[*155] *Where the answer is taken abroad, in a foreign language, the court will order it to be interpreted by a sworn interpreter and the translation to be filed with the original. (*i*) And it has been decided in Ireland that the answer of a foreigner who does not understand English must be sworn in the language he speaks, and be filed with an English translation; and if he files an answer in English only it will be taken off the file. (*k*)

Answer of a deaf and dumb person.] The same course of proceeding seems proper where the defendant is deaf and dumb. (*l*) In a case however, which occurred in 1745, a different course appears to have been adopted. The defendant being deaf, and incapable of giving instructions for his answer, the court ordered a commission to issue for taking the answer in the old way, with the bill annexed, for the commissioners themselves to endeavor to take the answer. (*m*)

Answer of a blind person.] Where a defendant is blind, some other person must swear that he has truly distinctly, and audibly read over

(*e*) Hinde, 252. 1 Dan. Ch. Pr. 219.

(*f*) Milt. 82.

(*g*) Wilson v. Grace, 14 Ves. 172.

(*h*) Hinde's Ch. 228.

(*i*) Bank v. Solomons, 1 Fow. Ex. Pr. 427. Simmonds v. Du Barre, 3 Bro. Ch. R. 263.

(*k*) Hayes v. Leguin, 1 Hogan, 274.

(*l*) Reynolds v. Jones, cited 2 Dan. Ch. Pr. 280.

(*m*) Gregory v. Weaver, *ibid*.

the contents of the answer to the defendant. The defendant must also swear to the answer. (*n*)

Answer of an illiterate person.] Where an answer is put in by an illiterate person, who can neither read nor write, by the practice of the court of Exchequer in England the solicitor for the defendant must make an affidavit that he has read over the answer to the defendant, and that the defendant understood it. And this should be stated in the jurat. And in a case where, instead of the above form, the jurat stated (the answer having been taken by commission,) that the answer had been read over to the defendant by one of the commissioners, and that the defendant declared that he perfectly understood it, the answer was considered irregular, and was, upon motion, taken off the file. (*o*) So, where an answer by an illiterate person was not accompanied by any affidavit of his solicitor as to its having been read over to him, &c., and the jurat did not express that he had affixed his mark in the presence of the commissioners, it was ordered to be taken off the file for irregularity. (*p*) In the court of chancery, however, an affidavit by the solicitor is not required; but in the jurat returned in that court, it is expressly stated that the party made his mark in the presence of the commissioners. The form of the jurat in such cases is as follows: "This answer was *taken, and the above named defendant C. [*156] D. has duly sworn to the same upon the Holy Evangelists, at &c., this day of [the same having been first read over and explained to the said C. D. who appeared perfectly to understand the same,] and made his mark thereto in our presence," &c. (*q*)

Answer of a corporation.] The answer of a corporation is usually put in under the corporate seal, and without oath. (*r*)(74) But where it is the object of the corporation to obtain a dissolution of an injunction, it is necessary to have the answer verified by the oath of some of the corporators or officers of the corporation who are acquainted with

(*n*) 2 Dan. 280.

(*o*) Attorney Gen. v. Malin, 1 Younge, 376.

(*p*) Pilkington v. Himsworth, 1 Young & Col. 612.

(*q*) 1 Young & Col. 615. note.

(*r*) Vermilyea v. Fulton Bank, 1 Paige, 37. 1 Smith's Ch. Pr. 188.

(74) 1 Dan. Ch. Pr. 3d Am. ed. p. 767; Anon. 1 Vern. 117. See *Kittredge v. Claremont Bank*, (1 Woodb. & Minot, 244;) *Baltimore & Ohio R. R. Co. v. City of Wheeling*, (13 Gratt. 40;) 1 Grant Ch. Pr. 120; 1 Hoff. Ch. Pr. 239; *Angell & Ames on Corp.*, § 665, &c.; *Haight v. Prop. of Morris Aqueduct*, (4 Wash. C. C. 601;) *Champlin v. Corp. of New York*, (3 Paige, 572.) The answer should be signed by the principal officer, in addition. In the case of a bank, the secretary, cashier or president, usually signs it. (1 Hoff. Ch. Pr. 239; *Superisors, &c. v. Mississippi, &c. R. R. Co.* 21 Ill. 338.)

the facts; as the injunction cannot be dissolved upon an answer without oath, denying the equity of the bill. (s)(75)

The answer of a corporation should be signed by the president. It is usual for the secretary or cashier to sign it also.

Individual members of a corporation may be called upon to answer to a bill of discovery under oath; but in that case the individuals must be named as defendants in the bill. (t) But where a bill was filed against a corporation generally, who put in an answer under their corporate seal, the court refused, on motion, to order certain officers of the corporation to make oath to the answer so filed. (u)(76) And whenever a discovery from the officers would be prejudicial to the corporation and not be necessary to the complainant's case, the officers are not bound to make the discovery. (v)

Upon the answer of the officers or agents of a corporation joined as defendants with the corporation for purposes of discovery, no decree for relief can be founded, either as against them or the corporation. After putting in their answer they may be examined as witnesses by the complainant. (w)

But where the officer of the corporation from whom the discovery is sought is a mere witness, and the facts he is required to discover are merely such as might be proved by him on his examination, he ought not to be made a party. Thus, where an officer of the Bank of England was made a party for the purpose of obtaining from him a discovery as to the times when the stock in question in the cause had been transferred, *and he demurred to the bill, the court allowed the demurrer, on the ground that the officer was in that case merely a witness. (x)(77)

A contrary doctrine, however, seems to prevail in Massachusetts. In *Wright v. Dame*, (xx) it was decided that a member of a corporation, though not an officer or agent thereof, might be made a party to a bill against the corporation and individuals for discovery and relief; and that he is bound to answer, on oath, so much of the bill as seeks for a

(s) *Fulton Bank v. New York and Sharon Canal Co.*, 1 Paige, 311.

(t) *Brumley v. The Westchester Man. Society*, 1 John. Ch. R. 366. 1 Vern. 117. 3 Peer Wms. 310. 1 Bro. C. Rep. 469.

(u) *Id. ib.*

(v) 2 Bac. Abr. Corp. 13. 2.

(w) *Vermilyea v. Fulton Bank*, 1 Paige, 37.

(x) *How v. Best*, 5 Mad. 19.

(xx) 1 Metcalf, 237.

(75) Yet it has been held, in Alabama, that the answer of a corporation, under its seal, is something more than a pleading; and where it negatives the bill, warrants the dissolution of an injunction. (*Hogan v. Branch Bank of Decatur*, 10 Ala. 485.)

(76) The plaintiff cannot compel the officers—even those who have signed the answer—to swear to it. (1 Hoff. Ch. Pr. 239; *Brumly v. The Westchester Manuf. Society*, 1 John. Ch. 366. See *Kittredge v. Claremont Bank*, 1 Woodb. & Minot, 244.)

(77) The bank was probably not a party in that case. (Note, by Chancellor Walworth, to 1st edition.)

discovery of matters affecting the corporation. And it is not necessary the bill should aver that the corporator thus made a defendant has any information which is not possessed by other members. Nor need the bill assign any special reason for requiring such defendant to make the discovery prayed for. (y)

Where officers of a corporation are made defendants together with the corporation, the court will not compel them to put in a joint answer with the latter. The corporation has a right to put in a separate answer, to deny facts which the officers may suppose to exist, or to make admissions and offers. (yy)

Although it is not an unusual practice to make the clerk or other principal officer of a corporation a party to a suit against such corporation, for the purpose of eliciting from him a discovery of entries or orders in the books of the corporation, yet where such is not the case, it is still the duty of the corporation, when informed of the nature and extent of the claims made upon them, to cause diligent examination to be made before they put in their answer, of all deeds, papers, and muniments in their possession or power; and to give, in their answer, all the information derived from such examination. And it was said by Sir J. Leach, master of the rolls, that if a corporation pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the schedules to their answer, the court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice; and on that ground will charge them with the costs of the suit. (z)

If the majority of the members of a corporation are ready to put in their answer, and the head or other person who has charge of the common seal refuses to affix it, application must be made to the supreme *court for a *mandamus* to compel him; and in the meantime the [*158] court of chancery will stay the process against the corporation. (a) (78)

Where a suit is instituted against a *corporation sole*, he must appear and defend, and be proceeded against, in the same manner as if he were a private individual. (b)

Answer of an Attorney General.] The answer of an attorney-general is put in without oath, but should be signed by him. (c)

(y) *Id. ib.*

(z) *Attorney Gen. v. East Retford*, 2 My. & K. 35.

(a) See *Rex v. Wyndham*, Cowp. 377. Bac. Ab. tit. Corp. 13.

(b) 1 Dan. 189.

(yy) *Vermilyea v. Fulton Bank*, supra.

(c) 1 Fow. Exch. Pr. 451.

(78) A foreign corporation cannot be compelled to file an answer; and the want of an answer, where it was not needed for the purposes of discovery, has been held no good objection, on a motion to dissolve an injunction. (*Balt. & Ohio R. R. Co. v. City of Wheeling*, 13 Gratt. 40.)

It is entirely in his discretion whether he will put in a full answer or not. (*d*) The usual course, however, is for him to put in a general answer, stating that he is a stranger to the matters contained in the bill, and leaves the complainant to make out his case as he may be able, and submits the interests of the state to the protection of the court. (*e*) But he will be permitted to withdraw this answer and put in another insisting upon the particular right of the state. (*f*) And whenever the interests of the state or the purposes of public justice require it, a full answer will be put in by him, at first. (*g*)

The answer of the attorney-general cannot be excepted to for insufficiency; (*h*) even though it be to a cross-bill filed by the defendant in an information for the purpose of obtaining a discovery of matters alleged to be material to his defence to the information. (*i*) But where a cross-bill is filed against an attorney-general, praying relief as well as a discovery, he cannot protect himself from answering by means of a demurrer. (*k*)

Joint or separate answer.] Two or more persons may join in the same answer, and where their interests are the same and they appear by the same solicitor, they ought to do so, unless some good reason exists for their answering separately. The 130th rule of this court provides that where the same solicitor appears for two or more defendants, or different solicitors who are partners appear for several defendants, and separate answers are put in, the taxing officer shall consider whether such separate answers were necessary and proper; and disallow any part of the costs thereby unnecessarily or improperly incurred.

In England no preliminary inquiry will be permitted as to the expediency of filing separate answers by the same solicitor; not even with a [*159] view to modify the costs which the complainant must pay upon dismissing his bill. It is only at the hearing, when all danger of prejudice to the parties is over, that the court will make any order upon the subject. (*l*) But the rule of our court of chancery above referred to, will apply to a case of dismissal, as well as to any other, and protect the party from paying such unnecessary costs thereon.

Where two defendants answer jointly, and one speaks positively for himself, the other may, in cases where he is not charged with anything upon his own knowledge, say that he perused the answer and believes

(*d*) Davidson v. Attorney Gen. 5 Price. 398. n.

(*e*) Errington v. Att'y Gen., Bunb. 303. 1 Newl. Pr. 103.

(*f*) Id. ib.

(*g*) Colebrook v. Att'y Gen. 7 Price, 192. Crawford v. Att'y Gen., id. 1.

(*h*) 1 Fow. Ex. Pr. 452. 2 id. 11.

(*i*) 1 Dan. 185.

(*j*) Dean v. Att'y Gen. 1 Young & Col. 209.

(*k*) Vansandau v. Moore, 1 Rus. 441.

it to be true; but it is otherwise where the defendants answer separately. (*m*)(79)

It is a general rule that where a joint fiduciary character exists, a joint defence should be adopted. But this rule does not apply where the joint parties are liable to account and incur responsibility as in the case of executors and trustees. (*n*)

Where, in a suit against twelve defendants, an answer was put in and filed, purporting to be the joint and several answer of all, but was in fact not signed or sworn to by one of the defendants; and after a replication was filed, proofs taken, the cause set down for hearing, a motion for re-examination of a witness, a denial of the same, an appeal from such decision, and a motion to file a supplemental answer, a separate answer was filed without the leave of the court, by the defendant who had not joined in the original answer, setting forth substantially the same defences wished to be set forth in the supplemental answer; it was *held*, that the separate answer was filed irregularly, and it was directed to be taken off the files of the court. (*o*)

A joint answer of husband and wife must be sworn to by both; unless the complainant consents to receive such answer upon the oath of the husband only. (*p*)

Answer to amended bill.](80) In answering an amended bill the defendant, if he has answered the original bill, should answer only those matters which have been introduced by the amendments. (*q*) In fact, the answer to an amended bill constitutes, together with the answer to the original bill, but one record, as much as if it had been engrossed on the same paper; (*r*) in the same manner that an original

(*m*) 1 Harr. 135.

(*n*) *Reade v. Sparkes*, 1 Molloy, 8.

(*o*) *Fulton Bank v. Beach*, 2 Paige, 307; S. C. 6 Wend. 38.

(*p*) *New York Chemical Co. v. Flowers et al.*, 6 Paige, 654.

(*q*) *Hinde's Ch.* 22.

(*r*) *Mitt. Eq. Pl.* 257. *Hildyard v. Cressy*, 3 Atk. 303. *Bennington Iron Co. v. Campbell*, 2 Paige, 159.

(79) A defendant may sufficiently answer by adopting the answer of his co-defendant. (*Binney's Case*, 2 Bland. 99; *Warfield v. Banks*, 11 Gill & John. 98.) By the 62d Equity Rule of the United States Courts, it is provided that when the same solicitor is employed for two or more defendants, and separate answers are filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers, &c., were necessary or proper, and ought to have been joined together.

There are many cases where only one set of costs has been allowed by the court to two defendants whose interest was so far joint as to have made a severance of their defences unnecessary. Thus trustees will not, in general, be allowed costs consequent upon their separate defences, unless they have some of them a beneficial interest, or there is some special reason for their severance. (1 Dan. Ch. Pr. 3d Am. ed. 743; *Gamut v. Taylor*, 2 Beav. 346; *Woods v. Woods*, 5 Hare, 427; *Dudgeon v. Corley*, 4 Dru. & W. 158; *Aldridge v. Westbrook*, 4 Beav. 212; *Tarbut v. Woodcock*, 3 Beav. 289; *Far v. Sheriff*, 4 Hare, 428.)

(80) Where the complainant amends his bill before the defendant has answered the original bill, a new order to answer is necessary. (*Cowman v. Lovett*, 10 Paige, 559.)

[*160] and an amended *bill are considered as the same record. Upon this principle it is that it has been held that it is impertinent to repeat in the answer to the amended bill, what appears upon the answer to the original bill; unless by the repetition the defence is materially varied. (s) Where the amendments are not noted upon the amended bill, the defendant's solicitor should either decline receiving it, or should ascertain what the amendments are and answer them only. (t)

It being a rule that facts occurring since the filing of the bill must be introduced by a supplemental bill, and not by way of amendment, (u) it has been held that when a complainant amends his bill by the insertion of matters which have occurred since the filing of the original bill, the defendant, instead of pleading or demurring to the amended bill on that ground, may, by answer to the amended bill, claim the same benefit that he would have been entitled to if he had pleaded or demurred. (v)

In a case where exceptions to an answer had been allowed, and the complainant had obtained an order to amend, and for the defendant to answer the exceptions and amendments at the same time, and the defendant put in an answer to the amended bill only; whereupon the complainant issued an attachment; it was held that it was irregular, and that the complainant ought to have moved to take the second answer off the file. (w)

It is frequently the practice, in putting in an answer to an amended bill, to entitle it "An answer to the original and amended bill." It is not necessary, however, to do so; as "An answer to the amended bill" only, will be sufficient. (x)

Commission to take answer.] If the defendant resides at some place out of this state, the 41st rule points out a method in which his answer can be sworn to and authenticated before some officer residing at that place. It may also be sworn to before a commissioner appointed by the governor of this state under the act of 1840, p. 235. (y) These provisions will, in most cases, supersede the necessity of issuing a commission. But it may sometimes be necessary or convenient to issue a commission, instead of taking the other course.

To obtain a commission, the defendant should apply to the court, upon notice to the complainant, and upon an affidavit stating that the de- [*161] fendant *has appeared, and that he resides abroad, stating the particular place. This affidavit may be made by the defendant's solici-

(s) *Smith v. Searle*, 14 Ves. 415.

(u) *Stafford v. Howlett*, 1 Paige, 200. 2 Atk. 136.

(v) *Wray v. Hutchinson*, 2 My. & Keen, 235.

(w) *Smith v. Bryon*, 3 Mad. 428.

(t) 2 Paige, 159.

(u) *De Tastet v. Lopez*, 1 Sim. 11.

(y) See ante, p. 145, 146.

tor, or by a general attorney. (z) In the order granting the commission, the court will extend the time for answering, if necessary.

The notice of motion should name the commissioners proposed by the defendant. Upon the hearing of the motion, the complainant, if he wishes to join in the commission, may name commissioners on his part.

One commissioner on each side is sufficient; but, for greater caution, it is customary to name two or more. (a)

The order having been obtained, the commission is issued, under the seal of the court, directed to the persons appointed by the court as commissioners, and is transmitted to them by the defendant's solicitor. Or if the defendant is resident in a foreign country, it may be sent to some professional person there, to take care that it be properly executed. And though the foreign country be at war with this country, it must be there executed. In this respect, a commission to take an answer differs from a commission to examine witnesses; which it seems may be executed at the nearest neutral port. (b)

If the complainant has joined in the commission, six days' notice of the time and place of executing it must be given to his commissioner. (c) If the complainant has not named commissioners, no notice need be given, and the commission may be executed by the commissioners named in the commission, *ex parte*. (d)

If the defendant gives notice of executing the commission, but neither countermands it in due season, nor executes it at the time, the court, on motion, will order costs to be taxed for the adverse party's attendance. (e)

On the day appointed, the commissioners are to meet; and if only one attends on each side, it will be sufficient. But in case none of the complainant's commissioners attend, the defendant must have two commissioners present, because no fewer than two can take his answer and return the commission. (f)

Where there is a joint commission, and the commissioners of one party only, attend, they may, after waiting until six o'clock in the evening, proceed to take the answer; but not before. (g)

*When the commissioners are ready to proceed, the defend- [*162] ant's solicitor or agent having prepared the answer and engrossed it, produces it, together with the defendant, (who attends for the purpose of swearing to it,) to the commissioners; whereupon one of the com

(z) 1 Hoff. Pr. 237.

(b) — v. Romney, Amb. 62.

(d) Hinde's Ch. 234.

(f) Hinde, 284.

(a) Id. ib.

(c) Pound v. Wildgoose, 8 Price, 102.

(e) Prac. Reg. 116.

(g) Prac. Reg. 116.

missioners, having opened the commission, interrogates the defendant in the following manner: "Have you heard this your answer read? and do you exhibit it as your answer to the bill of complaint of A. B.?" To which the defendant answering in the affirmative, the commissioner proceeds to administer to him the oath or affirmation, as in other cases. (*h*) In a case where the defendant was an idolater, the order and commission directed the commissioners to administer the oath in the most solemn manner, as in their discretion should seem meet; and if any other than the christian oath was administered, to certify what they did. (*i*)

It is said that commissioners may refuse to execute the commission, unless they are allowed to read the answer. (*k*) And where a defendant, having taken out a commission to take his answer only, tenders a demurrer to the commissioners, and refuses to answer upon oath, they must certify such his refusal, and the reason thereof, together with the demurrer, and leave the same to the consideration of the court. (*l*)

The defendant having been sworn, must sign his answer in the presence of the commissioners; and the answer thus taken, together with the schedules, (if there are any,) are to be annexed to the commission. And the commissioners must then write the *caption*, at the foot of the answer, thus:—"This answer was taken, and the above named defendant C. D. was duly sworn to the truth thereof on the Holy Evangelists, at the house of . . . , in . . . , on the . . . day of . . . , before us, by virtue of the commission hereto annexed." This caption must be varied according to the nature of the case. Thus, in the case of a Quaker, or Moravian, it must be expressed to have been taken upon his "solemn affirmation;" and if it be the answer of a corporation aggregate, it must be "under the common seal of the said corporation, as by the said seal affixed appears," &c. (*m*) The caption should state correctly whether it be an answer, or an answer coupled with a plea or demurrer, &c. The commissioners should also be particular, when the answer is by two or more defendants, to state that they were all sworn; because where the caption of the joint and several answer of two defendants expressed only that it was *sworn*, [*163] *without stating that the defendants were *both sworn*, the answer was suppressed. (*n*)

The answer and schedules, with the caption, being thus annexed to the commission, the *return* must be endorsed upon the commission, thus: "The execution of this commission appears in a certain schedule

(*h*) Hinde's Ch. 235.

(*k*) 1 Harr. 176.

(*m*) 2 Dan. 90.

(*i*) Ramkissenseat v. Barker, 1 Atk. 19.

(*l*) Prac. Reg. 118.

(*n*) Hinde, 236. Anon., Mos. 238.

(or schedules) hereto annexed." And the return thus endorsed must be signed by two commissioners. (o) The commission must then be tied up and sealed, and directed to the register or clerk; and if sent by a messenger, delivered to him by the commissioners. The messenger, on his arrival, delivers it to the register or clerk, who swears him to the fact that he received the commission from the hands of one or more of the commissioners, and that it has not been opened nor altered since he so received it. (p)

In the case of *Brown v. Southworth*, (q) the chancellor laid it down as the settled practice of the court, that a commission for the examination of witnesses may be returned by the commissioners, by mail, unless there is a special order to the contrary. And that each of the commissioners, after the sealing up of the commission and the depositions taken by them, should sign his name upon the outside of the package, in his own proper handwriting. In analogy with this practice relative to witnesses, probably a similar course would be sanctioned with respect to commissions to take answers of defendants. At all events, the court would doubtless authorize it, whenever specially applied to for such an order. Indeed, it seems to have been directed in one case. (r)

When the commission is returned by a messenger, it is to be left by him with the register.

If one of the commissioners is the bearer of the commission, the above formalities with regard to swearing the messenger are dispensed with. The commissioner delivers it, sealed, into the hands of the register or clerk, who accepts it without oath, and endorses it thus: [Date,] "Received by the hands of G. H., one of the commissioners." (s)

It is provided by statute that when a commission shall be issued to take a defendant's answer, no copy or abstract of the bill shall be annexed thereto. (t)

Amendment of answer.] It is only under *very special circumstances that a defendant can be allowed to make any alteration in his answer, after it has been put in. (u) (81) But the court will some-

(o) *Id.* ib.

(g) 9 Paige, 351.

(s) *Hinde's Ch.* 237.(u) *McKim v. Thompson*, 1 Bland, 162. 4 John. Ch. Rep. 375. 2 Hayw. 178.(p) *Id.* 237.(r) *Barclay v. Barker*, cited 1 Hoff. Ch. Pr. 233.

(t) 2 R. S. 179. § 78, (orig. § 72.)

(81) *Smith v. Babcock*, 2 Sumner, 583; *Western Reserve Bank v. Stryker*, 1 Clarke, 380; *Cock v. Evans*, 9 Yerg. 287, 233; *Burden v. McElmoyle*, 1 Bailey Eq. 375; *Giles v. Giles*, *id.* 428; *Carier v. Wood*, 1 Bald. 239; *Liggon v. Smith*, 4 Hen. & Munf. 405; *Culloway v. Dobson*, 1 Brock. 119; *Coffman v. Alline*, Litt. Sel. Cas. 201; *Maron v. Debow*, 2 Hayw. 178; *Flora v. Rogers*, 4 *id.* 202; *Jackson v. Cutright*, 5 Munf. 308; *Hennings v. Conner*, 4 Bibb. 299; *Beach v. Fulton Bank*, 3 Wend. 574; *Taylor v. Bogert*, 5 Paige, 33; 1 Dan. Ch. Pr. 3d Am. ed. 778, and n.; *Story's Eq. Pl.* § 896 to 901.

times permit it to be done, upon special application. It is, however, a matter in the discretion of the court; which discretion is exercised with great caution. It may be done, in a small matter, at any time before issue joined, on motion. But in a material point, the motion must be made upon an affidavit of the facts which make it necessary, and after notice to the complainant's solicitor. (v) An amendment may be granted for the purpose of correcting a mistake or error in a matter of fact, or in the statement of a fact; (w) or in making an admission of assets; (x) or a mistake in the title of the answer. (y) So it will be allowed where new matter has come to the defendant's knowledge since the answer was put in; (z) or in cases of surprise, as where an addition has been made to the draft of the answer after the defendant has perused it. (a) (82)

(v) *Liggon v. Smith*, 4 Hen. & Munf. 477.

(w) *Alpha v. Payman*, 1 Dick. 33. *Berney v. Chambers*, Bunb. 248. *Countess of Gainsborough v. Gifford*, 2 Peer Wms. 424.

(x) *Dagley v. Crump*, 1 Dick. 35.

(y) *Amb. 62*. 1 *Mad. 269*. 1 *Ves. & B. 186*.

(z) *Patterson v. Slaughter*, *Amb. 292*. *Wells v. Wood*, 10 *Ves. 401*. *Alpha v. Payman*, *Dick. 33*.

(a) *Chute v. Lady Dacre*, 1 *Eq. Ca. Ab. 29*.

(82) The provisions of the Code, in respect to the amendment of answers, are as follows:

No variance between the allegation in a pleading, and the proof, shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved, to the satisfaction of the court, and in what respect, he has been misled; and thereupon the court may order the pleading to be amended. (§ 169.)

When the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. (§ 170.)

But where the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within sections 169 and 170 but a failure of proof. (§ 171.)

Any pleading may be once amended by the party, of course, without costs, and without prejudice to the pleadings already had, at any time within twenty days after it is served, or at any time before the period for answering it expires; or, it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading; unless it be made to appear to the court that it was done for the purposes of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is, or may be, noticed. If it appear to the court that such amendment was made for that purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case, a copy of the amended pleading must be served on the adverse party. (§ 172.)

And the court may, before or after judgment, in furtherance of justice, and upon such terms as may be proper, amend any pleading, &c., by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the pleading, &c., to the facts proved. (Code, § 173.)

Whenever a party seeks to avail himself of the provisions of section 169 of the Code, he must prove, to the satisfaction of the court, that he has been misled, and the proof must show in what respect he has been misled. (*Callin v. Gunter*, 10 *How. Pr. 315*; *S. C. 11 N. Y. 368*; *Deuel v. Spencer*, 1 *Ab. 237*; *Cotheal v. Talmadge*, 1 *E. D. Smith, 575*; *Cobb v. West*, 4 *Duer. 38*.) It is very clear that sections 169 and 170 contemplate a case where the alleged variance has been discovered, or is de-

But an amendment of the answer will not be permitted for the pur-

veloped on the trial or hearing, at which time the relief, in a case to which it is appropriate, may be given at once, and the trial thereafter proceed upon the amended pleadings. (*Egert v. Wicker*, 10 How. Pr. 193, 197; *Cotheal v. Talmadge*, 1 E. D. Smith, 573; S. C. 9 N. Y. 551; *Therasson v. Peterson*, 22 How. Pr. 98.) Unless the party claiming to have been misled is able to prove it, to the satisfaction of the court, the variance will be disregarded, and the pleadings may be amended to conform to the facts proved. (*Chapman v. Casotin*, 3 Bosw. 456.) Or, the trial may proceed without an amendment, either before a judge or a referee, and if the plaintiff have a verdict, he may move to have the pleading amended to correspond to the facts proved; provided the defendant has not been misled or surprised by the variance. (*Lettman v. Ritz*, 2 Sandf. 735. See also *DePeyster v. Wheeler*, 1 id. 719; S. C. 1 Code Rep. 93; *Harmony v. Bingham*, 1 Duer, 210; S. C. 12 N. Y. 99; *Hart v. Hudson*, 6 Duer, 294; *Parsons v. Suydam*, 3 E. D. Smith, 276; *Craig v. Ward*, 36 Barb. 377; S. C. 3 Keyes, 387; *Relyea v. Beaver*, 34 Barb. 547; S. C. 25 N. Y. 123; *Emery v. Pease*, 20 N. Y. 62; *Coleman v. Playsted*, 36 Barb. 29; *Seaman v. Low*, 4 Bosw. 338.)

Since the court has a discretion in that respect, it is no ground of review, on appeal, that a request for leave to amend was made, on the trial, and refused. (*Phinck v. Vaughan*, 12 Barb. 217; *Hendricks v. Decker*, 35 id. 302; *Dennis v. Snell*, 50 id. 95; S. C. 34 How. 467; 54 Barb. 411; *New York Marbled Iron Works v. Smith*, 4 Duer, 362, 367; *Gould v. Glass*, 19 Barb. 186.) And the general rule is that the discretion of the court, in allowing or disallowing an amendment, having been exercised, it is not the subject of review on appeal. (*Gould v. Rumsey*, 21 How. Pr. 97; *Macqueen v. Babcock*, 13 Ab. 263; S. C. 22 How. Pr. 229; 3 Keyes, 423; *Salters v. Genin*, 19 How. Pr. 233; S. C. 10 Ab. 478; *Bailey v. Johnson*, 1 Daly, 62; *St. John v. West*, 3 Code R. 85; S. C. 4 How. Pr. 329; *Ford v. David*, 1 Bosw. 570; *Travis v. Barger*, 24 Barb. 614; *Phinck v. Vaughan*, 12 id. 215; *N. Y. Marbled Iron Works v. Smith*, 4 Duer, 362; *Smalley v. Doughty*, 6 Bosw. 63; *Kissam v. Roberts*, id. 154; *Binnard v. Spring*, 42 Barb. 470; *Schermerhorn v. Wood*, 30 How. 316.) Yet if some substantial right has been invaded, by the amendment, an appeal to the general term will be allowed. (*Union Bank v. Mott*, 11 Ab. 42; S. C. 19 How. Pr. 267. See *Johnson v. McIntosh*, 31 Barb. 267.) But where a party has leave to amend granted him, at special term, which is reversed at general term, no appeal lies to the court of appeals. (*New York Ice Company v. Northwestern Ins. Co.* 23 N. Y. 357; S. C. 12 Ab. 414; 21 How. 296; *Hodges v. Tennessee Marine & Fire Ins. Co.* 8 N. Y. 416. See *Lounsbury v. Purdy*, 18 N. Y. 515.)

If the answer be one merely of denial, it cannot be amended, *of course*; because no reply or demurrer to such an answer can be interposed. (*Ferrand v. Herbeson*, 3 Duer, 655; *Plumb v. Whipples*, 7 How. Pr. 411.) Hence, if a defendant wishes to amend such an answer, by setting up new matter, or a counter-claim, or in any other way, he must apply to the court for leave, on motion and upon notice. (*Van Sant. Eq. Pr.* 221.)

Prior to the amendment of the Code, in 1852, the court, by the terms of section 173, could only allow such amendments as would not change, substantially, the claim or defence. But, by a very slight change in the language of the section, this restriction which, before, was general, is now limited to those cases in which amendments are allowed for the purpose of conforming the pleading to the facts proved. In all other cases the court is invested with the power, in its discretion, to allow "any allegations material to the case" to be inserted in the pleading; even though the effect may be to change entirely the cause of action or defence. (*Beardsley v. Stover*, 7 How. Pr. 294.)

Facts occurring after service of the answer, or facts of which the defendant was ignorant at the time of putting in the answer, cannot be set up by way of amendment of the answer. If attempted, the amended answer will be irregular, and may be set aside on motion. (*Van Sant. Eq. Pr.* 222.)

Amendments should be liberally allowed by the court in furtherance of justice. (*Vanderbilt v. Access. Transit Co.* 9 How. Pr. 352; *Cook v. Spears*, 2 Cal. 409; *Stearns v. Martin*, 4 id. 227; *Butler v. King*, 10 id. 342; *Smith v. Yreka Water Co.* 14 id. 201; *Lord v. Hopkins*, 30 id. 78; *McMillan v. Dana*, 18 id. 339; *Roland v. Kreyenhagen*, 18 id. 455; *Pierson v. McCahill*, 22 id. 127.)

It rests entirely within the discretion of the court to allow, or refuse to allow, an amendment of the pleadings, on the trial, in order that proof of a new cause of action or defence, may be admitted. (*Hendricks v. Decker* 35 Barb. 298; *Roth v. Schloss*,

pose of enabling the defendant to set up the defence of usury, unless

6 id. 308; *Brown v. McCune*, 5 Sandf. 224, 229.) The question cannot be reviewed on a motion for a new trial. (See *Hendricks v. Decker*, *supra*.) It is not a ground of, nor will it be considered on, appeal. (*Gould v. Ramsey*, 21 How. Pr. 97. See *McCarty v. Edwards*, 24 id. 236.) But it seems that the rule is different when the refusal to allow the amendment is based by the judge on the ground that he has no power to do so. (*Russell v. Conn*, 20 N. Y. 83.)

The objection that the proof does not correspond with the pleading must be taken at the trial, or it cannot be raised on appeal. (*Rosebrooks v. Dinsmore*, 5 Ab., N. S. 59; S. C. 36 How. 138. See also *Babbett v. Young*, 51 Barb. 466.) Notwithstanding the facts proved may themselves constitute a cause of action or defence, unless they agree with and sustain the pleading, it is a failure of proof under section 171 of the Code. (*Gasper v. Adams*, 28 Barb. 441.) When there is a particular matter set up in a pleading, which is not proved in some particular, it is a case of variance provided for by sections 169 and 170; but if there are no allegations showing a ground of action or defence, the Code does not allow a decree founded on the proof without allegations. (*Kelsey v. Western*, 2 N. Y. 500; *Richards v. Allen*, 3 E. D. Smith, 399.)

The right to amend of course, under section 172, does not constitute, of itself, a stay of proceedings. (*Casson v. Whalon*, 1 Code Rep., N. S. 27; *Plumb v. Whipples*, 7 How. Pr. 411.) Under this section a party may strike out a cause of action or defence by amendment of course. (*Watson v. Rushmore*, 15 Ab. 51.) It is not the practice of the courts, when a party is obliged to apply for leave to amend his pleading, to grant such leave for the purpose of allowing the defendant to set up the statute of limitations, usury, or any of that class of defences usually denominated unconscionable. But under section 172 a defendant is entitled, as a matter of course and of right, to amend his answer once, within twenty days after its service (if not put in for delay), by adding thereto a new and distinct defence, even though it be that of the statute of limitations. (*McQueen v. Babcock*, 22 How. Pr. 229.)

The only limit to a defendant's right to amend of course is that it shall not be done for the purpose of delay. (Code, § 172.)

The right to amend is absolute, subject only to the power of the court to strike out for cause shown. If the amendment is made in good faith, and not for the purpose of delay, it cannot be stricken out, although the effect may be to deprive the opposite party of the benefit of a circuit or term. The court must pass upon the question of intent as well as of the effect, and be satisfied that it was made for the purpose of delay, and that such will be the effect of it, before it can be stricken out. The statute does not authorize the party (whose pleading has been amended) to decide in the first instance, and disregard it at his peril, leaving the rights of the parties to be subsequently settled upon motion; but provides for a decision upon the good faith and propriety of the amended pleading, before any other proceedings are had in the action which may affect the rights of the parties. If the amended pleading shall be served during a circuit, the court can, upon a proper case being made, require the party amending to show cause, at a short day, why the amended pleading should not be stricken out. (*Griffin v. Cohen*, 8 How. Pr. 452; *Farrand v. Herbeson*, 3 Duer, 658; *Cooper v. Jones*, 4 Sandf. 699; *Spencer v. Tooker*, 21 How. Pr. 333; S. C. 12 Ab. 353; *Burrall v. Moore*, 5 Duer, 654; *Thompson v. Minford*, 11 How. Pr. 273; *Rogers v. Rathbun*, 8 id. 466.) The courts have, at all times, favored amendments to the utmost extent that was supposed consistent with a due regard to the rights of suitors and the proper dispatch of business. The Code of 1848 interposed no restriction upon the right of either party to amend his pleading without costs and without prejudice. In 1849 the section was amended by providing that pleadings might be amended once. It was again amended, in 1851, for the reason that parties sometimes availed themselves of its provisions for the purposes of delay. There is nothing in section 172 authorizing the party upon whom the amended pleading is served to disregard it, if served within the proper time. (*Stout v. Curran*, 7 How. Pr. 36.)

If a party notices the cause for trial, he thereby waives his right to amend his pleading without leave. (*Phillips v. Suydam*, 6 Ab., N. S. 289; S. C. 54 Barb. 153.) Where an amended answer is served for delay, and at so late a period as to throw the cause over the circuit, it may be treated as a nullity. (*Allen v. Compton*, 8 How. Pr. 251.) In *Vanderbilt v. Bleecker*, (4 Ab. 289,) where the answer was amended in the matter of a clerical error only, and was served five days before the circuit, it was held that the plaintiff might return it, and proceed; and that in such a case the question of good faith might be raised at the circuit.

A party's right to amend of course is gone after a first amendment; and he cannot

he pays, or offer to pay the money actually lent, with legal interest.

amend again without leave of the court. The rule is the same whether the first amendment was by leave of the court or not. (*Jeroliman v. Cohen*, 1 Duer, 629, 631.)

Section 172 provides that a pleading may be amended once, of course, at any time within twenty days after it is served. (*Clor v. Mallory*, 1 Code R, 126.) Or at any time within twenty days after the service of the answer or demurrer to such pleading. (See *Seneca County Bank v. Garlinghouse*, 4 How. Pr. 174.) If the pleading is served by mail, the party may amend it of course, at any time within forty days. (*Washburn v. Herrick*, 4 How. Pr. 15.)

It is too late for the defendant to amend of course, even if twenty days have not elapsed since the service of the answer, if issue has been joined, the cause noticed for trial, and the taking of proofs has commenced, under section 391 of the Code. In such a case he can only amend by leave of the court. (*Snyder v. White*, 6 How. Pr. 321, 325.)

A defendant is not deprived of his right to amend of course for the reason that he has been served with notice of motion for judgment on account of the frivolousness of the answer. He may amend within twenty days after service of the answer; and the motion for judgment will be defeated on the ground that the pleading objected to does not exist; the amended pleading having taken its place. (*Burrall v. Moore*, 5 Duer, 655, 656.)

Under section 172 a plaintiff is authorized to amend his complaint of course by setting forth a new cause of action. This right is not restricted to setting forth a cause of action of the same class as that contained in the original complaint; but he may, by omitting the original cause of action, insert another of a different class; provided the summons be appropriate to it. The same principles should be applied to the amendment of answers. (*Brown v. Leigh*, 12 Ab., N. S. 193. But see *Woodruff v. Dickie*, 31 How. 164.) And, under the liberal rules of pleading introduced by the Code, the court may allow a verified answer to be amended, by striking out a material admission and substituting a denial, on proper terms. (*Strong v. Dwight*, 11 Ab., N. S. 319.) But in such a case the proposed amendments should be made by making, verifying and filing an entire new amended answer, so that the plaintiff can use the original answer as evidence, on the trial, to prove the defendant's admission that he asks to have struck out. (*Ibid.*)

In *Howard v. Michigan Southern R. R. Co.* (5 How. Pr. 206), it was held that a demurrer (coupled with an answer) could not be omitted by amendment. In *Troy & Boston Railroad Co. v. Tibbits*, (11 How. Pr. 168,) HARRIS, J. says: "I regard it as very much a matter of course, to allow any party to shape his own pleadings to suit himself; and for that purpose, to permit him, at any time before trial, to amend his pleadings so as to present his own views of the questions to be litigated, upon such terms as may be deemed equitable." And it was held, in that case, that there is now no restriction upon the power of the court, before trial, to allow amendments to pleadings, even though the effect be to change, entirely, the whole cause of action, or the grounds of defence. It is only when a party seeks to amend his pleadings after trial, that the court is prohibited from allowing an amendment that would substantially change the cause of action or the defence. But where a trial has been had, and subsequently set aside, and a new trial ordered, the court has the same power to allow the parties to amend their pleadings as though the action had never been tried. (*Ibid.*)

An amended pleading is one that is essentially different from the one the place of which it takes in the action. It will not suffice that it is in form and phraseology different from the one first served. If, in legal effect, it amounts to the same thing, it is not an amended pleading. (*Snyder v. White*, 6 How. Pr. 321.) In *Howard v. Michigan Southern R. R. Co.* (5 How. Pr. 206; S. O. 3 Code R. 213) an answer was put in which, if true, was a good defence; the same paper contained a demurrer to the whole complaint. The plaintiff replied, denying the facts set up, and noticed the demurrer for argument. An amended answer was then served, by the defendant, which in no way differed from the first, with the exception that the demurrer was omitted. It was held that the answer and demurrer were two distinct pleadings, and that the omission of the demurrer was no amendment to the pleading. But a party is not at liberty to disregard an amended pleading on the ground that he deems it inconsistent with the original. (*Spencer v. Tooker*, 12 Ab. 353.) Where a pleading has been amended it cannot be treated as a nullity, unless leave has been obtained from the court, except in the case of an amendment which is obviously a fraud. If the amendment is supposed to have been made in bad faith, the proper remedy is to

Nor will an amendment be granted to enable a party to set up the de-

pply to the court for relief. (*Griffin v. Cohen*, 8 How. Pr. 451; *Rogers v. Rathbun*, 1. 466. See *Hollister v. Livingston*, 9 id. 140.)

Where only a part of an answer is demurred to, the defendant, under the leave to amend, can amend only the defective portion of the answer, and cannot set up any new defences. But he may add to the part demurred to, anything which would strengthen the defence as originally made, even if such matter had for any cause been passed over, and left unanswered, in the first pleading. (*Fieldin v. Carel'i*, 26 How. 173; S. C. 16 Ab. 239; *McQueen v. Babcock*, 22 How. 229; S. C. 13 Ab. 263; 3 Keyes, 428; *Spencer v. Tooker*, 21 How. 333; S. C. 12 Ab. 353.) The defendant could do the same under the right to amend of course; and might even add new defences. (*Wyman v. Redmond*, 18 How. Pr. 272.) Leave to amend the pleading demurred to may be reserved after a demurrer has been argued and a decision rendered; but it is not within the power of the court to order the pleading to be amended. (*Lord v. Freeland*, 15 Ab. 122; S. C. 24 How. 316.)

After an answer has been demurred to, unless the defendant has previously amended of course, an amended answer may be served within twenty days. (*White v. Mayor, &c., of New York*, 14 How. Pr. 495; S. C. 5 Ab. 322.) The rule is the same, notwithstanding the plaintiff had obtained an order to strike out part of the pleadings, and the same order gave the defendant leave to amend, on terms, which he had not done. (*Cooper v. Jones*, 4 Sandf. 699.)

If a defendant puts in an answer which consists of mere denials, and new matters occur which he wishes to set up, his only remedy is to apply to the court for leave to put in a supplemental answer, under section 177 of the Code. (*Lampson v. McQueen*, 15 How. Pr. 315.) All objections to the propriety of an amended complaint are waived by the defendant amending his answer and taking issue on the new cause of action. (*Secor v. Law*, 9 Bosw. 163.)

In respect to amendments by the court, it has been held that section 173 of the Code applies to proceedings for partition, and the power of the court is not restricted by the provisions of the statute. (Laws of 1852, ch. 277; *Croghan v. Livingston*, 17 N. Y. 218; S. C. 6 Ab. 350; 25 Barb. 336; *Rogers v. McLean*, 31 How. 279; S. C. 34 N. Y. 536. But see, to the contrary, *Jennings v. Jennings*, (2 Ab. 6; *Lyle v. Smith*, (13 How. Pr. 104.) The power of amendment is confined to the court in which the action originated; and the superior court cannot amend, on appeal. (*Gould v. Glass*, 19 Barb. 186.) Where an action is commenced for a divorce for adultery, if the defendant is able to show a reasonable chance of establishing a defence, leave will be granted him to amend, or file a supplemental answer. He may set up the defence of adultery, against the plaintiff, when the fact has been discovered since the issues in the case were first joined. (*Strong v. Strong*, 28 How. 432; S. C. 3 Rob. 659.)

An answer may be amended on the trial if the new matter proposed to be introduced is, *prima facie*, a complete defence to the action; particularly if a valid excuse is presented for not pleading it before. (*Bailey v. Kay*, 50 Barb. 110; *Travis v. Tobias*, 8 How. Pr. 334; *Pomeroy v. Sperry*, 16 id. 211.) But it has been held that it would not be a "furtherance of justice," under section 172, to disturb a verdict perfectly proper upon the pleadings as they stand, in order to sustain a new defence, of which the plaintiff had no notice either before or at the trial, until after the evidence on both sides had closed. An amendment to warrant it would be a substantial change of the defence. (*Bunge v. Koop*, 5 Rob. 1.) On the trial of a cause the court has no power, and consequently a referee has none, to allow an amendment in a pleading by inserting a new cause of action, or a new defence. (*Ford v. Ford*, 35 How. 321; S. C. 53 Barb. 525.) The words of section 272, providing that referees shall have the same power to allow amendments to any pleadings as "the court upon such trial," upon the same terms, and with the like effect, appear to be unnecessary; inasmuch as the court has no other, greater or less power, "upon the trial," in respect to amendments, than at special term, or in banc or otherwise. (*Woodruff v. Dickie*, 31 How. 164; S. C. 5 Rob. 619.) There is no distinction between the powers of the court while sitting in different branches. It is enough that the court may amend any pleading, and that the power is not limited to any branch or part of the tribunal. All the powers of the court may be exercised by a single judge while sitting as a court; except when the power is confined to the court as a collective body. (lb.) As regards the allowance of amendments of pleadings, a judge presiding at the trial of a cause, with a jury, possesses all the powers of the court, and can allow them in the same manner and with the like effect, as the court sitting in any other organized form. (lb.)

fence of usury, or the statute of limitations, if he has not availed him-

Referees are no longer officers of, or under the control of, the court. They now possess all the powers of the court, and their allowance or disallowance of an amendment can only be reviewed, if reviewable at all, in the manner other decisions are reviewed—on appeal. (*Woodruff v. Dickie*, 31 How. 164.) A referee may allow an amendment of the pleadings, in his discretion. (*Melvin v. Wood*, 3 Keyes, 533; S. C. 3 Trans. App. 297; 4 Ab., N. S. 438; *Hoyt v. Hoyt*, 8 Bosw. 511; *Secor v. Law*, 9 id. 163.) Referees have the same power to allow amendments to pleadings as the court, on the trial, and upon the same terms, and with the like effect. (*Dunnigan v. Crummev*, 44 Barb. 528.)

In order to conform the pleadings to the evidence the courts are very liberal in allowing amendments *on the trial*. (Wait's Code, 328; citing *Van Duzer v. Howe*; 21 N. Y. 531; *Bank of Havana v. Magee*, 20 id. 355; *Hall v. Gould*, 13 id. 127; *Corning v. Corning*, 6 id. 97; *Wood v. Wood*, 26 Barb. 356; *Gasper v. Adams*, 24 id. 287; *Hunter v. The Hudson River Iron, &c. Co.* 29 id. 493; *Danahy v. Tyler*, 15 How. Pr. 399; *Fox v. Hunt*, 8 id. 12; *Getty v. Hudson River R. R. Co.* 6 id. 270.)

The amendment of pleadings on the trial is discretionary with the court, and is not reviewable on appeal. (*Richtmeyer v. Remsen*, 33 N. Y. 203; S. C. 6 Trans. App. 203; *Meyer v. Fiegel*, 7 Rob. 122; *Hendricks v. Decker*, 35 Barb. 293; *Roth v. Schloss*, 6 id. 308.) But it is improper for a judge or referee, upon the trial, to allow an amendment which will, in effect, amount to a new cause of action or defence. (*Ransom v. Wetmore*, 39 Barb. 101; *Eugen v. Davison*, 2 Duer, 153; *Hunt v. Hudson River Fire Ins. Co.* id. 481; *New York Marbled Iron Works v. Smith*, 4 id. 362; *Grosvenor v. Atlantic Fire Ins. Co.* 1 Bosw. 439; *Union Bank v. Mott*, 18 How. Pr. 506; S. C. 10 Ab. 372; *Robbins v. Richardson*, 2 Bosw. 245; *Ford v. Ford*, 35 How. 326; S. C. 53 Barb. 525; *Vibbard v. Roderick*, 51 id. 616; *Woodruff v. Dickie*, 5 Rob. 619; *Van Syckels v. Perry*, 3 id. 621; *Bailey v. Kay*, 50 Barb. 110; *Bigelow v. Dunn*, 53 id. 570.) The language of section 173 of the Code would seem to remove all restrictions upon the power of amendment of pleadings upon the trial, in cases in which it is made to appear to the court that the amendment will be in furtherance of justice. (*Van Ness v. Bush*, 14 Ab. 36; *Beardsley v. Slover*, 7 How. Pr. 294; *Harrington v. Slade*, 22 Barb. 161. See also *St. John v. Northrup*, 23 Barb. 183; *Daguerre v. Orser*, 3 Ab. 86; *Hagins v. De Hart*, 12 How. Pr. 322; *Davis v. Schermerhorn*, 5 id. 440.)

The provisions of section 173 of the Code, which authorize the amendment of pleadings *after judgment*, are to be construed as only permitting them for the purpose of sustaining such judgment. (*Englis v. Furniss*, 3 Ab. 82; *Gasper v. Adams*, 24 Barb. 283; *Williams v. Burch*, 6 Bosw. 674.) Upon appeal to the general term, after judgment, that court cannot amend the pleadings so that the merits of the case will be affected, and a new trial required. (*Brown v. Colie*, 1 E. D. Smith, 265.) But in any case in which the court, at special term, ought clearly to have allowed an amendment, the general term may treat the pleadings as having been amended in conformity with the proof. (*Bowdoin v. Colman*, 6 Duer, 183; S. C. 3 Ab. 431; *Bate v. Graham*, 11 N. Y. 237; *Clark v. Dales*, 20 Barb. 67; *Harrower v. Heath*, 19 id. 338; *Pratt v. Hudson River R. R. Co.* 21 N. Y. 305, 313; *Wright v. Whiting*, 40 Barb. 235.) In *Malcom v. Baker*, (3 How. Pr. 331,) after judgment for the plaintiff, which was affirmed on appeal, leave to amend the answer was refused as too late, notwithstanding the order of affirmance reserved to the defendant permission to apply for such leave.

When evidence of facts not within the answer is admitted, and the referee decides in favor of the defendant on those facts, an amendment of the answer cannot be made so that it will conform to the proof. (*Johnson v. McIntosh*, 31 Barb. 272.) A party will not be allowed, after trying one defence and failing in it, to set up an entirely new one. (*Willett v. Fayerweather*, 1 Barb. 72.)

No notice of motion for leave to amend need be given when the only ground for or against the amendment is furnished by the record. In such a case the amendment may be granted on the hearing at the general term. (*Clark v. Dales*, 20 Barb. 67.)

Even after judgment the court has an extraordinary power to insert new allegations material to the case in a pleading. This power will, however, be very sparingly exercised. (*Field v. Hawenurst*, 9 How. Pr. 75; *Egert v. Wicker*, 10 id. 193.)

Where a complaint is amended in a material particular, the right of the defendant to answer the amended complaint is absolute and unrestricted. He may interpose any defence that he may have. (*Harriott v. Wells*, 9 Bosw. 631.)

self of the opportunity to interpose such defence in the first

The terms of an amendment are within the discretion of the court, and the exercise of that discretion is not the subject of review upon exceptions or appeal. (*Van Ness v. Bush*, 14 Ab. 36.) The party who applies for the amendment should bear all the expenses of it, (*Union Bank v. Mott*, 19 How. Pr. 267; S. C. 11 Ab. 42,) and all additional expenses imposed on the opposite party should be repaid him. (*Hare v. White*, 3 How. Pr. 296; S. C. 1 Code R. 70.) Where the court, at the trial, imposes terms as a condition of granting leave to amend an answer, the terms will be deemed to be acquiesced in, unless an exception is taken at the time. (*Griggs v. Howe*, 31 Barb. 100; S. C. 2 Keyes, 574; 3 id. 166.)

It has been held that it is not in furtherance of justice, after judgment has been entered, to allow an amendment in order that a party may plead the statute of limitations. Such an amendment does not come within the terms of section 174 of the Code. (*Clinton v. Eddy*, 37 How. 23; S. C. 54 Barb. 54.)

Leave to amend the answer, or to file a supplemental answer, for the purpose of setting up a defence that outstanding mortgages have been purchased, which are a lien upon real property in litigation between the parties, will be granted on such terms as will protect the rights of the plaintiff. (*Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 2 Rob. 612.)

A defendant, by amending his answer, and taking issue on a new cause of action added to the complaint by amendment, waives all objection to such amendment. (*Secor v. Law*, 9 Bosw. 163.)

If a defendant does not know that too many are joined as plaintiffs until after the same appears in evidence, he should then apply for leave to amend his answer. (*Ackley v. Tarbox*, 31 N. Y. 564; *Gillam v. Sigman*, 29 Cal. 657.)

By Rule 60 of the Equity Rules of the United States Courts, it is provided that "after an answer is put in it may be amended as, of course, in any matter of form, or by filling up a blank or correcting a date, or reference to a document or other small matter, and be resworn at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court, or the judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom."

It has been held that a defendant will not be allowed to amend his answer after the opinion of the court, and the testimony have indicated in what respect it may be modified so as to effect his purpose. (*Calloway v. Dobson*, 1 Brock. 119.) Amendments are within the discretion of the court, and cannot be controlled by *mandamus*. (*Jackson v. Smith*, 1 Paine, 453; *ex parte Bradstreet*, 7 Peters, 634,) and are governed by their own rules and modes of practice. (*Wright v. Hollingworth*, 1 Peters, 165; *Walden v. Craig*, 7 Wheat. 576; *United States v. Buford*, 3 Peters, 12.)

In *Maryland*, where an order granting to the plaintiff the right to surcharge and falsify an account, was appealed from, and the appellate court remanded the cause for the purpose of having the pleadings amended, and for further proceedings, and extended the right to surcharge and falsify the account to both parties, provided the defendant's unamended pleadings should warrant such extension, it was held that the defendant could amend his answer so as to surcharge and falsify in respect to matters known to him at the time of filing his original answer. (*Williams v. The Savage Manuf. Co.* 3 Maryland Ch. Decis. 418.)

In *California*, amendments, of course, may be made, without costs to either party, to a pleading, before the trial of the issue of law, on a demurrer filed thereto. (Cal. Pr. Act, § 67; *Allen v. Marshall*, 34 Cal. 165; *Lord v. Hopkins*, 30 id. 76; *Barber v. Reynolds*, 33 id. 497.) But a party shall not so amend more than once. (Cal. Pr. Act, § 67.) After demurrer, and before argument and submission of the issue thereon, either party may amend a pleading by filing the same as amended, and serving a copy on the adverse party or his attorney, who has ten days to answer or demur thereto. (Cal. Pr. Act, § 67.) A defendant cannot amend his answer by inserting an averment which is but a conclusion of law. (*Levinson v. Swartz*, 22 Cal. 229.) A referee cannot order an amendment. (*De la Riva v. Berreyessa*, 2 Cal. 195.) Amendments should be liberally allowed by the court, in furtherance of justice. (*Cook v. Spears*, 2 Cal. 403; *Stearns v. Martin*, 4 id. 227; *Butler v. King*, 10

id. 342; *Smith v. Yreka Water Co.* 14 id. 201; *Lord v. Hopkins*, 30 id. 78; *McMillan v. Dana*, 18 id. 339; *Roland v. Kreyenhagen*, id. 455; *Pierson v. McCahill*, 22 id. 127.) After demurrer sustained, amendments may be made on motion. (*Smith v. Yreka Water Co.* 14 Cal. 201; *Gallagher v. Delaney*, 10 id. 410; *Pierson v. McCahill*, 22 id. 127; *Fish v. Redington*, 31 id. 186.) The party desiring to amend, after demurrer sustained, must make his motion to the court; and he cannot object, on appeal, that he was not permitted to amend, when he made no offer. (*Smith v. Yreka Water Co.*, *supra*.) After a demurrer to the defendant's answer has been sustained, it is in the discretion of the court to allow the defendant to amend. (*Gillan v. Hutchinson*, 16 Cal. 153.)

The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading. (Cal. Pr. Act, § 63; 3 Estee's Pr. 300.) at any stage of the trial, in furtherance of justice. (*Peters v. Foss*, 16 Cal. 357; *Lestrade v. Barth*, 17 id. 285. See also *Arnold v. Arnold*, 20 Iowa, 273; 1 Scam. 45; 3 id. 312, 45; 32 Ill. 331; 35 id. 22; 47 Maine, 492; 42 N. H. 25.) The allowance of amendments at the trial is in the discretion of the court, (*Thornton v. Borland*, 12 Cal. 438; *Gillan v. Hutchinson*, 10 id. 153; *Cooke v. Spears*, 2 id. 433; *Stearns v. Martin*, 4 id. 277.) and that discretion will rarely be revised; (*Pierson v. McCahill*, 22 Cal. 127;) but, for its abuse, the appellate court will interfere. (*Cooke v. Spears*, 2 Cal. 409.) Where, from oversights of counsel, committed under pressure of business, pleadings are defective, amendments should be allowed with great liberality. In such cases, when an offer to amend is made at such a stage of the proceedings that the other party will not lose an opportunity to fairly present his whole case, an amendment should be allowed. (*Kierstein v. Madden*, cited, 3 Estee's Pr. 300.)

Where, in the course of a trial, it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the court should allow amendments on such terms as may be just, at any time after the commencement of the trial. (*Stringer v. Davis*, 30 Cal. 218; *Peters v. Foss*, 16 id. 357; *Lestrade v. Barth*, 19 id. 660; *Gavitt v. Doub*, 23 id. 78.)

A defendant may amend his answer by showing that the whole interest in a joint counter-claim has been transferred to him; (*Stearns v. Martin*, 4 Cal. 229;) or he may amend by inserting new matter, (*Pierson v. McCahill*, 22 id. 127,) if not entirely foreign to the cause of action. (*Nevada & Sac. Co. Canal Co. v. Kidd*, 28 Cal. 673.) The fact that such new matter was well known to the defendant at the time the original answer was filed, is no good reason why the amendment should not be permitted. (*Pierson v. McCahill*, *supra*.) Where an amended answer is complete in itself, and is inconsistent with the original answer, the two cannot stand together. (*Kuhland v. Sedgwick*, 17 Cal. 123.) If the defendant does not know that too many are joined as plaintiffs until after the same appears in evidence, he should then apply for leave to amend his answer. (*Gillam v. Sigman*, 29 Cal. 657.) And if testimony, offered by the defendant, is rejected, because of a defective denial, he should be allowed to amend his denial. (*Stringer v. Davis*, 30 Cal. 318.) So, if the defendant has acquired title to the premises demanded during the litigation, he should be allowed to amend his answer, so as to obviate the objection to the introduction of testimony excluded by the court under the original answer. (*McMinn v. O'Connor*, 27 Cal. 238.)

After trial, error in the computation of interest may be corrected in the court below. (*Whitney v. Bankman*, 13 Cal. 536.) Upon the trial, every material allegation of the complaint, not specifically controverted, is to be taken as true; but where the defendant supposed he had denied material allegations, and the court sustained his view of the answer, it was held that the appellate court, on reversing the judgment, might allow the court below to exercise its discretion in permitting the answer to be amended. (*Fish v. Reddington*, 31 Cal. 186. See *Pierson v. McCahill*, 22 id. 127.) The court may, on granting leave to file an amended pleading, impose such terms as it may deem proper. (3 Estee's Pr. 310.)

The party desiring to amend must serve an engrossed copy of the pleading, with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where the amendment is to be inserted, together with notice of the application to amend. (Cal. Pr. Act, § 43; 3 Estee's Pr. 311.)

In *Nevada*, it has been held that if, instead of demurring, advantage be taken of a defective pleading, by motion for judgment, the court should permit an amendment of the pleading, where an amendment will cover the defect, the same as if a demurrer had been interposed. (*Cal. State Tel. Co. v. Patterson*, 1 Nev. 151.)

In *Ohio*, the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, &c., by adding or striking out the

name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change, substantially, the claim or defence by conforming the pleading, &c., to the facts proved. (Code, § 137.) At any time within ten days after a demurrer is filed, the adverse party may amend, of course, on payment of costs since filing the defective pleading. Notice of filing an amended pleading shall be forthwith served upon the other party, who shall have the same time to answer, or reply thereto, as to an original pleading. (Id., § 135.) If a demurrer is sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct; (Id., § 139;) and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defence is not apparent, the court may *require* the pleading to be made definite and certain by amendment. (Id., § 118.) It has been held that an amendment of an answer that might change the whole condition of the defence will not be allowed, of course. (*Evens v. Hall*, 1 Handy, 434.) Where a defendant answers that he executed a contract as a broker or agent, and, after the testimony is before the court, asks to amend his answer so as to show that he executed the contract under a mistake of his legal responsibility thereon, the court will not grant leave to amend, unless the facts proved show at least a reasonable probability that this can be established. (*Wilson v. Bailey*, 1 Handy, 177.)

If the allegation in a pleading be so indefinite and uncertain that, in the opinion of the other party, the precise nature of the charge or defence does not so appear as to predicate a judgment thereon, such party should move, under section 118, to have the pleading made definite and certain. Such motion should be made before the trial of the action. If not, the court, or jury, under its direction, may find any fact which the pleading, however general, will, on any fair construction, authorize. (*Smith v. Woodruff*, 1 Handy, 276.)

In *Indiana*, an answer may be amended without leave of the court, at any time before it is replied to or demurred to, but not afterwards, without leave of court. (2 R. S. 43, sec. 97; B. C. Civ. Prac. 90.) If a pleading be amended without leave of the court, in a case where leave is necessary, the amendment need not be answered, although a rule has been taken therefor; and the court will strike out the amendment, and try the cause on the original pleadings. (8 Ind. 178.) When an amended answer is stricken from the files, on motion, the original answer stands as if no amendment had been made. (16 Ind. 125.)

The provisions of the *Wisconsin* Code, respecting amendments, are the same as those of *Ohio*, above set forth. (Code, §§ 77, 80, 81, 82.) The Code of *Kansas* also contains the same provisions; (Code, §§ 141, 142, 145, 147, 149;) also the Code of *Minnesota*. (Pub. Stat. of 1859, p. 543, § 90; 544, §§ 91, 93, 94.) By the Chancery Code of *Illinois*, the circuit courts, when sitting as courts of equity, may permit the parties to amend their bills, answers, &c., on such terms as the court may deem proper, so that neither party be surprised or delayed thereby. (Ch. Code, § 34; Statutes of 1858, vol. 1, p. 142.)

In *Michigan*, the court in which any action is pending has power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein. (Compiled Laws of 1857, vol. 2, p. 1200, § 1.)

In *Kentucky*, whenever it is alleged that a party has been misled to his prejudice by a variance between the allegation in a pleading and the proof, and the fact is shown to the satisfaction of the court, the court may order the pleading to be amended, upon such terms as may be just. (Civ. Code of Pr. § 153.) The court may at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence by conforming the pleading, &c., to the facts proved, and when the allegations of a pleading are so *indefinite or uncertain* that the precise nature of the claim or defence is not apparent, the court may *require* the pleading to be made definite and certain by amendment. (Id. § 161.) Courts may permit such amendments to be made without being verified, unless a new and distinct cause of action or defence is thereby introduced. (Id. § 166.)

In *Barbour v. Moss's adm'r*, (cited Myers' Code, p. 427,) it was held that where the defendant must have known the facts contained in an amended answer, which he proposed to file, at the time of filing his original answer, it was not an abuse of discretion to refuse leave to file it.

instance. (83) Yet it seems that where such defences are defectively set forth, an amendment will be allowed, in order to give the party the benefit of the defence which he intended to present. But he will not be permitted to put in a new or additional plea or answer. (b)

And the court has never permitted amendments to be made where the application has been made merely on the ground that, the defendant, at the time he put in his answer, was acting under a mistake in point of law; and not on the ground of a fact having been incorrectly stated. Thus, where a defendant, who was an executor, had admitted himself accountable for the surplus, and it was afterwards found that the circumstances of the case were such that he would have been entitled to it *himself, permission to amend was refused. (c) So where a defendant had, by his answer, admitted the receipt of a sum of money from his father by way of advancement, and refused to bring it into hotchpot, he was not permitted to amend his answer as to the admission; although he swore that he made it under a mistake as to the law of the case. (d)

The court will also refuse to permit an amendment of an answer after an indictment for perjury preferred or threatened; even though it

(b) *Beach v. Fulton Bank*, 3 Wend. 573.

(c) *Rawlins v. Powell*, 1 Peer Wms. 306.

(d) *Pearce v. Grove*, Amb. 63, S. C. 3 Atk. 522.

(83) It is not the practice of the courts, when a party is obliged to *apply* for leave to amend his pleading, to grant such leave for the purpose of allowing the defendant to set up the statute of limitations, usury, &c., or any of that class of defences usually denominated unconscionable. But the defendant is entitled, as a matter of course and of right, to amend his answer within twenty days after its service (if it be not done for delay,) by adding thereto such defences, or any new and distinct defence. (*Macqueen v. Babcock*, 22 How. Pr. 229; S. C. 3 Keyes, 428; 13 Ab. 268.) The court, in the exercise of a sound discretion, will not permit a defendant who asks a favor to interpose the statute of limitations, where he, in effect, concedes that the debt has not been paid. (*Osgood v. Whittelsey*, 20 How. Pr. 72; *Sagory v. The New York & New Haven R. R. Co.* 21 id. 455.)

The fact that an answer sets up the defence of usury, is no reason why the defendant should not have leave to amend his answer in respect to other defences. (*Brown v. Mitchell*, 12 How. Pr. 408.) In *Bates v. Voorhies*, (7 How. Pr. 234,) HARRIS, J. refused to allow an amendment to set up the defence of usury, stating, however, that although it was against his own convictions of justice and propriety, such had been the practice, and that, perhaps, the practice had become so inveterate that it could not be disregarded. In *Grant v. McCaughin*, (4 How. Pr. 216,) where a default for want of an answer was opened, PARKER, J., refused to impose the terms that the defendant should not set up the defence of usury. In *The Union National Bank of Troy v. Bassett*, (3 Ab., N. S. 359,) it was held that the court has power, under section 173, to allow a defendant to amend his answer by setting up usury as a defence; and that no distinction is made between defences, provided a proper case is made. The defence of usury must rest on the same ground as any other. (See, also, *Sheldon v. Adams*, 18 Ab. 405; S. C. 41 Barb. 54; 27 How. 179.)

It has been held, in *South Carolina*, that where there has been a decree to account, the defendant will not be permitted to amend his answer so as to embrace the defence of the statute of limitations. (*McRea v. David*, 7 Rich. Eq. 375.)

In *California*, one of two defendants may be permitted severally to plead the statute of limitations by filing a separate plea, (*Robinson v. Smith*, 14 Cal. 244,) as it may be pleaded at any time. (*Cook v. Spears*, 2 Cal. 409; *Stuart v. Lander*, 16 id. 372.)

is satisfied that the defendant did not intend to perjure himself, and had no interest in so doing. (e)

Where an amendment to an answer is allowed, the amendments must be served upon the complainant. Thus, where the jurat to an answer was defective, and the defendant had leave to amend by adding a proper jurat to the answer on file, it was held that the amendment was not complete until a copy of the amended jurat was served on the complainant's solicitor. (f)

Supplemental answer.] The practice of allowing the answer to be amended, however, has been almost entirely superseded, in modern times, by permitting the defendant to file a *supplemental answer*, whenever necessary to correct any error. This practice has been adopted in all cases in which it is wished to correct a mistake in an answer as to a matter of fact. (g) Nor is it confined to matters of mistake only, but has been extended to other analogous cases; as where a defendant, at the time of putting in his original answer, was ignorant of a particular circumstance, he has been permitted to introduce that circumstance by supplemental answer. (h) And where a defendant had wished to state a fact in his original answer, but had been induced to leave it out, by the mistaken advice of his solicitor, he was allowed to state it by supplemental answer. (i) So where a defendant had been induced, by the misrepresentation of the complainant that certain securities mentioned in the bill had been fairly obtained, to put in an answer admitting the securities, &c., the defendant was permitted to file a supplemental answer. (k) (84)

(e) *Verney v. Macnamara*, 1 Bro. C. C. 419.

(f) *Taylor v. Bogert*, 5 Paige, 33.

(g) *Strange v. Collins*, 2 Ves. & B. 163. *Taylor v. Obee*, 3 Price, 83. *Ridley v. Obee*, Wightv. 32.

(h) *Jackson v. Parish*, 1 Sim. 505. *Tidswell v. Boyer*, 7 id. 64.

(i) *Nail v. Punter*, 4 Sim. 474.

(k) *Curling v. Marquis of Townshend*, 19 Ves. 628.

(84) By section 177 of the Code, the plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made; and either party may, by leave of the court, in any pending or future action, set up by a supplemental pleading the judgment or decree of any court of competent jurisdiction rendered since the commencement of such action, determining the matters in controversy in said action, or any part thereof; and if said judgment be set up by the plaintiff, the same shall be without prejudice to any provisional remedy theretofore issued, or other proceedings had in said action on his behalf.

Amendments to a pleading can only relate properly to the time when the original pleading was made, and can only state facts in existence at that time. To introduce matters occurring at a subsequent stage, would render the record incongruous. Such matters should be brought before the court by a supplemental pleading. This is the case where the party was ignorant, at the time of putting in his original pleading, of the matters sought to be introduced by the supplemental. (*Hornfager v. Hornfager*, 3 How. Pr. 13; S. C. 1 Code Rep. N. S. 180; *Drought v. Curtiss*, 8 How. Pr. 1; *Hendricks v. Decker*, 3 Barb. 235; *Williams v. Hernon*, 16 Ab. 173; *McMahon v.*

*But although the court will, in cases of a clear mistake or other [*166] cases of that description, permit a defendant to correct his answer by filing a supplemental answer, it always does so with great difficulty where an addition is to be put upon the record prejudicial to the complainant; though it will be inclined to yield to the application if the object is to remove out of the complainant's way the effect of a denial, or to give him the benefit of a material admission. (l) But where the application

(l) Bowen v. Cross, 4 John. Ch. 375.

Allen, 1 Hilt. 103; *S. C.* 12 How. Pr. 89; 3 Ab. 89; *Houghton v. Skinner*, 5 How. Pr. 420; *Radley v. Houghtaling*, 4 id. 251; *Sage v. Mosher*, 17 id. 367; *Lampson v. McQueen*, 15 id. 345.)

Thus, in an action for the partition of land, brought by the grantee in the sheriff's deed after sale on execution, evidence that after issue joined the judgment on which the sale took place was vacated is inadmissible, unless the fact has been set up in a supplemental answer. (*Williams v. Hernon*, 16 Ab. 173.) So the recovery of a judgment in a former action, after the original answer in a later suit was put in, should be set up in a supplemental answer, on leave obtained for that purpose. (*Hendricks v. Decker*, 35 Barb. 302.) Matters which have occurred since the first answer was put in, can only be set up by leave of the court, in a supplemental answer. (*Lampson v. McQueen*, 15 How. Pr. 345; *McMahon v. Allen*, 3 Ab. Pr. 86; *S. C.* 12 How. Pr. 39; *Houghton v. Skinner*, 5 id. 420; *Dias v. Merle*, 4 Paige, 259.)

In an action for divorce on the ground of adultery, the defendant, on showing a reasonable prospect of establishing the defence, may have leave to amend, or to file a supplemental answer, setting up the defence of the plaintiff's adultery, discovered after the issues were first joined in the action. (*Strong v. Strong*, 28 How. 432.) So a release given after issue is joined in an action, can properly be set up only by supplemental answer. (*Matthews v. Chicopee Manuf. Co.* 3 Rob. 712.)

A supplemental pleading is in addition to, and not a substitute for, the original. (*Dann v. Baker*, 12 How. Pr. 521.) And the supplemental pleadings allowed by section 177 must not contradict the statements in the first, but must be consistent with them. (*Ibid.*; *Slauson v. Englehart*, 34 Barb. 198; *Watson v. Thibou*, 17 Ab. 134.) The court may compel a party applying for leave to file a supplemental pleading, to elect to substitute it in the place of the previous one; but unless it does so, both remain. (*Brown v. Richardson*, 4 Rob. 603; *Bate v. Fellowes*, 4 Bosw. 633. See *Dann v. Baker*, 12 How. Pr. 521.)

The proper mode of applying to the court for leave to file a supplemental pleading is either by motion, on proper notice, or upon an order to show cause. The motion cannot properly be made at the trial. (*Garner v. Hannah*, 6 Duer, 262. See also *Hoyt v. Sheldon*, 4 Ab. 59; *Hoyt v. Thompson's Ex'rs.* 19 N. Y. 207.)

If a supplemental pleading is defective, the proper practice is to demur to it. (*Goddard v. Benson*, 15 Ab. 191; *Abbot v. Ruyesley*, Freem. 252; *S. C.* 2 Mod. 307.)

Any defence should be allowed to be set up by supplemental answer, which a party could have pleaded *puis darrein continuance*, as a matter of strict right. (*Hoyt v. Sheldon*, 6 Duer, 661; *S. C.* 4 Ab. 59; 19 N. Y. 207; *Bate v. Fellowes*, 4 Bosw. 633; *Radley v. Houghtaling*, 4 How. Pr. 251; *Sandford v. Sinclair*, 3 Denio, 269; *Morell v. Garelly*, 16 Ab. 269.) But in order that a defendant may, as a matter of right, put in a supplemental answer, what he proposes to plead must be true, and it must contain a good defence. Upon a motion for leave to put it in, the truth of the matter may be inquired into, (*Morel v. Garelly*, 16 Ab. 269,) and where it appears that the proposed answer is false, leave to file it will be refused. (*Ib.*) If the defendant is guilty of laches, it is in the discretion of the court to refuse leave. (*Ib.* See also *Bancker v. Ash*, 9 John. 250; *Morgan v. Dyer*, id. 255; *Ludlow v. McCrea*, 1 Wend. 228; *Tuffs v. Gibbons*, 19 id. 639; *Hoyt v. Sheldon*, 6 Duer, 661; *Sandford v. Sinclair*, 3 Denio, 269.)

In a proper case, leave to amend or to file a supplemental answer for the purpose of setting up an equitable defence, will be granted upon such terms as will protect the rights of the plaintiff. (*Madison Avenue Baptist Church v. Baptist Church in Oliver Street*, 2 Rob. 642.) In *Stewart v. Isidor*, (5 Ab., N. S. 68,) where the defendants in a creditor's suit sought to set up their discharge in bankruptcy by a supplemental answer, although it did not appear whether the plaintiffs had disclosed

is made on the ground of mistake, it will be granted only where there is a mistake, properly speaking, as to a matter of fact. (*m*) And it may be here remarked, that where a defendant, in putting in his original answer, has mistaken facts, he cannot contravene his own admission in any other way than by moving to correct his answer either by amendment or supplemental answer. He cannot do so by filing a cross-bill. (*n*)

(*m*) 2 Dan. 340. *Edwards v. McLeay*, 2 Ves. & B. 256. *Livesey v. Wilson*, 1 id. 149.

(*n*) *Berkley v. Ryder*, 2 Ves. sen. 533.

their claim of lien, or proved their debt in bankruptcy, it was held that the supplemental answer might be interposed.

An order allowing a supplemental pleading may be appealed from. (*Harrington v. Slade*, 22 Barb. 164; *Guild v. Parsons*, 16 How. Pr. 382; *Cheeseman v. Sturges*, 19 Ab. 293.)

In *Bowen v. Irish Presbyterian Congregation*, (6 Bosw. 246,) after a trial had been had, the court refused to allow a supplemental answer to be filed. And in *Houghton v. Skinner*, (5 How. Pr. 420,) it was held that an answer in the nature of a plea *puis darrein continuance* will not be allowed after two trials, where the defendant had knowledge of the facts before answering in the cause. And it seems that the court will not, even before trial, allow a supplemental answer to set up a technical defence to defeat a just claim. (*Hoyt v. Sheldon*, 4 Ab. 59; 6 Duer, 661.)

The supplemental answer, under the Code, is a substitute for the old plea of *puis darrein continuance*; but it differs from that plea in this respect, that the supplemental answer may be allowed, on motion, whenever the facts forming the ground of the answer have occurred since the answer was put in, or where the defendant was ignorant of them at the time of pleading the first answer; whereas the plea of *puis darrein continuance* could strictly be pleaded only before or at the next continuance after the facts transpired. When the facts asked to be incorporated and pleaded in a supplemental answer go to divest the plaintiff of the right to maintain the action, and transfer the cause of action to another who has received satisfaction for the demand involved in it, it is the duty of the court to grant the motion, whether the motion be made at the earliest day or not. (*Drought v. Curtiss*, 8 How. Pr. 56.) See, however, *Morel v. Gareilly*, (16 Ab. 239,) where it is said that the application should be made promptly.

In *California*, where circumstances occurring subsequently to the commencement of the action render it proper, the same may be presented by supplemental pleadings, and issue taken thereon in the same manner as in the case of original pleadings. (Cal. Pr. Act, § 67; *Van Maren v. Johnson*, 15 Cal. 311.) When a female party subsequently marries, her husband must be joined with her, and this should be done, and an averment of the marriage be made, by supplemental pleading, and not by amendment of the original. (*Van Maren v. Johnson*, *supra*.) If the defendant, in an action to recover the possession of real estate, has acquired title to the premises pending the litigation, evidence of this fact cannot be introduced, unless it is pleaded as a defence in a supplemental answer. (*McMinn v. O'Connor*, 27 Cal. 246.) In such an action, title acquired by defendants *pendente lite*, and other matters of defence arising subsequent to the commencement of the suit, must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*. (*Moss v. Shear*, 30 Cal. 468.) So a transfer of title by the plaintiff to another, since the commencement of the action, must be set up in the original, or in a supplemental answer. (*Ib.*)

In *Kentucky*, *Wisconsin*, *Minnesota*, *Kansas* and *Ohio*, the plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the filing of the former petition, answer or reply. (Kentucky Civ. Code, § 162; Code of Wisconsin, § 85; Pub. Stat. of Minn., p. 544, § 93; Code of Kansas, § 152; Civ. Code of Ohio, § 142.)

In *Indiana*, by the Code, the court may, on motion, allow supplemental pleadings, showing facts which occurred after the former pleadings were filed. (2 Rev. St. 102, § 50.) Under the present system in that state, common law practice and chancery practice being blended together, section 102 not only provides a substitute for pleas *puis darrein continuance*, but provides also for some of the cases in which supplemental pleadings were necessary or proper under the practice of the court of chancery. (Bicknell's Civ. Prac. 108.) It seems that now as heretofore, where the

The court, with a view of guarding the rights of the complainant, requires to be clearly satisfied that justice requires the filing of a supplemental answer. In making the application, therefore, the defendant must state specifically what he wishes to put upon record, in order that the court may judge how far his application is reasonable. (*o*) And a supplemental answer will not be allowed to be filed unless on new matter, nor unless a sufficient reason appears for not having inserted it in the original answer. (*p*) Where it was evident, however, that an omission in the answer must have arisen from a mere slip, the court allowed the defendant to file a supplemental answer for the purpose of supplying the omission, without any affidavit in explanation. (*q*) Where, after answer filed, the defendant obtained an exemption of his person from imprisonment, under the act, it was held that he might file a supplemental answer to present that fact. (*r*) So where, in a suit for a divorce, the complainant commits adultery after the answer of the defendant is put in, she will be permitted, if she applies immediately after the discovery of the fact, to set up that defence in a supplemental answer, or by a cross-bill in the nature of a plea *puis darrien continuance*. (*s*)

It is material to observe, that if a defendant is allowed to correct a mistake by a supplemental answer, he is held strictly to that mistake; and if he goes beyond that and makes any other alteration in the case than what arises from the correction of such mistake, his supplemental answer will be taken off the file. (*t*)

(*o*) *Curling v. Marquis of Townshend*, 19 Ves. 628.

(*q*) *Scott v. Carter*, 1 Young & Jer. 452.

(*s*) *Smith v. Smith*, 4 Paige, 432.

(*p*) *Tennant v. Willsmore*, 2 Anst. 362.

(*r*) *Anon.*, Hopk. 27.

(*t*) *Strange v. Collins*, 2 Ves. & B. 167.

matter to be introduced existed before the suit was commenced, an *amendment* is proper; but where the matter arises after the institution of the suit, or plea pleaded, a *supplemental* pleading is proper. And this is true in general, whether the suit be for an equitable or for a legal right. (*Id.* 109.) Leave to file a supplemental pleading will not be granted without cause shown to the court, which is done by filing an affidavit that the matter of the proposed supplemental pleading is true, and arose after plea. (*Ibid.*) Such supplemental pleading necessarily waives everything in the former pleading inconsistent with it, and such a pleading by the defendant must be pleaded in bar of the further maintenance only of the action. (*Id.* 110.)

It has been decided in the *United States courts*, that where the circuit court, after a reversal of its decree, further proceedings being awarded, allowed a supplemental answer, to bring before the court the facts which were proper to be known before instructions were given to the master as to the mode of settling the accounts, this was proper; and that no objection could be taken to it on a subsequent appeal (*Williams v. Gibbs*, 20 How., U. S. 535.) A supplemental answer to a bill of foreclosure should embrace new matter discovered subsequent to the filing of the original answer. (*Sydam v. Truesdale*, 6 McLean, 459.) Where a defendant has answered generally to a matter of which he has no particular knowledge, he may be allowed to file a supplemental answer on the same subject, after he has acquired particular information concerning it, and to introduce into such answer new matter which has come to his knowledge since filing the original answer, on furnishing the opposite party with the names of the witnesses by whom he expects to prove it. (*Carter v. Wood*, 1 Baldw. 289.)

[*167] *The defendant will not be allowed to file a supplemental answer contradicting the statements in the first answer. (*u*) Therefore, where an original bill has been filed and answered, and afterwards a petition is filed to amend the prayer of the bill, and the prayer is amended, and new matter introduced; and the defendant, without leave, files another answer, (in which, without replying to the new matter,) he essentially alters and new models the matter of his original answer, the court may order the new answer to be taken off the files. (*v*)

There appears to be no particular limit to the time within which an application for leave to file a supplemental answer will be granted; provided the cause is in such a state that the complainant may be placed in the same situation that he would have been in had the original answer been correct. Accordingly, in several instances such applications have been granted after replication filed. (*w*) But where the complainant cannot be placed in the same situation that he would have been in had the defence been stated on the record at the proper time, the court will not permit a supplemental answer to be filed. (*x*) Therefore, where an application for that purpose was made after the cause had been set down for hearing, the court denied it, with costs. (*y*)

But although the rule of practice now is, that in cases of mistake in the statements or admissions in an answer, or in analogous cases, the defendant will not be permitted to amend his answer, but must apply for leave to file a supplemental answer for the purpose of correcting the mistake, the old course of taking the answer off the file and amending it is still pursued in cases of error or mistake in matters of form. (*z*) Thus, where the title of an answer was defective, a motion by the defendant to take it off the file and amend and re-swear it, was granted. (*a*) And so where in the title of an answer the name of the complainant was mistaken, a similar order was made. (*b*) The addition of the name of a party omitted in the title, has also been permitted. (*c*)

So, also, the defendant has been permitted to add the schedules referred to in his answer, where they have been accidentally omitted. (*d*) And in several cases in the court of exchequer, where verbal inaccuracies have crept into answers, they have been ordered, at the hearing, to [*168] *be struck out. (*e*) In general, however, the court will not per-

(*u*) *Greenwood v. Atkinson*, 4 Sim. 61.

(*v*) *Thomas v. Visitors of Frederick School*, 7 Gill & John. 389.

(*w*) 2 Dan. 342. 19 Ves. 628. 1 Sim. 505,

(*x*) *Id. ib.*

(*y*) *Macdougall v. Punier*, 4 Russ. 486.

(*z*) 2 Dan. 343.

(*a*) *White v. Godbold*, 1 Mad. 269.

(*b*) *Peacock v. Duke of Bedford*, 1 Ves. & B. 186. 1 Fow. Ex. Pr. 389.

(*c*) 1 Fow. Ex. Pr. 389.

(*d*) *Id. ib.*

(*e*) *Ellis v. Saul*, 1 Aust. 332. Vide *Jesus College v. Gibbs*, 1 Young & Col. 162. 1 Younge,

mit such amendments as those above mentioned, without making it part of the order that the answer shall be *re-sworn*. (*f*)

The court has also permitted an answer to be amended, by adding the name of the counsel who signed the same to the record. (*g*)

The application either for leave to amend the answer, or to file a supplemental answer, when granted, is generally upon the terms of paying costs to the complainant for opposing the application, and furnishing the complainant's solicitor with a copy of the amended or supplemental answer *gratis*; giving him the usual time to except thereto.

Of taking answers off the file.] In case any irregularity has occurred, either in the frame or form of an answer, or in the taking or filing of it, the complainant may take advantage of such irregularity by moving to take the answer off the file. (*h*) Thus, where a defect occurs in the title, so that it does not distinctly appear whose answer it is, or to what bill it is an answer; (*i*) or where the complainant is misnamed in the title, (*k*) the answer may, on motion by the complainant, be ordered to be taken off the file for irregularity. But, in such cases, the motion should not be to take the "answer of C. D." &c. off the file; but it should be called, in the notice, "a certain paper writing purporting to be the answer," &c. (*l*) The answer, in case of a defect in the title, may also be taken off on the application of the defendant. But as such an answer is a nullity, a motion for that purpose is unnecessary. The defendant may leave the answer upon the file, and put in another. (*m*)

So where an answer has been prepared for five defendants, it cannot be received as the answer of two only, (*n*) nor can it be received as the answer of six, (*o*) and where such an answer has been filed, it will upon application of the complainant, be ordered to be taken off the file. (*p*) It seems, however, that after such an answer has been filed, the defendant may apply, by motion, to have it taken off the file and amended by striking out the names improperly introduced. (*q*)

If the signature of counsel is not affixed to the answer, the answer *will also be taken off the file on the application of the com- [*169] plainant. (*r*) (85) So it will if it is not signed by the defendant; and

(*f*) *Peacock v. Duke of Bedford*, 1 Ves. & Bea. 186. *Lord Moncaster v. Braithwaite*, 1 Younge, 382. (*g*) *Harrison v. Delmont*, 1 Price, 108. 2 Young & Col. 3.

(*h*) 2 Dan. Ch. Pr. 343.

(*k*) *Griffiths v. Wood*, 11 Ves. 62.

(*m*) *Id. ib.*

(*o*) *Cope v. Parry*, 1 Mad. 83.

(*q*) *Id. ib.*

(*i*) *Pieters v. Thompson*, Coop. 249.

(*l*) *Id. ib.*

(*n*) *Harris v. James*, 3 Bro. C. C. 371.

(*p*) *Cooke v. Westall*, 1 Mad. 265. See vide 2 Ves. & B. 310.

(*r*) *Wall v. Stubbs*, 2 Ves. & B. 358.

(85) A party has a right to suppose that the pleading served on him is a correct copy of that filed; and where the copy of an answer contains neither the signature of solicitor or counsel, nor has a *jurat*, the plaintiff may apply to take the answer off the files for irregularity. (*Littlejohn v. Munn*, 3 Paige, 280; *Supervisors, &c. v. Mississippi, &c. R. R. Co.* 21 Ill. 338; *Spicer v. Frazer*, 7 Ind. 661; *McLure v. Colclough*, 17 Ala. 89.)

this too although an answer on oath was waived by the bill. (s) So where the defendant files a new or supplemental answer to an amended bill without leave, the court may order it to be taken off the files. (t) So where the answer is filed without oath. (u) (86) Or where the answer of a foreigner who does not understand English, is not put in in the language he speaks, together with an English translation, but in English only. (v) Or where a separate answer is put in without leave, by one of several defendants, after the others have answered and a replication has been filed, proofs taken, and the cause set down for hearing. (w) So where an answer is very evasive, the court may order it to be taken off the file. (x) But where the defendant merely stated "that he had no knowledge of any of the matters in the bill mentioned," the court of exchequer refused to order the answer to be taken off the file on the alleged ground that it was illusory; but left the complainant to except. (y) And an answer, however evasive, will not be ordered to be taken off the file after the complainant has excepted to it. (z)

If a married woman puts in an answer separately from her husband, without a previous order of the court authorizing it, her answer may be taken off the file. (a) The same rule prevails where the husband answers separately from his wife without leave. (b) And in a case where the joint answer of husband and wife was sworn to by the husband only, it was ordered to be taken from the file. (c) So an answer taken under a commission will be taken off the file if the jurat does not state where it was sworn to. (d)

An answer may also be ordered to be taken off the file for the purpose of being produced before the grand jury on an indictment for perjury preferred by the complainant. (e) (87) But this will not be permitted if

(s) *Denison v. Bassford*, 7 Paige, 370.

(t) *Thomas v. Visitors of Frederick School*, 7 Gill. & John, 289.

(u) *Trumbull v. Gibbons*, Halst. Dig. 172. *Nesbitt v. Bellam*, 7 Gill. & John, 494. In *Rogers v. Cruger*, (7 John, 558, 581.) the answer of a guardian ad litem of an infant defendant was ordered to be taken from the file because it was put in without oath.

(v) *Hayes v. Leguin*, 1 Hogan, 274.

(w) *Fulton Bank v. Beach*, 2 Paige, 307. 6 Wend. 36, S. C.

(x) *Phillips v. Overton*, 4 Hayw. 292.

(y) *Olding v. Glass*, 1 Young & Jer. 340.

(z) *Glassington v. Thwaites*, 2 Russ. 458.

(a) *Perine v. Swaine*, 1 John. Ch. Rep. 24. Prac. Reg. 53.

(b) *Leavitt v. Cruger*, 1 Paige, 421.

(c) *New York Chemical Co. v. Flowers and wife*, 6 Paige, 654.

(d) *Henry v. Costello*, 1 Hogan, 130.

(e) *Thompson v. Crosthwaite*, 2 Young & Jer. 512. *Curtis v. —*, 1 Hogan, 132.

(86) But if the plaintiff waives an answer on oath, he cannot apply to have the answer taken off the files, on the ground that the defendant knows it to be wholly untrue. His only remedy in such a case is at the hearing to ask to have the defendant charged personally with the costs to which he has improperly subjected the plaintiff by false pleading. (*Denison v. Bassford*, 7 Paige, 370.)

(87) An application to take an answer off the files, in order to prosecute for perjury, is made to the discretion of the court, and will not be granted unless some ground is laid to enable the court to judge of the propriety of such a proceeding. (*Daly v. Toole*, 1 Irish Eq. 344; S. C. 2 Dru. & W. 599.)

it *appear that the alleged perjury is in a part wholly immaterial [*170] to the merits of the cause. (*f*)

It is to be observed that if the complainant intends to apply to the court for an order to take an answer off the file for an irregularity, he should do so before he accepts the answer; otherwise the right to make the application will be considered waived; except in the case of an irregularity in the jurat or of an omission of the oath of the defendant, in which cases there can be no waiver of the irregularity. (*g*) It being a universal principle, in all courts, that *jurats* and affidavits, when contrary to practice, are open to objection in any stage of a cause. (*h*)

Exceptions to answers will be considered in a future chapter. (*i*)

SECTION VI.

DISCLAIMER.

A disclaimer is where a defendant, upon oath, denies that he has, or claims any right to the subject matter in demand by the complainant's bill; and renounces all title thereto.

Where a person who has no interest in the subject matter of a suit, and against whom no relief is prayed, is made a party, the proper course for him to adopt, if he wishes to avoid the discovery, is to demur; unless the bill states that he has or claims an interest. In which case, as a demurrer, which admits the allegations in the bill to be true, will of course not hold, he can only, (except in cases of partial discovery, to which he may object by answer,) avoid putting in a full answer by plea or disclaimer. (*k*)

Although, strictly speaking, a disclaimer is distinct from an answer, yet it cannot often be filed alone, but is usually put in under the title of an answer. For, although the defendant may not at the time he disclaims, possess any interest in the matter, yet he might have had an interest which he has parted with. And this circumstance, it seems, *would entitle the complainant to an answer as to the certainty [*171] of the fact; in order that, if such is the case, he may be enabled to make ! the proper person a party instead of the defendant. (*l*)

(*f*) McGowan v. Hall, 1 Hayes, 17.

(*g*) 2 Dan. 344. 280.

(*h*) Id. 280. Pilkington v. Himsworth, 1 Young & Col. 612. But in the case of *Nesbitt v. Dellam* (7 Gill. & John. 494,) where the oath of the defendant to the answer was omitted, but the complainant proceeded with the cause without making that objection, it was held that he could not avail himself of it in the appellate court.

(*i*) BOOK I. Ch. VII. Sec. 1.

(*k*) 2 Dan. 233. Mitf. 153.

(*l*) Mitf. Eq. Pl. 257. Oxenham v. Esdale, McCle. & Young, 540.

A defendant cannot shelter himself from answering by alleging that he has no interest in the matter of the suit, in cases where, though he may have no interest, others may have an interest against him. Thus it has been held that a party to an account cannot, by disclaiming an interest in the account, protect himself from setting out the accounts. (*m*) So a defendant who has improperly interfered with a party's right so as to make a suit necessary, may be compelled to answer the whole bill with a view to charge him with costs, notwithstanding a disclaimer. (*n*) So if a fraud be charged against the defendant, he must answer as to the fraud, and cannot put in a disclaimer only. (*o*) And a disclaimer by one of several defendants cannot be permitted to prejudice the complainant's right as against the others. (*p*) (88)

A disclaimer, though in substance distinct from an answer, is in point of form an answer, and is put in and filed in the same way; and the same formal words which precede and conclude the one are pursued as to the form of the others. (*q*) The form of a disclaimer is simply that the defendant disclaims all right and title to the matter in demand.

A disclaimer is put in upon oath. It must also be signed by the defendant; and in no case can such signature be waived with propriety, since it is a rule that no record will be received without signature, which tends to prejudice the rights of the defendant. (*r*)

Should there appear any inconsistency between the answer and disclaimer, the matter will be taken more strongly against the defendant upon the disclaimer than upon answer; since it is only by the latter that the defendant's title can be ascertained. (*s*) But the defendant may answer as to one part of a bill and disclaim as to the other part.

A defendant is not absolutely estopped by his disclaimer from afterwards insisting upon a claim. (*t*) Thus, if a party has disclaimed in ignorance of his rights, and afterwards discovers the same, he may apply to the court to get rid of the effect of the disclaimer, upon a distinct

(*m*) *Glassington v. Thwaites*, 2 Russ. 458.

(*n*) *Hutchinson v. Reed*, 1 Hoff. Ch. Rep. 315.

(*o*) *Bulkeley v. Dunbar*, 1 Aust. 37.

(*p*) *Williams v. Jones*, 1 Younge. 252. *Hill v. Adams*, 2 Atk. 39.

(*q*) 1 Fow. Ex. Pr. 351. *Hinde*, 209.

(*r*) 1 Smith, 198.

(*s*) *Mitt*, 251.

(*t*) *Branch v. Spursel*, *Harr.* 235.

(88) A defendant cannot, by disclaiming, deprive the plaintiff of the right to require a full answer from him, unless it is evident that the defendant should not, after the disclaimer, be continued a party to the suit. (*Ellsworth v. Curtis*, 10 Paige, 105.) Where a simple disclaimer is filed, a plaintiff who is entitled to an answer must move to take the disclaimer off the files, and he cannot except. But if the disclaimer is accompanied by an insufficient answer, the plaintiff should except to the answer. (*Ib.*)

No replication is necessary in order to bring a disclaimer to a hearing. (*Spofford v. Manning*, 2 Edw. Ch. 358.)

application supported by affidavit, establishing a special case. (*u*) But he *must make out a very strong case, upon affidavit, to get rid [*172] of such a disavowal of title. (*v*)

If the defendant puts in a disclaimer where he ought to answer, or accompanies his disclaimer by an answer which is considered insufficient, the complainant may except to it in the same manner as to an answer. (*w*) It seems, also, that if a defendant, under pretence of putting in a disclaimer and answer, puts in a mere disclaimer without any answer, such a proceeding will be considered evasive, and the pretended disclaimer and answer will be taken off the file. But if the complainant, instead of applying to the court in the first instance, excepts to the disclaimer, he will be precluded from afterwards moving to take it off the file. (*x*)

A defendant who disclaims may be examined as a witness by a co-defendant; (*y*) but the complainant cannot read his evidence in support of his own right, to the prejudice of another defendant. (*z*)

Where a disclaimer to the whole bill has been filed, the complainant should not reply to it. His proper course is, either to dismiss his bill as against the party disclaiming, with costs, or to amend it. He may also set the cause down upon the disclaimer; in which case, if he can satisfy the court that he had probable cause or reason to file his bill against such defendant, he may have a decree against such defendant, and all claiming under him, without costs on either side. (*a*) But if it should appear in such a case that the defendant was made a party without probable cause or reason, the complainant will be ordered to pay him his costs. (*b*)

If the complainant replies to a general disclaimer, and serves the defendant with a subpoena to rejoin, the defendant will be entitled to have his costs taxed against the complainant, for vexation. But it is otherwise where the disclaimer is to part, and there is an answer or plea to another part of the same bill. In such cases the complainant may file a replication to the plea or answer. (*c*)

It seems, however, that the defendant is not bound to wait for his costs till the hearing of the cause. If he think that he has been made a defendant vexatiously, he may apply for his costs by motion, on notice to the complainant, as soon as the complainant's time for amending his bill has expired. (*d*) But if the complainant can succeed in satisfying

(*u*) *Sidden v. Lediard*, 1 Russ. & My. 110.

(*w*) *Glassington v. Thwaites*, 2 Russ. 453.

(*x*) *Id.* ib.

(*z*) *Hill v. Adams*, 2 Atk. 39.

(*b*) *Hinde's Pr.* 209.

(*d*) *Hinde's Pr.* 209.

(*v*) *Seton v. Slade*, 7 Ves. 267.

1 *Anst.* 37.

(*y*) *Seton v. Slade*, 7 Ves. 267.

(*a*) *Prac. Reg.* 175.

(*c*) *Williams v. Longfellow*, 3 Atk. 582.

[*173] *the court that he had just ground for making the defendant a party, probably the latter would take nothing by his motion, in such a case. (e)

SECTION VII.

JOINDER OF SEVERAL DEFENCES.

Having in the preceding sections of this chapter, given an outline of the various methods of defence which may be resorted to by defendants in this court, it remains to show in what cases, and in what manner, those defences may be joined or combined.

The rule is general, as we have already observed, that all or any of the customary modes of defence may be joined; provided each relates to a separate and distinct part of the bill. Thus, a defendant may demur to one part of the bill, plead to another, and disclaim as to another. (f) He may also put in separate demurrers to separate and distinct parts of the bill, for separate and distinct causes. For the same grounds of demurrer, frequently, will not apply to different parts of a bill, though the whole may be liable to demurrer; and in that case the demurrier may be overruled, upon argument, and another allowed. (g) The defendant may also plead different matters to separate parts of the same bill. (h) (89)

(e) See 2 Dan. 236.

(f) Mitf. Eq. Pl. 258.

(g) Id. 174. North v. Earl of Strafford, 3 Peer Wms. 148. 1 Atk. 544.

(h) 2 Dan. 106, 349.

(89) Under the Code, a defendant may set forth by answer as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished. (Code, § 150.) And he may demur to one or more of several causes of action stated in the complaint, and answer the residue. (Id. § 151.)

A defendant may plead one defence to one part of a cause of action, and another defence to other portions of the same cause of action. (*Longworthy v. Knapp*, 4 Ab. 115.) But each defence must be complete of itself, (*Baldwin v. U. S. Telegraph Co.* 54 Barb. 505; S. C. 6 Ab., N. S. 405,) and each answer must stand by itself, as a distinct defence, (*Swift v. Kingsley*, 24 Barb. 541; *Ayres v. Covill*, 18 id. 260; *Hamer v. McFarlin*, 4 Denio, 511,) unless it in terms adopts, or refers to, the matter contained in some other answer. (*Baldwin v. U. S. Telegraph Co.*, *supra*.) Each defence should consist of allegations or averments of fact, stated positively, or upon information and belief, (*Simmons v. Fairchild*, 42 Barb. 409,) and answer the cause of action to which it is addressed, (*Brown v. Ryckman*, 12 How. Pr. 314,) and be complete, without reference to others. (*Spencer v. Babcock*, 22 Barb. 326; *Sinclair v. Fitch*, 3 E. D. Smith, 677; *Bridge v. Payson*, 5 Sandf. 210; *Loosey v. Orser*, 4 Bosw. 392; S. C. 7 Ab. 372, 337; *Benedict v. Seymour*, 6 How. Pr. 293.) Defences separately pleaded cannot be sustained nor defeated by connecting two or more of them together, any more than, formerly, special pleas could be by so connecting them. (*Spencer v. Babcock*, 22 Barb. 323; *Ayrault v. Chamberlain*, 33 id. 237;

The rules of pleading upon this subject of the joinder of defences are thus concisely stated by Lord Redesdale in his Treatise on Equity Pleading: "All these defences must clearly refer to separate and distinct parts of the bill. For a defendant cannot plead to that part to which he has already demurred; neither can he answer to any part to which he has either demurred or pleaded; the demurrer demanding

Ritchie v. Garrison, 10 Ab. 246; *Landan v. Levy*, 1 id. 376; *Sinclair v. Fitch*, 3 E. D. Smith, 677.) But it seems that a defendant may aver, once for all, certain facts applicable to each of several defences or counter-claims, and having averred them in one defence, or by way of introduction to all, thereafter refer to them in any other defence, distinctly and intelligibly, so as to include them in it. (*Xenia Branch Bank v. Lee*, 7 Ab. 337; 2 Bosw. 634. See also *Ayres v. Covill*, 18 Barb. 231; *Sinclair v. Fitch*, 3 E. D. Smith, 677.)

There is no rule prohibiting a defendant from uniting in the same answer any kind of defence he may have, except that such defences shall not be inconsistent; that is to say, they must not be such that one must necessarily be false. (*Van Sant. Eq. Pr.* 215; *Schneider v. Schultz*, 4 Sandf. 654; *Arnold v. Dimon*, 4 id. 630; *Roe v. Rogers*, 8 How. Pr. 356; *Livingston v. Harris*, 2 E. D. Smith, 197.) If they are, one of them will be struck out, or the defendant will be compelled to elect by which he will abide. (*Ibid.*) But the correct rule is held to be that answers which were not inconsistent under the former practice will not be held to be inconsistent under the Code. (*Lanning v. Parker*, 9 How. Pr. 238.) In *Willett v. The Metrop. Ins. Co.* (2 Bosw. 679,) the answer, first, denied each and every allegation in the complaint, and then, in successive paragraphs, separately numbered, admitted in terms many averments of the complaint. The plaintiff moved to strike out as false either the general denial or the admissions. It was held that there was no propriety in permitting two statements in a pleading in direct conflict with each other; and the court ordered that the general denial be struck out, unless the defendant withdrew the paragraphs containing the admissions. When the court assumes to compel a defendant to elect between inconsistent defences, it must do so on the ground that from the very nature of the case it is impossible that the defendant can have two such defences. (*Hollenbeck v. Clow*, 9 How. Pr. 281.) Answers are now regarded as inconsistent only when one of them is conceded or shown to be false; (*Ostrom v. Birby*, 9 How. Pr. 57;) or, as it is said in *Hollenbeck v. Clow*, (*supra*), when "the several defences contain matter so inconsistent that the proof of one defence would necessarily disprove the other." (See also *Otis v. Ross*, 8 How. Pr. 184.) The defendant may, therefore, subject to the above limitation, deny any, or all, of the allegations in the complaint. He may set up matter in avoidance, going to defeat or bar the same cause of action. He may set up matter in abatement, or a dilatory defence, to the same cause of action; or he may meet it with a counter-claim, going not only to defeat the plaintiff's demand, but showing the defendant entitled to an affirmative judgment. And the defendant may also avail himself of as many defences as he pleases, whether they be such as would be strictly legal, or defences of a purely equitable nature. (*Van Sant. Eq. Pr.* 215.)

Each defence must not only be separately stated, but plainly numbered. (Rule 25, Supreme Court.) To mark a defence as a separate defence, no formal commencement or conclusion is required. (*Bridge v. Payson*, 5 Sandf. 210.) There is but one safe rule in stating defences, viz.: to indicate distinctly, by fit and appropriate words, where the statement of each defence commences, and where it concludes. (*Lippencott v. Goodwin*, 8 How. Pr. 242.) To commence each defence, "and the defendant further says," is not sufficient. (*Ib.*) But it seems it is sufficient to commence, "and for a further defence." (*Benedict v. Symour*, 6 How. Pr. 235.) A failure to comply with this rule subjects every allegation which is not essential to a single cause of action to be stricken out, if objected to, as redundant. (*Ib.*; *Lippencott v. Goodwin*, *supra*; *Robinson v. Judd*, 9 id. 378, 332.) Where distinct causes of action are not separately stated or plainly numbered, the remedy is by motion to have the pleading made more definite and certain. (*Colton v. Jones*, 7 Ron. 164; *Wood v. Anthony*, 9 How. Pr. 78.) An objection for this defect cannot be raised by demurrer. (*Bass v. Comstock*, 33 N. Y. 21; *Colton v. Jones*, *supra*; *Dorman v. Kellam*, 14 How. Pr. 184.) When a party intends to insist on this objection, he should return the pleading, with his objection; otherwise the objection will be deemed waived.

the judgment of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea. Nor can the defendant, by answer, claim what, by disclaimer, he has declared he had no right to. A plea or answer will therefore overrule a demurrer, and an answer a plea. And if a disclaimer and answer are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer." (i)

(i) Mitf. Eq. Pl. 258.

(*Corbin v. George*, 2 Ab. 465; *Sawyer v. Schoonmaker*, 8 How. Pr. 198; *Strauss v. Parker*, 9 id. 342.)

The separate grounds of defence, separately stated, take the place of separate pleas under the former system. (*Cobb v. Frazee*, 3 Code Rep. 43.)

Formerly, a defendant might plead as many separate matters as he should think his defence required, subject to being compelled by the court to elect on which plea he would rely, or in cases where his pleas were inconsistent. (2 R. S. 352.) But the Code contains no provisions which allow an answer to be struck out on the specific ground of inconsistency as such. (*Ostrom v. Bixby*, 9 How. Pr. 57; *Hollenbeck v. Clow*, id. 289; *Smith v. Wells*, 20 How. Pr. 158.)

A defendant, after having interposed an answer, will not be allowed to withdraw it and put in a demurrer, unless special reasons are shown. (*Finch v. Pindon*, 19 Ab. 96.)

Where the defendant both answers and demurs to the same pleading, the defendant can treat neither the answer nor the demurrer as a nullity; but he should move to strike out the demurrer or the answer, or for an order that the defendant elect by which he will abide. (*Spellman v. Weider*, 5 How. Pr. 5; *Howard v. Michigan Southern R. R. Co.*, id. 205; S. C. 3 Code R. 213. See also *Clarkson v. Mitchell*, 3 E. D. Smith, 269; *Bolton v. Gardner*, 3 Paige, 273; *Clark v. Phelps*, 6 John. Ch. 214.)

A defendant cannot answer and demur to the same matter or count. (*Munn v. Barnum*, 12 How. Pr. 563; S. C. 1 Ab. 281; *Spellman v. Weider*, 5 How. Pr. 5.) Where an answer contained an objection of want of parties, it was held to be a demurrer, and the defendant was compelled to elect whether to abide by the answer or the demurrer. (*Struwer v. Ocean Ins. Co.* 16 How. Pr. 422.) To determine whether a defence is a demurrer or an answer, it is only necessary to ascertain whether it requires that any facts should be proved or not. (*Ibid.*)

An answer to a part of the complaint should so distinctly specify that portion to which it applies, that the court can at once see what it covers. (*Davison v. Schermerhorn*, 1 Barb. 480.) An answer containing a general and a specific denial of the same matter is bad for redundancy, and the defendant will be compelled, on motion, to elect which he will retain. (*Dennison v. Dennison*, 9 How. Pr. 246; *Blake v. Eldred*, 18 id. 240.)

Under the head of equitable defences are included all matters which would formerly have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. (*Dobson v. Pearce*, 12 N. Y. 156; S. C. 1 Ab. 103; 1 Duer, 142; *Sheehan v. Hamilton*, 3 Ab., N. S. 197; S. C. 2 Keyes, 304.) A strictly equitable defence may now be opposed to a legal cause of action. (*Foot v. Sprague*, 12 How. Pr. 355; *Hunt v. Farmers' Loan & Trust Co.* 8 id. 416; *Burgett v. Bissell*, 5 How. Pr. 192; S. C. 3 Code R. 215; *Hinenan v. Judson*, 13 Barb. 629; *Sheehan v. Hamilton*, *supra*.)

Section 150 of the Code is a statutory prohibition against duplicity in stating two defences together. (*Boyce v. Brown*, 7 Barb. 80; S. C. 3 How. Pr. 391.) But an answer denying two allegations, both of which are necessary to make out a good cause of action, does not contain a double defence. (*Otis v. Ross*, 8 How. Pr. 193; S. C. 11 N. Y. Leg. Obs. 343.) This section does not relate to defences of mere denials. (*Ibid.*) Where an answer, first, denied each and every allegation in the complaint contained, and then, in successive separately numbered paragraphs, admitted, in terms, many averments of the complaint, the general denial was, on motion, ordered to be struck out as false, unless the defendant withdrew the admissions. (*Willet v. Metropolitan Ins. Co.* 2 Bosw. 679.)

The following defences may be pleaded together: In an action for false representations, a general denial, and the truth of the representations made. (*Otis v.*

*To which it may be added that where a defendant adopts different modes of defence, it is necessary, not only that each defence should *in words*, be applicable to the distinct part of the bill to which it professes to apply, but that it should be so *in substance*. And if a defence, though in words applicable to part of a bill only, should on the face of it be applicable to the whole bill, it will not be good, and cannot stand in conjunction with another distinct defence, which is applicable and applied to another distinct part of the bill. (*k*)

(*k*) *Crouch v. Hickin*, 1 Keen, 335.

Ross, 8 How. Pr. 193; S. C. 11 N. Y. Leg. Obs. 343.) In an action to recover the possession of personal property, a general denial, and justification of the taking (*Hackley v. Ogman*, 10 How. Pr. 44.) A general denial and infancy. (*Mott v. Bennett*, 2 E. D. Smith, 52.) A denial of knowledge or information sufficient to form a belief as to the title of the plaintiff, and a lien on the property in suit. (*Townsend v. Platt*, 3 Ab. 325.) A denial of the full amount claimed, an admission of a certain amount due, and a tender of that amount, are all but one defence. (*Spencer v. Tooker*, 12 Ab. 353; S. C. 21 How. Pr. 333.)

The provisions of the *Ohio* Code, in respect to joinder of defences, are the same as those of section 150 of the *New York* Code. (Code of Ohio, § 93.) It has been held in that state that there are three kinds of defence which may be set up in an answer: 1. Matters which, by the common law, were usually pleaded in bar of the action. 2. Counter-claim. 3. Set-off. Although the answer may be so unskillfully drawn as not to distinguish between the three, yet if it contains sufficient facts to show a defence under either, the court will not permit the defendant to be prejudiced by not making the proper distinction in his answer between the three kinds of defence. (*Hill v. Butler*, 6 Ohio State Rep. 207.) The Code system of pleading in bar of the merits of an action, authorizes defences by answer, setting up, 1. General or specific denials; 2. New matter specially pleaded; 3. Counter-claim; 4. Set-off; 5. Equitable defences. (*Shur v. Statler*, 1 Wes. Law Monthly; Seney's Code, p. 134.) A pleading under the Code, which sets up two or more defences, but omits to separately state and number them, is not for that reason demurrable. The irregularity can be reached only by motion. (*Hartford Township v. Bennet*, 9 Ohio State Rep.; cited, Seney's Code, p. 135.) The defendant may now plead various matters of defence which could not be entertained prior to the Code, either on account of the separation of the law and equity jurisdiction of Courts, or the forms of actions and of pleadings. (*Hill v. Butler*, 6 Ohio State Rep. 607.)

In *Indiana*, the statutory provisions on the subject of joinder of defences are similar to those of *New York* and *Ohio*. (2 R. S. 39, sec. 56.) The Code of *Kentucky* contains the same provisions also. (Code, § 125.) So of *Wisconsin*, (Code, § 56,) *Kansas*, (Code, § 102,) and *Minnesota*, (Civil Code, § 73.)

In *California*, a defendant may set forth, by answer, as many defences and counter-claims as he may have. They must each be separately stated, and the several defences must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. (Cal. Pr. Act, § 49.) He may demur to the whole complaint, or to one or more of several causes of action stated therein, and answer the residue, or may demur and answer at the same time. (Cal. Pr. Act, § 42; *People v. McClellan*, 31 Cal. 101.) This, however, does not justify the mixing of law and fact in the same answer. (*Brooks v. Douglass*, 32 Cal. 203.) Filing an answer is a waiver of a demurrer previously interposed. (*De Boom v. Priestly*, 1 Cal. 203; *Pierce v. Minturn*, id. 470; *Brooks v. Minturn*, id. 451; *Bibend v. Kreutz*, 20 id. 103.) Where there is an issue of law and of fact, in the natural order of business, it is the duty of the court first to try and decide upon the equitable defence before proceeding with the action of law. (*Martin v. Zellerbach*, cited 2 E. Stee Pr. 643.) Upon a demurrer to a distinct defence, stated separately in an answer, no resort can be had to other portions of the answer to sustain such defence, for each defence must be complete in itself. (*Siter v. Jewett*, 33 Cal. 92.) Several defences may be set up in an answer, (Cal. Pr. Act, § 49,) but if they are contradictory, it is bad. (*Bell v. Brown*, 22 Cal. 671.) If an answer sets up inconsistent defences, and no objection be made by motion to strike out, or by demur-

When a demurer is put in to part only of the bill, and is accompanied by an answer or other defence to the remainder, it should be entitled "The demurrer of C. D., defendant, to part of the bill of complaint of A. B.; and the answer, &c. of the said C. D. to the remainder of the said bill of complaint." (l) The same rule is applicable to cases where the defence is partly by plea and partly by answer, except in those cases where the answer is in support of the plea. In such cases the plea and answer form but one defence, and the title is properly a "plea and answer," or, "the joint plea and answer," or, "the joint and several plea and answer," according to the circumstances. (m)

After a general order for further time to answer, the defendant cannot put in a demurrer, except on special leave by the court. Where he wishes for further time to demur, he must obtain a special order from the court for time to answer, plead, or demur. (n) This will enable him to put in a demurrer coupled with a plea and answer, or either of these defences.

A demurrer may also be taken under a commission to take a plea, answer, and demurrer; but not under a commission to take an answer only. (o)

Where a demurrer in connection with a plea or answer, or either of them, has been put in, the first step to be taken is to dispose of the de-

(l) Tomlinson v. Swinnerton, 1 Keen, 9, 13.

(m) 2 Dan. 205, 350.

(n) Burrall v. Raineteaux, 2 Paige, 331.

(o) Tomlinson v. Swinnerton, 1 Keen, 9, 13.

rer, the defendant may, on the trial, rely on any one of such defences. (*Klink v. Cohen*, 13 Cal. 623; *Uridias v. Morrell*, 25 id. 35.) Under section 46 of the Code, there are only two classes of defence allowed. The first consists of a simple denial, and the second of the allegation of new affirmative matter. And as the Code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defence, these two classes of defences must be the same in all cases. (*Piercy v. Sabin*, 10 Cal. 22.)

In *Massachusetts*, a defendant may demur to one part of the bill, plead to another, answer to another, and disclaim as to another. (Rule 21 of Mass. Ch. Prac.) Rule 6 of the *Maine* Chancery Practice is the same. Or, in *Massachusetts*, the defendant may, instead of filing a formal demurrer or plea, insist on any special matter in his answer, and have the same benefit thereof as if he had pleaded the same, or demurred to the bill. (Rule 23, Chancery Practice.) So in *Maine*, the defendant may have the benefit of a plea by inserting its substance in his answer. (Rule 6, Chancery Practice.)

In the *United States courts*, the defendant may, at any time before the bill is taken as confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or to part of it; and he may demur to part, plead to part, and answer as to the residue. (Rule 32 of the Equity Rules.) No demurrer or plea shall be held bad, and overruled, on argument, merely because such demurrer or plea shall not cover so much of the bill as it might by law have extended to, or merely because the answer of the defendant may extend to some part of the same matter covered by such demurrer or plea. (Rules 35 and 37 of the Equity Rules.)

A demurrer to a part of a bill, followed by an answer as to the residue, is not deemed overruled or withdrawn by the answer. (*Pierpont v. Fowle*, 2 Woodb. & Mi. 23.) But in *Bell v. Railroad Co.* (4 Wal. U. S. 598,) it was held that filing an answer was a waiver of irregularities previously set up in a demurrer.

murrer and also of the plea, if there is one, (unless it is intended to admit that it is a valid defence if true;) and for this purpose the demurrer and plea must be noticed for argument in the usual way. (*p*) If there should be any impertinence in the plea or answer, however, it should be expunged before setting down such plea or answer; as the setting down a plea for argument is a waiver of the impertinence. (*q*) But the *complainant must be careful not to amend his bill, or to except [*175] to the answer for insufficiency before the demurrer and plea have been disposed of: otherwise the validity of such plea or demurrer will be admitted. (*r*)

If upon the argument the demurrer and plea, or either of them, are overruled, the complainant may file exceptions for insufficiency, extending not only to the answer, but to the parts of the bill which were intended to be covered by the plea and demurrer. But if the demurrer and plea, or either of them, are allowed, the exceptions must not extend to the parts of the bill covered by them. (*s*) Where a partial demurrer has been allowed, the proper course is to amend the bill, either by striking out the part demurred to, or by making such alteration in the bill as will obviate the ground of demurrer. Thus, after a partial demurrer has been allowed, *ore tenus*, for want of parties, the bill may be amended by adding the necessary parties, or stating them to be out of the jurisdiction of the court. And it seems that such an amendment will not preclude the complainant from excepting to the answer as to those parts of the bill which are not covered by the demurrer. (*t*)

(*p*) 2 Dan. 351.

(*q*) Dixon v. Olmius, 1 Cox, 412.

(*r*) 2 Dan. 219, 351. 3 Peer Wms. 326. Boyd v. Mills, 13 Ves. 85. Mitf. 256.

(*s*) Cotes v. Turner, Bunb. 123.

(*t*) Taylor v. Bailey, 6 Law J. (N. S.) 222. Foster v. Fisher, 4 id. 237.

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*CHAPTER VII.

PROCEEDINGS ON THE PART OF THE COMPLAINANT
PREVIOUS TO REPLYING.

Sect. 1. EXCEPTING TO ANSWER.

2. AMENDING BILL OF COMPLAINT.

3. DISMISSING BILL BY COMPLAINANT.

4. MOTION FOR PRODUCTION AND INSPECTION OF DEEDS, &c.

5. MOTION FOR THE PAYMENT OF MONEY INTO COURT.

SECTION I.

EXCEPTING TO ANSWER.

EXCEPTIONS to an answer are of two kinds — for insufficiency, and for scandal and impertinence. The former lie where the answer does not sufficiently respond to the allegations and charges in the bill; and the latter where the answer contains scandalous or impertinent matter. (1)

Exceptions are allegations in writing stating the particular points or matters with respect to which the complainant considers the answer insufficient, as a response to the bill, or scandalous or impertinent. And the object of exceptions is to direct the attention of the court to the points excepted to, and to take its opinion thereon, before further proceedings are had; to the end that, if the answer is insufficient, a better answer may be compelled, or if scandalous or impertinent, that the scandalous or impertinent matter may be expunged.

1. *Exceptions for Insufficiency.*

In what cases they lie.] (2) Exceptions for insufficiency can only be

(1) The practice of excepting to an answer, whether for insufficiency or for scandal and impertinence, has become entirely obsolete in New York, under the present system. The Code of Procedure contains no provisions for the taking of exceptions to an answer.

(2) By the 61st Equity Rule of the *United States courts*, it is provided that after an answer is filed, on any day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

In *New Hampshire*, exceptions will be deemed waived, unless allowed and deliv

sustained where some material allegation, charge, or interrogatory in the bill is not fully answered. (*a*) They will not lie to the answers of *corporations; (*b*) nor to an answer to which the oath of the [*177] defendant is waived; (*c*) because such answers are not evidence. Nor will exceptions lie to the answer of an infant, because he is not bound by it, but may put in a new answer when he becomes of age. (*d*) It would therefore be useless, and occasion unnecessary expense, to call upon an infant to put in a full answer to the complainant's bill.

Neither can the answer of the attorney general be excepted to for insufficiency. (*e*) But the answers of lunatics or idiots, put in by their committees or guardians, may be excepted to. (*f*)

Exceptions founded on verbal criticism, slight defects, and the omission of immaterial matter, will be disallowed and treated as vexatious. (*g*)

Where the matter of the bill is fully answered, and the defendant sets up new matter which is irrelevant, and forms no sufficient grounds of defence, the complainant may except to the answer for impertinence, but not for insufficiency. (*h*)

Where a bill requires the defendant to view exhibits before putting in his answer, and he neglects to do so, the correct practice is to except to his answer on that ground. (*i*)

If a plea is ordered to stand for an answer, it is to be deemed a sufficient answer, as far as it covers the bill; but the complainant may still except to the residue of the plea as an answer. (*k*) And if a plea is ordered to stand for an answer, with liberty to except, the complainant may of course file exceptions to the answer, or to that part of it to which he is, by the order, permitted to except. (*l*) But the complainant cannot except to the plea as an answer unless liberty to except be expressly given. (*m*)

If a plea, or a demurrer to the whole bill not accompanied by an

(*a*) *Stafford v. Brown*, 4 Paige. 88.

(*b*) *Wallace v. Wallace*, Halst. Dig. 173.

(*c*) Rule 40.

(*d*) *Copeland v. Wheeler*, 4 Bro. C. C. 256. 13 Ves. 274. *Leggett v. Sellon*, 3 Paige, 84.

(*e*) 2 Dan. 302. *Davinson v. Atty. Gen.*, 5 Price, 398, n.

(*f*) *Id. ib.*

(*g*) *Baggot v. Henry*, 1 Edw. 7.

(*h*) *Stafford v. Brown*, 4 Paige, 88.

(*i*) *L'Estrange v. Moloney*, 1 Hogan. 470.

(*k*) *Kirby v. Taylor*, 6 John. Ch. Rep. 242.

(*l*) 2 Dan. 302.

(*m*) *Coke v. Wilcocks*, Mose. 73. 3 P. Wms. 239. 3 Atk. 814.

cred to the defendant's solicitor within one month from the delivery of the answer, or unless further time be allowed by the justice. (Rule 20 of Chancery Practice.)

In *Massachusetts*, the plaintiff must put in a general replication, or file exceptions, or set the cause for hearing on the bill and answer, within two calendar months after the answer shall have been filed; and if he fail to do so, a decree for the dismissal of the bill, with costs, may be entered.

answer is overruled, the defendant must answer without the complainant's being driven to except; but where a partial plea or demurrer is overruled, the complainant must except; as, since there is already an answer on the file, the defendant is not bound to answer further till [*178] exceptions have been taken. (*n*) *A complainant may also, where a partial demurrer is allowed, except to the answer to that part of the bill which is not covered by the demurrer. He must not, however, except to that part which is covered by the demurrer. (*o*) And where a plea is accompanied by an answer as to part of the bill, the complainant may, upon the allowance of the plea, except to the answer, as he must if a partial plea is overruled. (*p*)

But when the answer is accompanied by a plea, the complainant cannot except to the answer until the plea is argued and an order obtained that it shall stand for an answer with liberty to except. (*q*) If he does so, the exceptions will have the effect of allowing the plea, in the same manner as a replication would do. (*r*) And the effect of taking exceptions pending a demurrer to discovery, is to admit the demurrer. (*s*) But if the plea or demurrer is only to the relief prayed by the bill, and not to any part of the discovery, the complainant may take exceptions to the answer before the plea or demurrer is argued. (*t*)

The rule that the complainant must except to the answer as insufficient, applies even where the plea or demurrer is accompanied by an answer only as to a single fact—such as a mere denial of combination. (*u*)

It is a general rule that if matters of avoidance are set up in an answer obscurely or imperfectly, the complainant cannot procure a more complete statement by exceptions, but must first amend his bill. (*v*)

Exceptions to answers to amended bills.] Exceptions will lie to answers to amended bills, as well as to those put in to original bills; but where a complainant takes no exception to the answer to the original bill, he cannot take an exception to the answer to the amended bill, upon a principle which would have applied equally to the answer to the original bill. (*r*)

And upon a reference on such new exceptions alone, the master can-

(*n*) 2 Dan. 95, 302. Trim v. Baker, 1 Tur. & Russ. 253.

(*o*) Taylor v. Bailey, 6 Law J. (N. S.) 222.

(*p*) Cotes v. Turner, Bunb. 123.

(*q*) Darnell v. Reyney, 1 Vern. 344. 1 Smith, 280.

(*r*) Story's Eq. Pl. 535. Foley v. Hill, 3 My. & Craig, 475. And see *Kuypers v. Reformed Dutch Church*, 6 Paige, 570.

(*s*) 1 Smith, 280. Mitf. Pl. 317.

(*t*) Mitf. Eq. Pl. 317.

(*u*) Id. ib. Cotes v. Turner, Bunb. 123.

(*v*) Spencer v. Van Duzen, 1 Paige, 556.

(*r*) Ovey v. Leighton, 1 Sim. & Stu. 234. Bennington Iron Co. v. Campbell, 2 Paige, 160 Id. 369.

not inquire whether the old exceptions were fully answered, or whether any part of the original bill to which the old exceptions did not relate was answered by the first answer of the defendant. (*s*) If the new exceptions clearly relate to the original bill, and not to the amendments thereto, the defendant may move to take them from the files for irregularity; or if he has doubts on the subject, he may urge the objection before the master on the reference. (*t*) Where the reference on such exceptions has been proceeded in, if they do not relate to the amendments, the exceptions will be permitted to remain on the files; but the master's report allowing the new exceptions will be overruled. (*u*)

But circumstances may occur which may render an occasional departure from the above rule necessary. Thus, where, after a defendant had answered, the complainant amended his bill, by stating an entirely new case, it was held that exceptions would lie, although some of the interrogatories embraced in them were contained in the original bill. (*v*) So if the defendant, in answering amendments, alleges facts similar to those contained in his first answer, and not called for by the amendments, but alleges them without the circumstances given in the first answer, and interrogated to by the bill, an exception will lie. (*w*) Leave to file such an exception must be applied for, however; as it cannot be done without. (*x*)

Exceptions founded upon the new matters of the amendment may be taken within the same time as exceptions to a first answer, and may be filed of course, whether exceptions have been taken to the first answer, or not. They should be entitled "Exceptions taken by the complainant to the answer of the defendant C. D., to the complainant's amended bill of complaint," or, "to the answer, &c. to the amendments to the original bill of complaint of the complainant." (*y*)

Exceptions having been allowed to the answer, and the bill having been amended, and the usual order having been obtained that the defendant should answer the amendment and exceptions at the same time, the defendant put in a second answer. The complainant then took exceptions to the second answer, and entitled them "Exceptions to the further answer to the original bill and to the answer to the amended bill." The exceptions were held to be irregularly entitled, and were ordered to be taken off the file; because new exceptions cannot be taken to the further answer to the original bill; but if that an-

(*s*) 2 Paige, 160.

(*t*) 2 Paige, 160.

(*u*) Id. ib.

(*v*) *Mazzaredo v. Maitland*, 3 Mad. 66. See also, *Glassington v. Thwaites*, 2 Russ. 453.

(*w*) *Irvine v. Viana*, McCle. & Young, 563.

(*x*) Id. ib.

(*y*) *Bennington Iron Co. v. Campbell*, 2 Paige, 161. 1 Hoff. Pr. 259.

[*180] swer be considered *insufficient, it must be referred back to the master upon the old exceptions. (z)

Where exceptions to a former answer and to amendments to the bill are answered together, if neither the exceptions nor the amendments are fully answered, the complainant may file new exceptions founded on the new matter introduced into the bill by way of amendment. (a) If the new exceptions are not submitted to by the defendant within the eight days allowed for that purpose, the answers should, by an order, be referred upon the new exceptions, and upon such of the old exceptions as are not sufficiently answered. (b) Where the new exceptions are submitted to, the answer must be referred upon the old exceptions which are not sufficiently answered, within ten days after the answer is put in. (c)

If the bill has been amended, so that a further answer put in by the defendant is an answer to the amendments as well as the exceptions, the complainant may file new exceptions at any time within twenty days; but the answer, as to the old exceptions, will be deemed sufficient, unless new exceptions are filed, or it is referred on the old exceptions, within the first ten days. (d)

Waiver of exceptions.] The reason of the rule that a complainant, if he does not except to the answer to the original bill, cannot afterwards except to the answer to an amended bill on the ground that the defendant has not answered matters which were contained in the original bill, is, that by amending his bill, the complainant has admitted the answer to it to be sufficient. (e) Upon the same ground it has been held that a complainant moving as of course to amend his bill, after he has taken exceptions to the answer, will be considered as having waived his exceptions. To avoid this he must move specially for liberty to amend without prejudice to the exceptions. (f) But where the amendment of the bill extends only to the addition of another party, and requires no answer from the other defendants, the principle of waiver will not apply. (g) So where the complainant, after answer to the original bill, changed his name, and then amended his bill by substituting his new name for his old one, and adding another defendant, and afterwards took exceptions to the answer, a motion [*181] tion to take the exceptions off the file *was refused. (h) Nor

(z) *Williams v. Davies*, 1 Sim. & Stu. 426.

(a) 2 Paige, 160.

(b) *Id.* ib.

(c) *Id.* ib.

(d) *Hart v. Small*, 4 Paige, 333.

(e) 2 Dan. Pr. 304.

(f) *De la Torre v. Bernales*, 4, Mad. 396. *Irving v. Viana*, McCle. & Young, 563.

(g) *Taylor v. Wrench*, 9 Ves. 315.

(h) *Miller v. Wheatley*, 1 Sim. 296.

will an amendment amount to a waiver of exceptions if it is confined to the prayer of the bill—as, for an injunction. (*i*) But it will be a waiver of exceptions if the complainant takes the bill as confessed as to those points not responded to. (*k*)

Effect of exceptions.] Where exceptions to an answer are filed, they must be disposed of before any further proceedings can take place in the cause. (*l*) Therefore exceptions filed to an answer will prevent the court from ordering it to be taken from the file, notwithstanding it be evasive. (*m*)

The effect of filing exceptions, upon an injunction or *ne exeat* will be noticed presently. (*n*)

Form of exceptions.] Exceptions to an answer must be in writing; (*o*) and signed by counsel. (*p*)

Exceptions must be properly entitled; otherwise they will be suppressed, or taken off the file for irregularity. Thus, where exceptions having been allowed to an answer, the complainant obtained the usual order that he might be at liberty to amend his bill, and that the defendant might answer the amendments and exceptions at the same time, and amended his bill; whereupon the defendant put in a second answer, to which the complainant took exceptions, and entitled them “Exceptions to the further answer to the original bill,” the exceptions were ordered to be taken off the file; because new exceptions cannot be taken to a further answer to an original bill. (*q*)

The exceptions should point out, specifically, the parts of the bill, or the interrogatories which are unanswered, by separate exceptions applicable to each part. (*r*) And it is the rule in England, that where a complainant complains that a particular interrogatory in his bill has not been answered, he must state the interrogatory, in the terms of it, and not throw upon the court the trouble of determining whether the expressions of the exceptions are to be reconciled with the interrogatory. (*s*)

Although it seems to be unnecessary, in this state, to specify the precise words of the allegation, charge, or interrogatory in the bill which *is not fully answered, yet the substance, at least, must be [*182] stated; so that by referring to the bill alone, in connection with the

(*i*) Jacob v. Hall, 12 Ves. 458.

(*k*) Griffith v. Depew, 3 A. K. Marsh. 179.

(*l*) Clark v. Tinsley's adm'r, 4 Rand. 250.

(*m*) Glassington v. Thwaites, 2 Russ. 453.

(*n*) Post. p. 183.

(*o*) Beames' Ord, 78, 181.

(*p*) Yates v. Hardy, Jacob. 223. Candler v. Partington, 6 Mad. 122.

(*q*) Williams v. Davies, 1 Sim. & Stu. 426.

(*r*) 2 Dan. Pr. 306.

(*s*) Hodgson v. Butterfield, 2 Sim. & Stu. 236.

exception, the court may see that the particular matters, as to which a further answer is sought, are stated in the bill, or that an answer is called for by the interrogatories. (*ss*)

But even in England, the rule that exceptions to an answer for insufficiency must set forth the interrogatory in its very terms, does not apply to trifling verbal alterations. (*t*)

Where an exception did not follow the words of the interrogatory, but the defendant had submitted to answer, and put in a further answer, which was referred upon the same exceptions, it was held that he came too late with his objection to the form of the exceptions. (*tt*)

And so where a complainant, in his exceptions, went beyond the allegations in the bill, and, upon a reference, the master reported the answer insufficient; whereupon the defendant submitted to the report, and put in a further answer, upon exceptions to the second report, the defendant was held to have precluded himself from objecting to the form of the exceptions, by putting in a further answer. It was considered that he ought to have excepted to the first report. (*u*)

Exceptions for insufficiency may be allowed in part, and overruled as to part; (*v*) though it is otherwise as respects exceptions for impertinence. (*w*)

If defendants answer separately, exceptions must be taken to each answer; (*x*) and if a joint answer is put in, and one of the defendants die, exceptions may be taken to the answer as to the survivor only. (*y*)

It is a general rule that, after exceptions have been filed, no new exception can regularly be added. (*z*) But upon special cause shown to the court, leave will be given to amend or add to exceptions—as where there is a clear mistake; there being two causes, and the exceptions being taken from one bill instead of the other. (*a*) So where, by mistake, the exceptions have been drawn from the draft of a bill instead of the engrossment, which differed from the draft materially. (*b*) And [*183] in **Northcote v. Northcote*, (*c*) liberty was given to amend exceptions after they had been argued. But it does not appear upon what ground such liberty was given.

Within what time to be filed.] Where the answer is to the whole bill, the complainant must except to it within twenty days after it is put in. If the answer is to part of the bill only, exceptions must be filed within twenty days after the plea or demurrer to the residue of

(*ss*) *Stafford v. Brown*, 4 Paige, 83, 90.

(*tt*) *Hodgson v. Butterfield*, *supra*.

(*v*) *East India Co. v. Campbell*, 1 Ves. 247.

(*x*) *Sydolph v. Monkston*, 2 Dick. 609.

(*z*) *Partridge v. Haycraft*, 11 Ves. 575.

(*b*) *Bancroft v. Wentworth*, 10 Ves. 285, n.

(*t*) *Brown v. Keating*, 4 Lond. Jurist, 477

(*u*) *Crisp v. Nevil*, 1 Cha. Ca. 60.

(*w*) 1 Russ. & My. 30.

(*y*) *Lord Herbert v. Pusey*, 1 Dick. 255.

(*a*) *Dolder v. Bank of England*, 10 Ves. 284.

(*c*) 1 Dick. 22

the bill has been allowed or overruled. At the end of which time, if no exceptions are taken, and no order for further time has been granted, the answer will be deemed sufficient. (*d*)

Where there is a plea or demurrer to a part of the bill, and an answer to the residue, the complainant may except to such answer before the argument of the plea or demurrer. But the effect of such exceptions is to admit the validity of the plea or demurrer. (*e*) If the plea or demurrer, however, is only to the relief, and not to any part of the discovery, the complainant may take exceptions to the answer before the plea or demurrer is argued. (*f*)

The complainant, if he wishes to except, must be careful to do so before filing his replication; for by replying, he admits the answer to be sufficient. (*g*) But it is said by Mr. Daniell, that, in some cases, the court will permit a replication to be withdrawn and exceptions to be taken. (*h*) By this it must be doubtless understood, upon good cause shown.

One advantage which the complainant will gain by excepting to the answer is, that the exceptions will prevent the defendant from moving to dissolve an injunction or discharge a *ne exeat* on bill and answer.

But the filing of exceptions is no objection to a motion to dissolve the injunction, unless they affect the answer in points relating to the grounds of the injunction. (*i*) Nor, if they are frivolous. And the court will look into them to see if they are so. (*ii*)

And in order to have the filing of exceptions operate in any case, so as to prevent a dissolution of the injunction, on bill and answer, the complainant must file and serve them within ten days after the answer is put in. (*k*) If exceptions are filed within the ten days, it will not be in *order for the defendant to move for a dissolution of the [*184] injunction, or for a discharge of the *ne exeat*, on bill and answer, until the time for procuring the master's report on the exceptions (twenty days) has expired, unless a report against the validity of the exceptions is sooner obtained. (*l*)

The defendant, upon receiving exceptions, may give a written consent that they be referred forthwith; and unless the complainant procures the master's report within ten days thereafter, in favor of the exceptions, they will not prevent the dissolution of the injunction, or

(*d*) Rule 50. *Summers v. Murray*, 2 Edw. 205.

(*e*) *Boyd v. Mills*, 13 Ves. 85. *Mitt. Eq. Pl.* 317. *Ante*, p. 178.

(*f*) *Mitt.* 317. 3 *l.* *Wms.* 327, note (*s*).

(*g*) *Prac. Reg.* 376. *Coleman v. Lyne's ex'r*, 4 *Rand.* 454.

(*h*) 2 *Dan.* 308.

(*i*) *Doe v. Roe*, *Hopk.* 276.

(*ii*) *Noble v. Wilson*, 1 *Paige*, 164.

(*k*) Rule 38.

(*l*) Rule 39. *Parker v. Williams*, 4 *Paige*, 439.

discharge of the *ne exeat*. And the same practice is to be observed in referring a second or third answer on the old exceptions. (*m*)

The provisions of the 39th rule are not applicable to the case of an answer to which the oath has been waived, and which therefore is not liable to exceptions for insufficiency. (*n*) If the whole equity of the bill is denied, exceptions for impertinence will not prevent a dissolution of the injunction. (*o*)

The defendant may give notice of an application to dissolve an injunction, immediately upon the service of his answer, without waiting the ten days allowed the complainant to except; but if exceptions are duly served within the time prescribed by the rule, it will be an answer to the application. But the defendant is not at liberty to give notice of such an application for a time which is within the ten days allowed by the 38th rule for excepting to the answer. (*p*)

Where a complainant, after the defendant has submitted to answer some of the exceptions, amends his bill by inserting matter which also requires to be answered, he has 20 days, under the 50th rule, to file new exceptions to a further answer, for insufficiency as respects the amendment. (*q*)

If an answer is insufficient, the complainant must raise all his objections to it in the first instance; and he will not be permitted to take any exceptions to the second answer which were not taken as to the first. (*r*)

Obtaining further time to except.] Further time to file exceptions, not exceeding twenty days, may be obtained on application, and sufficient cause shown by affidavit, to a vice-chancellor or injunction master, and on such terms and conditions as he may direct. But no such [*185] order *for time can be granted by an injunction master or by a vice-chancellor out of court, after the time for excepting has expired, or where time has been before granted by order of the court, or by a vice-chancellor or master, or by agreement. (*s*)

A chamber order under the above rule, extending the time to file exceptions, will not prevent an application to dissolve the injunction, if exceptions are not filed within the ten days. (*t*) An extension of the time required by the 38th rule, within which exceptions must be filed to prevent an application for the dissolution of an injunction, can only be obtained upon a special application to the court, and on due notice to the defendant. (*u*)

(*m*) Rule 33.

(*n*) *Id.* *ib.*

(*q*) *Van Wagenan v. Murray*, 1 Edw. 319.

(*s*) Rule 125.

(*n*) *Livingston v. Livingston*, 4 Paige, 111.

(*p*) *Satterlee v. Bary*, 3 Paige, 142.

(*r*) *Eager v. Wiswall*, 2 Paige, 369.

(*t*) *Wakeman v. Gillespie*, 5 Paige, 112.

(*u*) *Id.* *ib.*

Filing and service of exceptions.] The exceptions having been properly drawn up, and signed by counsel in the manner already directed, are in the next place to be endorsed, filed in the proper office, and a copy served upon the defendant or his solicitor, within the time limited by the rule.

Submission to.] If the exceptions are for insufficiency, the defendant may, within eight days after the service thereof, give a written notice of his submission to answer any or all of such exceptions; and he will be liable for the costs of those he submits to. (*v*) If he submits to all the exceptions, or to part, and the rest are abandoned, or are disallowed on reference, the complainant may enter an order of course, that the defendant put in a further answer within twenty days after notice of the order, and pay the costs, or that an attachment issue, or that the bill be taken as confessed, at the election of the complainant. (*w*)

Where two or more defendants put in a joint and several answer, which is referred for insufficiency, and one or more of them submit to the exceptions, the others may have them argued. (*x*)

Where exceptions to the answer of one of the defendants are submitted to, if the exceptions go to the merits, an injunction will not be dissolved. (*y*) If exceptions have not been submitted to, nor allowed by the master, the court, on a motion to dissolve the injunction, will look into them to see they are not frivolous. If frivolous, they will furnish no objection to such motion to dissolve. (*z*)

*Where, upon a defendant submitting to answer exceptions, the [*186] complainant obtains an order that he may be at liberty to amend his bill, and the defendant may answer the amendments and exceptions at the same time, the defendant will be entitled to the time usually allowed to answer amended bills, to put in his answer to the exceptions and amendments. (*a*)

Reference of.] If the exceptions are not submitted to, within the eight days allowed for that purpose, the complainant may, at any time within ten days thereafter, have an order of course to refer the exceptions to an exception master, or to such vice-chancellor as may be agreed upon by the parties, with his assent. If the exceptions are not thus referred, they will be considered as abandoned, and the answer, as to them, will be deemed sufficient. (*b*) (3)

(*v*) Rule 50.
(*z*) Id. ib.

(*w*) Rule 58

(*x*) *Hinde's Pr.* 268.
(*a*) *Hinde* 262.

(*y*) *Noble v. Wilson*, 1 Paige, 161.
(*b*) Rule 51.

(3) By the 63d Equity Rule of the *United States courts*, where exceptions shall be filed to an answer for insufficiency within the period prescribed by those rules, if the defendant shall not submit to the same, and file an amended answer on the next

It has been decided that the complainant must not only enter an order to refer the exceptions within the ten days specified in the above rule, but he must also serve a copy or notice of such order, or take out and serve a summons from the master within the ten days, or the exceptions will be considered as abandoned. (c) And the practice is the same in England, under a rule of court similar to our 51st. (d)

In this court exceptions are always referred to a master, (e) or to a vice-chancellor acting as master; (f) though it is otherwise on the equity side of the court of exchequer, where it is the practice for the court itself to determine upon exceptions, in the first instance, upon argument. (g)

A reference of exceptions must be executed by such vice-chancellor as may be agreed upon by the parties, with his assent, or by an exception master who may be thus agreed upon, or by the exception master who is nearest or most convenient to the residence of either of the solicitors, and who is legally competent to execute the reference. But where the solicitors of both parties reside more than thirty miles from any exception master who is competent to act, the reference may be executed by any other master nearest or most convenient to the residence of either of such solicitors, or by the nearest exception master. (h)

The bill and answer, together with a copy of the order of reference, being left with the master, he issues a warrant underwritten, "to proceed on the exceptions to the defendant's answer." This is the first warrant both here and in England. (i)

[*187] *In proceeding upon exceptions, before the master, the course is for the complainant's solicitor or counsel to state the subject, shape, and prayer of the bill, and to read the first exception. The defendant's solicitor then reads from the answer such parts as he insists is an answer thereto; and each counsel argues on the point. The master will then allow or disallow it, or suspend his opinion; and thus all the exceptions are gone through with. (k)

If the defendant's solicitor or counsel does not attend, the master may proceed upon the matter of the reference *ex parte*. (l) Before he does so, however, the person who served the warrant must make an affidavit of its service upon the defendant. (m) It is decided in *Bying-*

(c) *Peale v. Bloomer*, 8 Paige, 78.

(e) *Byington v. Wood*, 1 Paige, 145.

(g) 2 Fow. Ex. Pr. 1, 2.

(i) 1 Hoff. Mast. 254. 1 Tur. Pr. 477.

(l) 2 Dan. Pr. 315.

(d) *Taylor v. Harrison*, 1 My. & Craig, 274.

(f) See Rule 51.

(h) Rule 99.

(k) 1 Tur. Ch. Pr. 477.

(m) *Hinde*, 263.

succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order book an order for that purpose. And if he shall not set the same down for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient.

ton v. Wood, (n) that if either party neglects to appear before the master and argue the exceptions, he will not afterwards be permitted to bring them before the court by exceptions to the master's report. And it was stated by the chancellor, in the same case, to be the duty of the master, although he proceeds, *ex parte*, to examine the exceptions with as much care as if they were litigated before him.

In England, warrants to proceed on the exceptions are successively taken out, until the master has made up his opinion. It is in this mode that further argument may be had upon them, and that the parties know the decision of the master. (o) With us the master adjourns the further hearing, when necessary. (p) If he does not decide at once, and apprise the parties of his decision, he should fix a day for them to attend, when he will be prepared, and then deliver his report to the prevailing party; which is the complainant if a single exception is allowed. (q)

No objections are taken to the draft of the master's report on exceptions, and no copies of the draft will be allowed on taxation, except the engrossed copy which is prepared by the master to file. (r)

In cases where a defendant has not answered, and insists upon some particular right or principle upon which he declines answering, masters generally report according to the exceptions; because they will not take upon themselves to judge how far the defendant ought or ought not to answer, but leave it to be determined by the court upon exceptions to their report. (s)

*It is said to have been formerly the practice, in some of the [*188] masters' offices, for the master to report the answer insufficient generally, upon the complainant establishing one exception, without entering into the others. (t) But in *Rowe v. Gudgeon*, (u) Lord Eldon expressed his disapprobation of this practice, and held that on the argument of the exceptions, the master's judgment ought to be given upon each. And in another case, (v) Sir Thomas Plumer, V. C., said that his opinion was that the suitor has a right to the master's judgment upon each of the exceptions.

When the bill has been amended and the defendant puts in a further answer, whereupon the complainant files new exceptions as to the amendments, the complainant must go before the master upon the old exceptions, as they apply to the original bill, and upon the new exceptions as to the new matter introduced by the amendments. (w) And

(n) 1 Patte. 146.

(p) Hoff. Mast. 254.

(r) Price v. Shaw, 2 Dick. 732. Richards v. Barlow, 1 Paige. 327. Id. 146. Hopk. 9.

(s) For. Rem. 105.

(v) Agar v. Gurney, 2 Mad. 389.

(t) For. Rem. 101.

(o) 1 Tur. 462, 477.

(q) 1 Harr. Pr. 230. 1 Tur. 462.

(u) 1 Ves. & B. 331.

(w) Partridge v. Haycraft, 11 Ves. 570.

in such a case he may have the master's judgment upon the answer to the amendments with reference to such parts of the original bill as applies to them. If the original words apply to the amendments, the master, in considering whether the answer is sufficient as to the amendments, must take into his consideration every thing in the amended bill that gives a construction to the amendments. (*x*)

Where, however, the reference is upon new exceptions founded on new matter introduced into the bill by way of amendment alone, the master cannot inquire whether the old exceptions were fully answered; or whether any part of the original bill to which the old exceptions did not relate, was answered by the first answer of the defendant. (*y*) If the new exceptions clearly relate to the original bill, and not to the amendments thereto, the defendant may urge the objection before the master, on the reference. (*z*)

Where exceptions are taken in the court of exchequer to the answer to the original bill, and exceptions are also taken to the answer to the amended bill, a separate order for the argument of each set of exceptions must be entered. And it is irregular to set them down for argument under one order. (*a*)

In deciding on the sufficiency or insufficiency of an answer, it is the duty of the master to take into consideration the relevancy or materiality of the statement or question referred to in the exception. (*b*) And the true way of ascertaining this materiality, is to inquire whether a further answer, stating or admitting the fact in the manner which would be most favorable to the complainant, would be of any benefit to him; (*c*) or would assist his equity, or advance his claim to the relief sought by the bill. (*d*) The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought, or to substantiate his proceedings and make them regular. (*e*)

Master's report.] The master having heard the arguments, and looked into the bill, answer, and exceptions, certifies his opinion as to the sufficiency or insufficiency of the answer, in a *report* to the court. And if he finds the answer insufficient, he must, in case it is a first or second answer, besides reporting upon the exceptions, fix the time to be allowed the defendant for putting in a further answer and paying the costs. And he must specify the same in his report. (*f*)

But the neglect of the master to fix the time, in his report, within

(*x*) *Id. ib.*, Per Lord Eldon. (*y*) *Bennington Iron Co. v. Campbell*, 2 Paige, 160.
 (*z*) *Id. ib.* (*a*) *Eastwood v. Dabree*, 1 Young & Jer. 508. (*b*) Rule 106.
 (*c*) *Davis v. Mapes*, 2 Paige, 106. (*d*) *Bully v. Kenrick*, 13 Price, 291.
 (*e*) *Davis v. Mapes*, *supra*. (*f*) Rule 55.

which the defendant shall answer the exceptions, will not render the report irregular as against the defendant; as the only effect of such a neglect of the master is to compel the complainant to make a special application to the court to obtain a further answer, if the defendant does not answer voluntarily. (*g*)

The complainant must procure and file the master's report within twenty days from the date of the order or reference, of the exceptions will be considered as abandoned; unless the master shall, within the twenty days, certify that the complainant has not been guilty of any unreasonable delay, and that a further time, to be specified in the certificate, is necessary. In such case the report must be obtained within that further time, or the exceptions will be considered as abandoned, and the answer will be deemed sufficient. (*h*)

The master is entitled, under this rule, to grant only one certificate extending the time for obtaining his report. (*i*) But where the time for making the report has passed, and it appears by affidavit that the omission to procure the master's certificate that further time was necessary to enable him to make his report, arose from inadvertence, the court *extended the time for another fortnight, on the [*190] complainant paying the costs of the application. (*k*) In an injunction case, however, the court will not enlarge the time for obtaining the master's report, except under special circumstances—such as the illness of the master, &c. (*l*)

The master's report must be delivered to the complainant, who must forthwith file it in the register's, assistant register's or clerk's office, as the case may require. And if the complainant does not except to it within eight days thereafter, it will become absolute as against him. (*m*) And if none of the exceptions are submitted to, or allowed by the master, the answer will be deemed sufficient, after the expiration of that time. (*n*)

No order to confirm the report is necessary.

Notice of its being filed must be given to the defendant; who may file exceptions to it within eight days after such notice; and if he does not except within that time, the report becomes absolute against him also. (*o*)

No proceedings can be taken upon the master's report until it is filed. Therefore, where a complainant, after the master had made his report on exceptions, but before it was filed, obtained an order for an

(*g*) *Corning v. Cooper*, 7 Paige, 587.

(*h*) *Watkins v. Redmond*, 2 Lond. Jurist, 152.

(*i*) *Davenport v. Whitmore*, 8 Sim. 251.

(*n*) *Idem*.

(*k*) Rule 54.

(*l*) *Burrell v. Nicholson*, 6 Sim. 212.

(*m*) Rule 56.

(*o*) Rule 56.

injunction, the injunction was held to be irregular. (*p*) And so if the complainant, before the master's report allowing the exceptions has been filed, obtains an order for leave to amend, and that the defendant may answer the amendments and exceptions at the same time, the order will be discharged. (*q*)

Exceptions to master's report.] Either party may except to the master's report. Exceptions by the complainant must be put in within eight days after the report is filed, and exceptions by the defendant within eight days after he receives notice that it is filed. (*r*)

Where a party has neglected to file exceptions to the report within the time prescribed by the rule of court, he will not afterwards be permitted to file them, unless he shows, by affidavit, that he was prevented from filing them by accident, mistake, or surprise. (*s*)

If the master has reported the answer insufficient, the defendant should except to the report before he puts in a further answer; for it has been held that where a first answer is, upon exceptions, reported [*191] insufficient, *the defendant, if he submits to put in a further answer without excepting to the report, admits that he ought to answer all the matter excepted to; and that he must therefore answer fully to all the points comprised in the exceptions, and cannot afterwards, by excepting to the report made upon a reference of his second answer, raise the question whether he ought to be compelled to answer the exceptions or not. And upon this ground, where exceptions were taken which extended to matters not charged in the bill, and upon reference the master reported the answer insufficient; whereupon the defendants, instead of excepting to the master's report, put in a further answer which fully answered the charges in the bill, but did not extend to those parts of the exceptions which were not founded on the bill; and the master, upon a second reference, reported the answer to be still insufficient, the court, upon exceptions to the master's report, ruled that, inasmuch as the defendants did not except to the first report, but had since answered, they had admitted that they ought to answer all the matter of the exceptions. (*t*)

Where the master has reported the answer to be sufficient, the exceptions to the report ought to be filed before the time fixed by the rules of the court for the complainant to file his replication has arrived. Otherwise the defendant may move to dismiss the bill for want of prosecution. In injunction cases, also, the complainant, if he wishes

(*p*) *Wynne v. Jackson*, 2 Sim. & Stu. 226.

(*q*) *Rushton v. Troughton*, 2 Sim. 33.

(*r*) Rule 56.

(*s*) *Adm'x of Foote v. Van Raust*, 1 Hill's Ch. Rep. 185.

(*t*) *Crispe v. Nevil*, 1 Cha. Ca. 60.

to revive an injunction which has been dissolved, upon the master's report of the sufficiency of the answer, should lose no time in filing his exceptions to the report; otherwise he may lose the benefit he would derive from his injunction. (u) So, when a complainant wishes to amend his bill, he must, if he intends to except to the report, do so, and get his exceptions disposed of before he obtains the order to amend; as an order to amend will be considered as a waiver of exceptions for insufficiency. (v)

Form of exceptions to report.] Exceptions to a master's report on exceptions either for scandal and impertinence or for insufficiency, must be drawn or perused, and settled and signed by counsel.

Exceptions to reports of masters are in the nature of special demurrers, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted. (w)

Where several exceptions to an answer are allowed by the master, and the defendant takes one general exception to the report, that exception will be overruled if any of the exceptions to the answer are well taken. (x)

When the master has reported an answer not scandalous or impertinent, the complainant, in his exceptions to the report, must show in what line or page, and how far, the answer is scandalous or impertinent. (y) And so where an answer is reported sufficient, it is said that the complainant in his exceptions to the report should show wherein it is insufficient. (z)

No exceptions can be taken to a master's report, which are not founded upon objections distinctly taken before the master. (a)

Filing exceptions to report.] The exceptions being drawn, engrossed, and signed by counsel, must be filed in the proper office. In England a deposit is necessary to be made, on filing exceptions, as a stake or recompense to the other party, if, upon argument, the exceptions should be disallowed. But this is not necessary here. (b)

Hearing of exceptions to report.] The argument of exceptions to a master's report is to be heard as a special motion; (c) of which the usual notice must be given to the opposite party. They may be heard either on a regular motion day, or any day in term.

(u) 2 Dan. Ch. Pr. 330.

(v) *De la Torre v. Bernales*, 4 Mad. 396.

(w) *Wilkes v. Rogers*, 6 John. 566.

(x) *Candler v. Pottit*, 1 Paige, 427. *Franklin v. Hunt*, 4 id. 332. *Noble v. Wilson*, 1 id. 164. *Green v. Weaver*, 1 Sin. 404. *Cotham v. West*, 1 Beav. 380.

(y) *Craven v. Wright*, 2 Peer Wins. 181. But see 2 Atk. 182, *contra*.

(z) *Id. ib.*

(a) *Byington v. Wood*, 1 Paige. 145.

(b) *Stafford v. Rogers*, Hopk. 98.

(c) Rule 62.

Either party may notice the same for hearing. The party excepting to the report must furnish the necessary papers for the court; and if he neglects to do so, the report will be confirmed. (*d*) Those necessary papers are the bill, answer, exceptions to answer, master's report, and exceptions to report.

If both parties have excepted, each must furnish copies of his own exceptions, and the party obtaining the reference must furnish such other papers as may be necessary. (*e*)

If either party neglects to appear before the master, on a reference of exceptions to the answer, and argue them, he will not be permitted to bring them before the court by exceptions to the master's report. (*f*) But on sufficient cause shown, and payment of costs, it seems leave may be given to refer back to the master the exceptions to the answer; in order that the party may have an opportunity to be heard thereon. (*g*)

Upon the hearing of exceptions to the report, the party excepting [*193] *must confine himself to the exceptions, and will not be allowed to go into a new case. The court acting merely in revision of the report, cannot entertain an objection raised on an extrinsic ground. (*h*) And the 106th rule also provides that on exceptions to the master's report, the parties shall be confined to the objections taken before the master.

The manner in which exceptions to the report are argued is as follows: The junior counsel for the exceptions (if there are more than one counsel), opens the exceptions to the court, and the leading counsel on the same side argues them. The counsel against the exceptions then state their case to sustain the report; and the matter having been thoroughly discussed, the court gives judgment for or against the report, by allowing or disallowing the exceptions. (*i*)

Costs on exceptions to report.] The costs of the hearing on exceptions to a master's report upon exceptions are in the discretion of the court. But neither party can have costs as against the other, unless he succeeds as to the major part of the exceptions to the report. And where the party succeeding as to the major part does not succeed as to all the exceptions, his costs to be allowed against the adverse party cannot be taxed at more than ten dollars. (*k*)

Upon the argument of exceptions to a report on exceptions to an answer, the solicitor is only entitled to the usual fee which is allowed

(*d*) *Idem*.

(*g*) *Id. ib.*

(*i*) *Hinde*, 276.

(*e*) *Idem*.

(*f*) *Brington v. Wood*, 1 Paige, 145.

(*h*) *Kilbee v. Sneyd*, 2 Moll. 239.

(*k*) Rule 62.

for attendance upon a special motion. (*l*) Each party is entitled to the costs of the hearing, as to the exceptions decided in his favor; which costs are to be set off against each other. Where the costs on each side would be nearly equal, the usual practice is to give costs to neither party. (*ll*)

When the court, upon exceptions, overrules the master's report, the party succeeding shall not have the costs, but they must abide the event of the suit. (*m*)

Proceedings for a better answer.] If all the exceptions to the answer are submitted to by the defendant, or a part are submitted to and the rest abandoned, or on a reference to a master are disallowed, the complainant may have an order of course that the defendant put in a further answer within twenty days after notice of the order, and pay the costs of the exceptions, or that an attachment issue, or that the bill be taken as confessed, at the election of the complainant. (*n*) (*4*)

*Where the master overrules a part of the exceptions, and the [*194] complainant excepts to the report, he cannot enter a common order that the defendant answer the exceptions submitted to by him, or which have been allowed by the master, until his exceptions to the report are finally disposed of by an order of the court thereon. (*o*)

With respect to the time when the order for a further answer may be entered, under the 58th rule, it has been decided by the chancellor that it cannot be entered until the master's report has become absolute against the defendant; i. e. until the expiration of eight days after the filing of the report; during which time the defendant has a right to except to it. (*p*)

The 59th rule provides that if, on a reference of exceptions, or the reference of a second answer upon the old exceptions, the answer is found insufficient, and the master's report has become absolute against the defendant, (by the expiration of eight days from the time it was filed,) the complainant may have a similar order of course to put in a

(*l*) *Richards v. Barlow*, 1 Paige, 323.

(*ll*) *Id. ib.*

(*m*) *Anon.*, 3 Atk. 235.

(*n*) Rule 68.

(*o*) *The New-York Fire Ins. Co. v. Lawrence*, 6 Paige, 511.

(*p*) *Utica Ins. Co. v. Lynch*, Aug't, 1831.

(4) The 64th Equity Rule of the *United States courts* directs that if, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed; or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody on such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

By the 65th Equity Rule of those courts, it is provided that if, upon argument, the

further answer and pay the costs, within the time specified in the master's report. (5)

In the cases specified in the 58th and 59th rules, the defendant is entitled to a copy of the taxed bill of costs at least ten days before the time for putting in the further answer expires, or he may put in such answer without paying the costs. But the complainant may afterwards proceed by attachment to compel payment thereof. (q)

If the defendant does not put in a further answer, and pay the costs within the time prescribed, or within such further time as may be allowed him, the complainant, on filing an affidavit showing such default, may have an order of course to take the bill as confessed, or for an attachment, according to the original order. (r)

If an order for an attachment is entered, the proceedings thereon will be similar to those employed to compel an original answer, or the appearance of the party; which have been already stated. (s)

The endorsement of the attachment, the recitals, &c., should state the writ to be issued for not putting in a further answer.

If the complainant has amended his bill, so as to require an answer to the amendments, as well as to the exceptions, the defendant has the [*195] same *time to answer the amendments and exceptions together, that he originally had to answer the bill. (t)

If, after an answer has been reported insufficient, and the time for putting in a further answer has been fixed by the master, the defendant finds himself unable to put in his answer within that time, he may get the time extended, on application to the court. Such application, however, should be made before the time fixed in the report has expired; otherwise the defendant will be in contempt under the

(q) Rule 60.
(s) Ante, p. 55, 87.

(r) Rule 61.
(t) Rule 60.

plaintiff's exceptions to the answer are overruled, or the answer is adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or by the judge thereof, at the hearing upon the exceptions.

In *New Hampshire*, if the defendant, on notice of exceptions to his answer, shall deliver to the plaintiff's solicitor, before the day appointed for the hearing thereon, a sufficient answer, the same shall be received without costs. If the exceptions are sustained, the defendant shall deliver to the plaintiff's solicitor a full and complete answer thereto within one month, and pay such costs as the justice allowing such exceptions shall order, or the bill shall be taken *pro confesso*; but if the plaintiff so elects, he may move for process of contempt to compel an answer. (Rule 21 of Chancery Practice; 38 N. Hamp. 609.)

(5) In *Massachusetts*, upon a second answer being adjudged insufficient upon the same exceptions as those before allowed, costs shall be doubled by the court, and the defendant may be examined upon interrogatories, and committed until he shall answer them; or the plaintiff may move the court to take so much of the bill as is not answered for confessed, and may file his replication, procure commissioners, and take testimony in the usual manner. (Rule 17 of Rules of Practice in Chancery.)

operation of the 61st rule, and cannot be heard to make such application.

A defendant may, if he chooses, file a further answer before the master has signed the report as to the insufficiency of the first answer. (*u*) And in an injunction cause, a defendant to whose answer exceptions have been allowed, is entitled to file a further answer after notice to his solicitor that the complainant has presented a petition for an order to be at liberty to amend, and that the defendant may answer amendments and exceptions together; provided the further answer be filed before the order is actually served. (*v*)

The subpoena for a better answer and for costs is abolished by the 58th rule.

Form of further answer.] The *form* of a second answer is nearly the same as that of an original answer. The title of it must correspond with the order under which it is put in; and if there are no amendments, it should be entitled "The further answer of the defendant C. D. to the original bill of complaint of the complainant." If there are amendments, it should be "The further answer of the defendant C. D. to the original bill of complaint, and the answer of the same defendant to the amended bill of the complainant." (*w*)

If, after exceptions to the original bill are allowed, the complainant amends his bill and the defendant puts in a further answer to the original bill and an answer to the amended bill, and the answer is referred back upon the old exceptions as to the original bill, and upon new exceptions as to the amendments, and is again reported insufficient, whereupon the bill is again amended, the answer should be entitled "a further answer to the original and first amended bill, and an answer to the secondly amended bill," &c. (*x*)

*But it is not necessary, in answering a bill which has been [*196] amended before answer, to call it an answer to, the original and amended bill. The most correct way is to call it "an answer to the *amended* bill" only, as the original bill has become nugatory by the amendment, and the defendant is not bound to notice it. (*y*)

A further answer is in every respect similar to, and is considered as part of, the answer to the original bill. Therefore, if a defendant, in a further answer, repeats any thing contained in a former answer, the repetition, unless it varies the defence in point of substance, or is otherwise necessary or expedient, will be considered as impertinent; and

(*u*) Wynne v. Jackson, 2 Sim. & Stu. 226.

(*w*) 2 Paige, 160. 1 Ves. & B. 186.

(*x*) Peacock v. Duke of Bedford, 1 Ves. & B. 186.

(*y*) Smith v. Bryon, 3 Mad. 423.

(*v*) Leyburn v. Green, 2 Russ. 577

if, upon reference to a master, such parts of the answer are reported to be impertinent, they will be struck out as such, with costs, which are in strictness to be paid by the counsel who signed the answer. (z) But if, after an answer has been put in, the complainant amends his bill, stating an entire new case, the defendant must answer that case, even though in so doing he answers some of the interrogatories which were in the original bill. (a)

When a defendant has insisted, in his first answer, upon some general ground of exemption from answering to particular interrogatories, and the master has reported against him, but the defendant has omitted to except to the report, he may still insist upon the same ground of defence by his further answer. (b) Though it seems that he cannot do so when his reason for not answering has been founded on an objection to the interrogatories themselves. (c)

Where the further answer is an answer to amendments as well as to exceptions, the exceptions should be answered first, and afterwards the amendments. (d)

New exceptions cannot be taken to a further answer to the original bill; but if the answer be considered insufficient, it must be referred back to the master upon the old exceptions. (e) And where a complainant refers a second or third answer upon the old exceptions, the particular exceptions to which he requires a further answer must be stated in the order of reference. And such second or third answer must be referred within ten days after it is filed, or it will be deemed sufficient. (f)

[*197] *Where the complainant amends his bill, and the defendant answers the amendments and exceptions together, if the complainant wishes to refer the further answer on the old exceptions, as well as to file new exceptions to the answer to the amendments, he must file his new exceptions within the ten days allowed by the above rule for referring the further answer on the old exceptions; and then, after waiting the usual time for the defendant to submit to the new exceptions, he must refer the answer upon the old exceptions which are not answered, and upon such of the new exceptions as are not submitted to. (g) Where the further answer is an answer to exceptions only, if the complainant wishes to except for impertinence, he must file such exceptions within the ten days allowed by the 52d rule for referring the answer on the old exceptions. (h) But if the further answer is in-

(z) Mitf. 256, 7. Doe v. Green, 2 Paige, 347.

(b) Finch v. Finch, 2 Ves. 491.

(d) 2 Eq. Drafts. 3.

(f) Rule 52.

(g) Hart v. Small, 4 Paige, 333.

(a) Mazzaredo v. Maitland, 3 Mad. 66.

(c) Crispe v. Nevile, 1 Ch. Ca. 60.

(e) Williams v. Davies, 1 Sim. & Stu. 426.

(h) Id. ib.

tended as an answer to amendments, as well as to the former exceptions, a neglect to file new exceptions within the first ten days does not deprive the complainant of the benefit of such new exceptions; provided they are filed and served within the twenty days allowed by the 50th rule for excepting—the further answer, so far as it purports to be an answer to the amendments, not being complete until the expiration of that time. The order of reference in such a case, however, must be a reference of the new exceptions only, or of such of them as have not been submitted to by the defendant. In other words, the further answer is complete as to the matters of the original bill and the old exceptions, unless some proceedings are had thereon within the first ten days after it is put in. But as to the new matters introduced into the bill by amendment, it is not complete until after the expiration of twenty days. (*i*)

Although, as has just been stated, a further answer can only be referred to the master upon the old exceptions, yet if the bill has been amended, the complainant may deliver new exceptions applying to any part of the amendments which he does not think sufficiently answered. But such new exceptions must not extend to any matter which was contained in the original bill. (*k*)

If the master finds a second answer insufficient, he must fix the time for putting in a further answer, and specify the same in his report. (*l*)

Further answers must be prepared, signed, and filed in the same manner as original answers.

Third answer insufficient. If the complainant considers [*198] the third answer insufficient, it may be referred to the master, as we have already seen, upon the old exceptions. The order of reference, however, must specify the particular exceptions to which a further answer is required. (*m*)

Such answer must be referred within ten days after it is put in. (*n*)

A second or third answer must be referred to the same master as the first, if he is in office and competent to act. (*o*)

The proceedings before the master, upon reference of the second or third answer for insufficiency, are precisely the same as upon the first. The master, however, in deciding upon the exceptions, is not to look at the second or third answer only, but he must look at it in connection with the preceding answer. (*p*)

If the master, upon looking into the further answer, shall still be

(*i*) *Id. ib.* 1 Edw. Ch. Rep. 319.

(*l*) Rule 55.

(*o*) *Leggett v. Dubois*, 3 Paige, 477.

(*k*) *Partridge v. Haycraft*, 11 Ves. 570.

(*m*) Rule 52.

(*n*) *Idem.*

(*p*) *Farquharson v. Balfour*, 1 Tur. & Russ. 189.

of opinion that no sufficient answer is given to the matter originally excepted to, he must report accordingly. But upon a reference of a third answer, the master is not to fix a time in his report for the defendant to put in a further answer.

The court will not stay the proceedings before the master, upon a reference as to the sufficiency of the third answer, for the purpose of enabling the defendant to put in a further answer. (*g*)

When the third answer is reported insufficient on the original exceptions, and the report has become absolute, (by the expiration of eight days from the time of filing it, without its having been excepted to,) (*r*) the complainant, on filing an affidavit of the facts, may have an order of course for an attachment against the defendant. (*s*)

The attachment issued under this rule should be endorsed, "attachment upon a third answer reported insufficient;" and the proceedings upon it will be similar to those upon an attachment for want of a first answer. (*t*)

If the defendant is arrested upon the attachment, he is to be examined on interrogatories to the points reported insufficient, and must stand committed until he shall have answered them to the satisfaction of the master, and paid the costs. (*u*)

The sheriff must keep the defendant in his actual custody, and [*199] bring *him personally before the court, and must keep and detain him in his custody until the court shall have made some order in the premises. (*v*) But the inability of the defendant, from sickness or otherwise, to attend, will be a sufficient excuse for not bringing him before the court. (*w*) The officer will not be required to confine the defendant in prison, or otherwise to restrain him of personal liberty, except so far as shall be necessary to secure his personal attendance. (*x*)

In the case of *Farquharson v. Balfour*, (*y*) the defendant being a gentleman advanced in years, was, by order of the court, allowed to remain at an hotel in the neighborhood of Lincoln's Inn, in the custody of the tipstaff, till his examination should be completed.

It is to be observed that the execution of the order for an attachment will not be suspended by exceptions to the master's report. Thus, where the defendant excepted to the report, before he could be taken into custody under the order, and thereupon, applied to the court to hear the exceptions *instantly*, and that in the meantime the process of contempt should be discontinued, the court refused the application, unless the

(*g*) *Russell v. Dight*, 6 Sim. 430.

(*s*) Rule 64.

(*u*) Rule 64.

(*w*) *Id.* 640. § 37.

(*r*) See Rule 56.

(*t*) See ante, p. 87. 88.

(*v*) 2 R. S. 537, § 12.

(*y*) *Tur. & Russ.* 134.

(*x*) *Id.* ib.

defendant would render himself amenable to the process. But upon the defendant rendering himself amenable by appearing upon the floor of the court, the exceptions to the master's report were allowed to be called on for argument. (z)

Examining defendant upon interrogatories. If a complainant, having obtained the order that the defendant should be examined on interrogatories before the master, means to exhibit interrogatories, he must, if the defendant is in custody, do so immediately. (a)

The statute requires that when a defendant arrested upon an attachment has been brought into court, or appeared therein, the court shall cause interrogatories to be filed, specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which he shall put in written answers, on oath, within such reasonable time as the court shall allow. (b)

In the case of *The People ex rel. Lovett v. Rogers*, (c) upon the defendants being brought before the chancellor upon an attachment, an order was entered directing the relator to file interrogatories specifying the facts and circumstances alleged against the defendant, and to serve a *copy upon him; and that the defendant put in written answers [*200] thereto, upon oath, within twenty-four hours.

The order for the examination of the defendant upon interrogatories, should contain a provision that the sheriff be at liberty to carry him before the master at such time and from time to time, as the master shall appoint, to be examined. (d)

As respects the *form* of the interrogatories, it has been held that they must be confined to the points to which the exceptions went. But they may require a more minute and particular discovery as to those points than was called for by the original bill. (e)

By the English practice, interrogatories are referred to a master to be settled. (f) But such is not the practice here. If the defendant considers either of the interrogatories improper, he can take the objection before the master by refusing to answer it; and the master's decision upon that point may be reviewed by the court, upon exceptions by either party, to his report.

Upon the examination before the master on interrogatories, the defendant has a right to have the assistance of counsel. (g)

In the case of *Farquharson v. Balfour*, before referred to, the mode of conducting the examination adopted by the master, and which was

(z) Id. ib.
(b) 2 R. S. 537, § 19.
(d) 1 Hoff. Pr. 254.
(f) Id. ib.

(a) Id. ib.
(c) 2 Paige, 103.
(e) Tur. & Russ. 193.
(g) Tur. & Russ. 184.

subsequently approved of by the court, was as follows: A written answer to the interrogatories was prepared and carried in by the defendant to the master, who compared the answer with the interrogatories, and then determined whether or not it was satisfactory. In the points in which the master considered the answer to be unsatisfactory, the defect was supplied by the personal examination of the defendant until the master was of opinion that the answer was sufficient. (*h*)

By the 105th rule, the master is authorized to examine the defendant either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require; the examination being at the time taken down by the master, or by his clerk in his presence, and preserved, in order that it may be used by the court if necessary,

In deciding on the sufficiency or insufficiency of the examination of the defendant, the master must take into consideration the relevancy or materiality of the statement or question referred to in the exception. (*i*)

[*201] **Master's report upon defendant's examination.* The defendant having passed his examination to the satisfaction of the master, the master reports the same to the court. Whereupon the defendant may move for his discharge from the attachment. But he is not entitled to his discharge upon a report of the sufficiency of his examination, until the complainant has had an opportunity of perusing such examination. (*k*) The complainant has also a right, before the defendant is discharged, to see all the documents mentioned in the schedules, or referred to in the examination, if they are so mentioned or referred to that, in the case of an answer, they would have made part of the answer. (*l*)

The certificate, or report, of the master as to the sufficiency of the defendant's examination does not require an order of confirmation. In this respect it is like the report of the master as to the sufficiency of an answer. The practice in relation to exceptions to an answer for insufficiency must be adopted and pursued in these cases, so far as the same is applicable. On filing the master's certificate, and notice thereof, if the defendant does not except to the same within eight days, the certificate will become absolute. (*m*) In case the master certifies that the examination is insufficient, the complainant may add new interrogatories to be approved of by the master if he shall deem such further in-

(*h*) See also Rule 105, which allows the master to examine defendant orally, as well as upon written interrogatories.

(*i*) Rule 106.

(*l*) Id. 202.

(*k*) Turr. & Russ. 201. 202.

(*m*) Case v. Abeel, 1 Paige, 630.

interrogatories necessary; and the order will then be that he put in his further examination to the exceptions and the new interrogatories together, within such time as the master may direct. But if the examination is certified by the master to be sufficient, the complainant will not be permitted to call for a re-examination of the defendant to the same point, on new interrogatories, without special permission of the court, on cause shown, and upon notice of the application to the adverse party. (n)

Taking bill as confessed on third answer reported insufficient.] If the defendant, after his third answer has been reported insufficient, cannot be arrested on the attachment issued against him, and does not surrender himself thereon within twenty days after notice to him or his solicitor of the issuing thereof, or within such further time as may be allowed him by the court, the complainant, on filing an affidavit of the facts, may have an order of course to take the bill as confessed. (o) And in case the defendant, on being arrested upon such attachment, neglects or refuses to answer the interrogatories to the satisfaction of the master, the complainant may have such an order. And in either case the *defendant may be further punished for the contempt, [*202] in the discretion of the court. (p)

2. *Exceptions for Scandal and Impertinence.*

The nature of scandal and impertinence, and the rules for distinguishing them, have been already stated in the chapter relative to bills of complaint, and in the first section of the 6th chapter. (q) Scandal and impertinence in answers is of the same nature, and subject to the same rules, and a similar method of practice, as when it is found in bills of complaint. In addition, however, to what has been already said respecting it, may be further remarked in this place, that facts set forth in the answer which are not material to the decision, are impertinent; and if reproachful, are scandalous. (r) Chancellor Kent remarks, that the best rule to ascertain whether the matter in an answer be impertinent, is to see whether the subject of the allegation could be put in issue, or be given in evidence between the parties. (s) (6)

(n) *Id. ib.*

(p) Rule 64.

(r) *Woods v. Morrell*, 1 John. Ch. Rep. 103.

(o) Rule 64.

(q) *Ante*. p. 41, 101.

(s) *Id. ib.*

(6) Rule 27 of the Equity Rules of the *United States courts*, directs that no order shall be made by any judge for referring any bill, answer or pleading, &c., for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are deemed scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process

If the matter of an answer is relevant, or can have any influence in the decision of the suit, either as to the subject matter of the controversy, the particular relief to be given, or as to the costs, it is not impertinent. (*t*) Or, in other words, whatever is material is not impertinent, as a general rule. (*u*) Thus, a statement introduced into an answer to show the temper with which a bill is filed, and the oppressive course pursued by the complainant, is not impertinent; as it may have an effect upon the costs. (*v*) If the complainant puts impertinent questions, however, in the interrogating part of his bill, he must take the answers to them, though they be impertinent. (*w*) Therefore, if a bill against executors calls specifically and particularly for accounts in all their various details, a very voluminous schedule containing a copy from the books of account, specifying each item of debt and credit, will not be impertinent; though it seems it would have been, had the bill not called for it. (*x*) And where a complainant avers the alienism of parties as a ground for their not being entitled under a will, it is not impertinent for a defendant to allege in his answer that the complainant, who also claims rights under the same will, is an alien likewise. (*y*)

[*203] *But statements in an answer, which are neither called for by the bill, nor material to the defence, with reference to the order or decree which may be made on the bill, are impertinent. (*z*) So are statements in an answer to a bill of revivor, which merely show irregularity and misconduct in the former proceedings in the suit. (*a*) And copies of receipts taken by the defendant for monies paid, and charged in account, and making an immense schedule to an answer, are impertinent. (*b*) So if a defendant to a bill of revivor puts new matter on the record, which might, if stated in the answer to the original bill, have produced a different decree, it will be impertinent and may be expunged. (*c*) And if the defendant in his answer sets up a distinct matter in avoidance, which is not called for by the bill, the same, if irrelevant or immaterial, may be excepted to for impertinence, or the complainant may have the benefit of the objection upon the hearing. (*d*)

(*t*) *Van Rensselaer v. Brice*, 4 Paige, 174. 1 Edw. 350.

(*u*) *Bally v. Williams, McCle. & Young*, 334.

(*v*) *Desplaces v. Goris*, 1 Edw. 350.

(*w*) *Woods v. Morrell*, 1 John. Ch. Rep. 103.

(*x*) *Scudder v. Bogert*, 1 Edw. 372.

(*y*) *Jolly v. Carter*, 2 Edw. 209.

(*z*) *Wagstaff v. Bryan*, 1 Russ. & My. 28.

(*a*) *Id. ib.*

(*b*) *Scudder v. Bogert*, 1 Edw. 372.

(*c*) *Nanny v. Totty*, 11 Price, 17.

(*d*) *Spencer v. Van Duzen*, 1 Paige, 555.

on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure a master to examine and report upon the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

An answer may be referred for scandal, at the instance of a co-defendant; but not for impertinence. (*e*)

By the English practice, a reference of the answer for impertinence is good cause to be shown against a motion to dissolve an injunction. (*f*) But by the practice here, where the whole equity of the bill is denied, it is no answer to an application to dissolve an injunction, that the defendant has also incorporated into his answer other matters which are scandalous, or otherwise irrelevant. (*g*)

Exceptions to an answer for scandal or impertinence must be filed within twenty days after service of the answer. (*h*) They are to be taken in the same manner as exceptions for insufficiency, and may be submitted to in like manner, and within the same time. And if not submitted to, they must be referred in the same manner, and the master's report procured within the same time, or they will be considered as abandoned, and the answer will be thenceforth deemed sufficient. (*i*)

An exception for impertinence must be supported *in toto*; and if it includes any part of the answer which is relevant and proper, the exception must fail altogether. (*k*)

Where exceptions for impertinence, if allowed, would mutilate the answer unnecessarily, by breaking up sentences and clauses [*204] which ought to stand or fall together, such exceptions should be disallowed. (*l*)

If the whole of a sentence or clause in an answer is impertinent, and depends upon the same principle, the complainant cannot except to a part of the sentence only, where the allowance of such exception will wholly change the meaning of what remains, or make it unintelligible. (*m*)

Exceptions should point out the exceptionable matter with sufficient certainty to enable the officers of the court to strike out such exceptionable matter, if the exceptions are allowed. (*n*)

The complainant is not precluded from excepting to the further answer of a defendant, for impertinence, although it purports to be an answer to the old exceptions for insufficiency only; but in that case his exceptions for impertinence must be filed within the ten days allowed for referring the further answer upon the old exceptions. (*o*)

(*e*) Fell v. Christi Coll., 2 Bro. C. C. 279. 2 Dan. 296.

(*f*) Fisher v. Bailey, 12 Ves. 19. Hunt v. Thomas, 2 Anst. 591.

(*g*) Livingston v. Livingston, 4 Paige, 111.

(*h*) Rule 50.

(*i*) Rules 53, 54.

(*k*) Van Rensselaer v. Brice, 4 Paige, 174. Wagstaff v. Bryan, 1 Russ. & My. 30. 1 Edw. 350.

(*l*) Franklin v. Keeler, 4 Paige, 352.

(*m*) Id. ib.

(*n*) Whitmarsh v. Campbell, 1 Paige, 645.

(*o*) Hart v. Small, 4 Paige, 333

If exceptions are taken for both insufficiency and impertinence, they must be taken and referred at the same time. (*p*) Therefore, where the complainant, after he had referred the further answer of the defendant for insufficiency, on the old exceptions, and after he had taken out and served a warrant to proceed on such reference, put in new exceptions to the further answer, for impertinence, and obtained another order of reference of those exceptions, it was held that the exceptions for impertinence were irregular; and they were ordered to be taken off the files of the court. (*q*)

If on a reference of exceptions to an answer for scandal or impertinence, the master reports that the answer is scandalous or impertinent, the complainant, on filing proof that the report has become absolute against the defendant, may have an order of course that the proper officers of the court expunge the scandalous or impertinent matter, and that the defendant pay the costs within twenty days after service of a copy of such order and of the taxed bill, or that an attachment issue. (*r*)

When the defendant submits to the exceptions, the same order may be entered on filing the notice of the submission. (*s*)

If the master disallows an exception for scandal or impertinence, his report is final, and cannot be excepted to in that respect. But the complainant may, upon the hearing of the cause, or upon the taxation [*205] *of the general costs in the suit, insist that the matter excepted to was in fact impertinent. (*t*)

Costs on exceptions to answer.] It is provided by the 63d rule, that on exceptions either for insufficiency or for scandal and impertinence, the complainant shall be entitled to the costs of the exceptions which are submitted to, and those which are finally allowed after a reference to a master; but that neither party shall be entitled to costs upon the reference of exceptions, unless he finally succeeds as to all the exceptions which are referred. The costs on exceptions are not to be taxed until all the exceptions are submitted to, abandoned, allowed, or finally disposed of; and then the whole costs to which the exceptant is entitled, are to be included in one bill, and the adverse party may offset any costs to which he is entitled.

Copies of pleadings for the master are not allowed on a reference of exceptions, unless in cases of difficulty where copies are required by him, and are actually made for that purpose. (*u*)

Only one solicitor and counsel fee can be charged on a reference; and

(*p*) Woods v. Morrell, 1 John. Ch. Rep. 103.
(*r*) Rule 57.
(*t*) Rule 57.

(*q*) Hart v. Small, *supra*.
(*s*) Idem.
(*u*) Richards v. Barlow, 1 Paige, 323.

only one fee can be allowed to the master; except by the special order of the court. (*v*)

It has before been stated that the defendant is liable to pay the costs of the exceptions which he submits to answer. (*w*)

If an answer contains scandalous or impertinent matter, the counsel whose name is subscribed to it is personally liable to the complainant for the costs on the exceptions for impertinence. (*x*)

When impertinent matter in an answer which should have been embraced in one exception, is made the foundation of several exceptions to detached parts thereof, the court may refuse to give the costs of the reference to the complainant, although the major part of his exceptions to the answer are finally allowed. (*y*)

Costs of exceptions to answer.] If the defendant submits to the exceptions, the complainant has his costs; and if they are referred, he has the costs of the exceptions allowed, and the defendant his costs of the exceptions disallowed; and the balance struck is to be paid. (*z*)

To entitle the exceptant to the costs of the reference, he must finally succeed in obtaining the allowance of a major part, in number, of the *exceptions referred. And each exception constituting a part [*206] of such majority must be wholly sustained. (*a*)

Where part of the exceptions to an answer are allowed, and the rest disallowed, the costs to which the respective parties are entitled may be offset, or a proportionate share of the costs only may be allowed to the party who succeeds as to a majority of the exceptions. (*b*)

SECTION II.

AMENDING BILL OF COMPLAINT.

Although, as a general rule, the bill may be amended at any time before decree, yet as it is most *usually* amended between the times of putting in the answer and of filing the replication, the present seems the most fitting place for treating of amendments. And in doing so, convenience will be promoted by considering the whole subject of amending bills, at whatever stage of the cause the amendment may be made.

In what cases the bill may be amended.] If a bill does not contain such material facts, or make all such persons parties, as are necessary

(*v*) *Id. ib.*

(*x*) *Doe v. Green*, 2 Paige, 347.

(*z*) *Methodist Episcopal Church v. Jaques*, 1 John. Ch. Rep. 65.

(*a*) *Buloid v. Miller*, 4 Paige, 473.

(*w*) See Rule 50

(*y*) *Franklin v. Keeler*, 4 Paige, 382.

(*b*) *Norton v. Woods*, 5 Paige, 200.

to enable the court to do complete justice, the complainant may alter it, by inserting additional matter subsisting at the time of filing the bill, of which he was not then apprised, or which he thought not necessary to be stated. And he may add such persons as shall be deemed necessary parties. Or in case the bill is found to contain matter not relevant, or no longer necessary to complainant's case, or the names of parties who may be dispensed with, the bill may be amended by striking out such matter or parties. The original bill thus added to, or altered, is termed *an amended bill*.

From what has just been stated, it will be seen that amendments to a bill are of two sorts—those which relate to parties, and those which affect the substance of the case. And amendments relating to parties are either by the addition or omission of them. There is also another class of amendments relating to parties; to wit, the changing of their situation by striking out the name of a co-complainant and making him a defendant.

Amendments being regarded with reference only to the furtherance [*207] of *justice, they are, as a general rule, in the discretion of the court, especially in matters of mere form. (c) They are, therefore, always allowed with great liberality, until the proofs are closed; except where the bill is sworn to; (d) in which case they are allowed with great caution. (e) (7)

(c) *Smith v. Babcock*, 3 Sumner, 410. *Garlick v. Strong*, 3 Paige, 440. *McElwain v. Willis*, id. 505.

(d) *Cock v. Evans*, 9 Yerg. 287.

(e) *Verplanck v. The Mercantile Ins. Co.* 1 Edw. 46. *Swift v. Eckford*, 6 Paige, 22.

(7) The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party; or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change, substantially, the claim or defence, by conforming the pleading or proceeding to the facts proved. (Code, § 173.)

No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits. Whenever it shall be alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just. (Code, § 169.) Where the variance is not material, as provided in section 169, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. (Code, § 170.)

The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment. (Code, § 122.)

Section 173 of the Code does not authorize the court to amend the pleadings so as to conform to the facts proved, establishing the right of the plaintiff to recover, if

Facts which have occurred since the filing of the original bill ought not to be introduced by amendment; because, as the amendments are held to constitute part of the same record as the original bill, (*f*) which can only relate to facts which had occurred previous to the time when it was preferred, the introduction of matters of a posterior date would render the record incongruous. Matter, therefore, which has occurred

(*f*) Vere v. Glynn, 2 Dick. 441. Jopling v. Stuart, 4 Ves. 619. Ogden v. Gibbons, Halst. Dig. 172.

the amendment would substantially change the claim upon which the action is founded. (*Nosser v. Corwin*, 36 How. 540.) But the court, at the trial, may remedy by amendment a variance between the case made by the proof and the complaint, where all the facts essential to the rights of the parties are put in issue by the answer and reply. (*Hall v. Gould*, 13 N. Y. 127.) And where, in an action to recover specific personal property, the jury found for the plaintiff as to the one part, and for the defendant as to the other, designating the articles generically, without specifying them in detail, it was held that it was competent for the court, at the trial, to render the verdict certain by directing an amendment of the complaint, so as to insert therein a list of each class of articles intended by the generic designation of the verdict. (*Emerson v. Bleakley*, 5 Ab., N. S. 350.)

The court, however, cannot allow an amendment of the complaint on the trial, the effect of which would be to introduce a new cause of action, instead of the one laid in the complaint—a cause of action barred by the statute of limitations; or the effect of which would be to enable the plaintiffs to recover one-half of a claim which they have purchased since the commencement of the action, and which they could not have recovered as the action was originally commenced. (*Van Syckels v. Perry*, 3 Rob. 621.) The right of amendment is limited to the subject matter for which the action was originally brought. (*Ibid.*) In *Andrews v. Bond*, (16 Barb. 633,) where the action was founded on tort, and the defendant had a verdict, the plaintiff asked leave to amend his complaint by changing the action to one on contract. Leave was refused. (See *Walter v. Bennett*, 16 N. Y. 250; *Mayor, &c. of New York v. Parker Vein Steamship Co.* 21 How. Pr. 289. And see, to the contrary, *Allabeen v. Wakeman*, 10 Ab. 162.) When all the facts stated in a complaint, assuming them all to be true, will not entitle the plaintiff to any relief, a fact essential to the cause of action, and occurring after the service of the summons and complaint on one of the defendants, cannot be incorporated into the complaint by amendment, nor be made a part of the case by a supplemental complaint. (*McCullough v. Colby*, 4 Bosw. 603.)

A refusal to allow the complaint to be amended on the trial, or a refusal to conform the pleadings to the proof, is entirely within the discretion of the court, and is not the proper subject of an exception; (*Binnard v. Spring*, 42 Barb. 470; *Hunt v. Hudson River Fire Ins. Co.* 2 Duer, 482;) nor reviewable upon appeal; (*Richtmeyer v. Remsen*, 38 N. Y. 206; S. C. 6 Trans. App. 203; *Meyer v. Fiegel*, 7 Rob. 122; *Hendricks v. Decker*, 35 Barb. 298; *Roth v. Schloss*, 6 id. 308;) nor are the terms upon which an amendment is granted subject to review upon exceptions. (*Fibbard v. Roderick*, 51 Barb. 616.) But an order made by a referee, on the trial of an action before him, allowing an amendment, which order he has no authority to make, is the subject of exception, and may be reviewed on appeal from the judgment entered on the referee's report. Besides this, the special term possesses the power to set aside any order made by a referee in the progress of a cause which he had not authority to make. (*Ford v. Ford*, 53 Barb. 525; S. C. 35 How. 321.) See further, as to the cases in which an order made at a special term, refusing to allow an amendment of the complaint after trial, is not appealable. (*Saltus v. Genin*, 19 How. Pr. 233.)

An amendment supplying an averment of the negotiation of a bill of exchange to the plaintiff, is properly allowed; but if it were not, the allowance of such an amendment is a matter of discretion, and not reviewable on appeal. (*Van Duzer v. Howe*, 21 N. Y. 531.)

Yet if some substantial right has been invaded by an amendment, an appeal to the general term will be allowed. (*Union Bank v. Mott*, 11 Ab. 42; S. C. 19 How. Pr. 267. See *Johnson v. McIntosh*, 31 Barb. 267.) An order granting leave to amend by adding another cause of action, without permitting the defendant to answer anew, is appealable. (*Allabeen v. Wakeman*, 10 Ab. 162.) So where the court refused to

since the original bill was filed, should be brought before the court by supplemental bill, and not by amendment. (*g*)

Nor can a bill be amended by inserting therein facts known to the complainant at the time of filing the bill; unless some excuse is given for the omission. (*h*) And amendments can only be granted when the bill is defective in parties, or in the prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself nor repugnant thereto. (*c*)

(*g*) Archbp. of York v. Stapleton, 2 Atk. 136. Stafford v. Howlett, 1 Paige, 200.

(*h*) Whitmarsh v. Campbell, 2 Paige, 67.

(*c*) Verplanck v. The Mercantile Ins. Co. 1 Edw. 46. Lyon v. Talmadge, 1 John. Ch. 184. Rodgers v. Rodgers, 1 Paige, 424.

grant an amendment on the ground that it did not possess the power. (*Russell v. Conn*, 20 N. Y. 81; *McElwain v. Corning*, 12 Ab. 16; *Sheldon v. Adams*, 41 Barb. 54; S. C. 27 How. 179; 18 Ab. 405.) Where a party has leave granted him, at special term, to amend, and the order is reversed at general term, no appeal lies to the court of appeals. (*New York Ice Co. v. Northwestern Ins. Co.* 23 N. Y. 357; S. C. 12 Ab. 414; 21 How. Pr. 296; *Hodges v. Tennessee Marine & Fire Ins. Co.* 8 N. Y. 416. See also *Lounsbury v. Purdy*, 18 N. Y. 515.)

Leave to amend, so as to change the venue, may be granted in the discretion of the court. (*Paine v. Parker*, 13 John. 329; *Fish v. Lyon*, 1 How. Pr. 234.) So the plaintiff may, after the defendant has answered, amend his complaint, of course, and without costs, by stating the place of trial to be in a county different from that specified in the original complaint. (*Stryker v. New York Exchange Bank*, 42 Barb. 511; S. C. 28 How. 20.)

There is now no restriction upon the power of the court to allow a party, at any time before trial, to amend his pleadings, so as to present his views of the questions to be litigated upon such terms as may be just, even though the effect of the amendment will be to change entirely the whole cause of action, or the grounds of defence. It is only when a party seeks to amend his pleadings *after trial* that the court is prohibited from allowing an amendment which would substantially change the cause of action or defence. (*Troy & Boston R. R. Co. v. Tibbits*, 11 How. Pr. 168, 170. See *Woodruff v. Dickie*, 5 Rob. 619; S. C. 31 How. 164; *Beardsley v. Stover*, 7 How. Pr. 294; *Daguerre v. Orser*, 3 Ab. 86; *Harrington v. Slade*, 22 Barb. 164.) In *Bailey v. Johnson*, (1 Daly, 61,) it was held that a change in the form of the action would not be allowed on the trial.

A complaint cannot be amended when the effect will be to change the action into one for equitable relief, without leave of the court. (*Gray v. Brown*, 15 How. Pr. 555.)

Where a mistake has occurred in the names of the plaintiffs, it may be corrected, either on the trial or afterwards, by amendment. It is not a ground of non-suit. (*Barnes v. Perine*, 9 Barb. 206; *Burnup v. Halloran*, 1 Code R. 51; *Bank of Havana v. Magee*, 20 N. Y. 355.) This may be done even after judgment. (*Ackley v. Tarbox*, 31 N. Y. 564.) In *Platt v. Hudson River R. R. Co.* (21 N. Y. 305,) the difference between a complaint framed as an action for damages on a refusal to fulfil a contract, and one for a refusal to execute an instrument which embodied the contract in question, was held formal, and curable by amendment.

If the complaint, in an action to recover the possession of personal property, states facts sufficient to show that, in law, the defendant's holding of the property is unlawful, that is sufficient, especially after judgment. The omission to allege in the complaint a demand of the property before suit brought, is cured by proof of the fact, by the report of the referee finding the fact of a demand, and by the judgment. (*Fullerton v. Dalton*, 58 Barb. 235.) When the parties go down to trial, and a cause of action is proved, though the complaint may be defective, tested merely as a pleading upon demurrer, it is the duty of a referee, or a court, to conform the pleading to the facts proved, in furtherance of justice; and after judgment, if it be entered according to a case duly proved, it is the duty of the court to amend, or to regard the pleading as duly amended. (Ibid.)

When the supreme court has acquired jurisdiction, it may amend any process or proceeding to retain it, and carry out and effectuate its object, in furtherance of jus-

In some cases, however, the court will suffer matters which have occurred since the filing of the original bill to be introduced by amendment. Thus where the complainant has an inchoate right at the time of preparing his original bill, and which merely requires some formal act to render his title perfect; and such formal act is not completed until afterwards, the introduction of that fact by amendment will be permitted. The case of an executor filing a bill before probate, and afterwards obtaining probate, is an instance of this kind. (d) Where, also, the defendant in his answer states facts which have taken place since the bill was filed, the court will permit such facts to be incorporated into the bill by amendment. (e) But an amendment of the bill

(d) 1 Dan. 511. *Humphreys v. Humphreys*, 3 P. Wms. 348. *Bradford v. Felder*, 2 McCord's Ch. Rep. 170. *Butler v. Butler*, 4 Litt. 201.

(e) *Knight v. Matthews*, 1 Mad. 566.

tice. But it cannot make a void proceeding valid by an amendment in the same proceeding or matter. (*Bangs v. McIntosh*, 23 Barb. 591.) It is a fundamental rule, that where there is an absence of jurisdiction the defect cannot be supplied by amendment or supplemental proceedings, so as to make the void proceedings valid from the beginning. (*Ibid.*)

A lessor cannot recover rent, upon a complaint for use and occupation, where it appears from the evidence that there was a lease of the premises to other parties, and that the defendants were in as assignees of the term. But in such a case the court may, on the trial, allow an amendment of the complaint, so as to conform it to the proof, and permit a recovery for the rent due on the lease, where it does not appear that the defendants have been surprised. (*Bedford v. Terhune*, 30 N. Y. 453; S. C. 27 How. 422; 1 Daly, 371.)

In *Chapman v. Webb*, (1 Code Rep., N. S. 388,) an amendment was allowed, changing an allegation from "contract price" to "value." In *Bacon v. Comstock*, (11 How. Pr. 197,) changing an allegation from "severally indorsed" to "jointly indorsed." And in *Bragg v. Bickford*, (4 How. Pr. 21,) by adding a verification. In *Merchant v. New York Life Ins. Co.* (2 Sandf. 669; S. C. 2 Code R. 66, 87,) an amendment was allowed, on satisfactory cause for the mistake being shown, increasing the amount claimed in an action on contract, for money only, after a reply repeating the original claim, though both pleadings were verified. In *Pratt v. Hudson River R. R. Co.* (21 N. Y. 305,) the difference between a complaint framed as an action for damages on a refusal to fulfil a contract, and one for a refusal to execute an instrument which, it was agreed, embodied the contract in question, was held formal, and curable by amendment.

In an action upon a promissory note, an amendment of the complaint, by inserting therein a count for goods sold and delivered, which formed the consideration of the note, was allowed on the trial. Held, that as the amendment was in furtherance of justice, and did not change, substantially, the claim of the plaintiff, and it only operated to confirm the pleading to a state of facts which the evidence had already disclosed might possibly exist, it was clearly authorized. (*Fibbard v. Roderick*, 51 Barb. 616.)

Independent of the Code, the supreme court has the power, on motion at special term, at any time before verdict, to allow amendments to pleadings, by permitting the insertion of a new cause of action, or a new defence. But the power of the court to allow such an amendment during the trial of a cause, is quite a different thing. Such a power did not exist before the Code, nor has it been conferred by that statute, it seems. (*Ford v. Ford*, 53 Barb. 525; S. C. 35 How. 321.) The court has no power, on the trial of a cause, to allow the amendment of a pleading by inserting a new cause of action, or a new defence. And if such power is not possessed by the court, it is not possessed by a referee. (*Ibid.*; *Union Bank v. Mott*, 18 How. Pr. 506.) If, on the trial before a referee, such an amendment is desired, it can only be sustained by suspending the trial or hearing, and applying, on notice, to the special term. (*Ibid.*) The opinions advanced in *Woodruff v. Dickie*, (13 How. Pr. 164,) that "a referee is no longer an officer of the court;" that "the court, at special

is not necessary to enable the complainant to avail himself of such facts at the hearing; as the replication puts all the facts stated in the answer completely in issue between the parties; and the complainant may, after such replication, examine witnesses as to such facts, as well as the defendant. (f) Yet where it is important to the complainant that a fact disclosed in the answer should be further inquired into, or avoided by some further statement, the practice of introducing such facts from the answer of the defendant, into the bill, is often resorted to. Thus,

(f) *Attwood v. —*, 1 Russ. 355.

term, has no more power to grant amendments than the court has on the trial;” and that “a referee has all the powers of a court at special term to allow amendments,” disapproved. (Ibid.) An amendment which will change the form and nature of the action from tort to assumpsit, cannot be asked for after the whole case is finished. (*Remson v. Wetmore*, 39 Barb. 104.)

After the trial of an action has been commenced, the power of the courts over the amendment of the pleadings is of a very limited and restricted character. But at any time before the trial has begun the pleadings may, upon special motion, be changed and amended in all respects. (*Bigelow v. Dunn*, 53 Barb. 570.) Where a verdict exceeds the amount of damages claimed in the complaint, an amendment of the complaint by increasing the demand of damages to the amount of the verdict, will not be allowed, except upon the condition of payment of costs, and granting a new trial. (*Corning v. Corning*, 6 N. Y. 97; *Bowman v. Earle*, 3 Duer, 69.) Where, in such a case, the judge, at the trial, allowed an amendment of the complaint, without imposing terms, and judgment was entered for the amount of the verdict; and the supreme court, on appeal, vacated the order granting the amendment, and gave leave to the plaintiff to remit the damages, so far as they exceeded the amount originally demanded; and that being done, affirmed the judgment for that amount, with costs, reversing it as to the excess, the judgment was affirmed. (Ibid.)

Where a complaint and answer are both very general in point of form, but neither party demurs, and both have gone to trial with a full understanding of their rights, and neither party has been taken by surprise by the pleading of his adversary, and a full and fair investigation has been had upon the merits, such an amendment will be allowed as may be necessary to conform the complaint to the facts proved, and as will do substantial justice to both parties. (*Hunter v. Hudson River Iron & Machine Co.* 20 Barb. 493.)

After an action has been tried and submitted, it is discretionary with the court to allow an amendment by inserting the names of new parties defendant. (*Ford v. Belmont*, 7 Rob. 510.) And the court has power, at general term, to modify a judgment dismissing a complaint absolutely, so as to add to it a direction to let the cause stand over to add parties in a proper case. (*Loeschigk v. Addison*, id. 506.) If it is shown that the plaintiff was acquainted with the facts before the commencement of the action, which he failed to set up, he cannot do so by amendment after trial. (*Bulen v. Burdell*, 11 Ab. 381. See *Cocks v. Radford*, 13 id. 207.)

If the complaint was not amended on the trial, but might have been, and sufficient evidence is offered to sustain a cause of action, the court will, even after the trial, allow it to be amended *nunc pro tunc*, to sustain the verdict. (*Coleman v. Playsted*, 36 Barb. 26; *Lounsbury v. Purdy*, 18 N. Y. 515, 521.)

And even after judgment the court has an extraordinary power to insert new allegations material to the case in a pleading. This power will, however, be very sparingly exercised. (*Field v. Hawchurst*, 9 How. Pr. 75; *Egert v. Wicker*, 10 id. 193.) After judgment, amendments will very rarely be allowed for any other purpose than to sustain the judgment. (*Englis v. Furniss*, 3 Ab. 82; *Gasper v. Adams*, 24 Barb. 288; *Williams v. Birch*, 6 Bosw. 674.)

In *Saltus v. Genin*, (3 Bosw. 639,) where the plaintiff waited two years and three months after the court had, on appeal, decided that, upon the facts proved and specially found on the trial, no recovery could be had under his complaint, it was held that it was too late to ask leave to amend, if the sole ground of the application was that on the trial evidence was given of facts of which the plaintiff was not before apprised. If in any case an amendment should be allowed after so great delay, it

where a complainant not being satisfied with the answer, amended his bill, stating by way of pretence a quotation from the answer, and negating it, and insisted that the facts would appear differently if the defendant would look into his accounts, it was held that the matter so introduced was not impertinent. (*g*)

(*g*) See *Seelye v. Boehm*, 2 Md. 176.

ought not to be where it appears that, if the plaintiff is entitled to recover at all, it is upon a ground highly technical, and where, if his claim be strictly legal, it is not meritorious. (*Ibid.*) After a trial has been had, and the defendant's case has been fully developed, if the plaintiff amends his case, he should elect upon what averments he will rest his case, and should not be permitted to speculate upon the chances of proof by declaring in the alternative upon inconsistent and hypothetical statements of his cause of action. (*Ibid.*) After a trial has been had, and eight months have elapsed since the court, on appeal, has decided that, upon the facts stated in the complaint, the plaintiff cannot recover, if he can be permitted to amend by changing, substantially, his cause of action, it should only be on the payment of all the costs accrued since the original complaint was filed. (*Ibid.*)

Where the complaint, in an action to recover back money paid by mistake, alleges a demand and refusal to pay, and the defendant, in his answer, admits the refusal to pay, proof that the defendant afterwards promised does not present a material variance. The court may amend the complaint to conform to the proof, and after all the facts have been elicited, the pleading will be regarded as if the amendment had actually been made. (*Rosboro v. Peck*, 48 Barb. 92.)

It is very doubtful whether a motion to set aside a regular judgment rendered at a general term will be granted at a special term, in order that a party may amend his pleadings. If it can, it will only be done where it is clearly shown that the party has been surprised or misled, and also that it is required to promote the ends of justice. (*Malcom v. Baker*, 8 How. Pr. 303.)

Section 122 of the Code provides that when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

It has been held that a third person asking to come in and defend or contest the plaintiff's claim must apply before judgment. (*Carswell v. Neville*, 12 How. Pr. 445.) This provision of section 122 is confined in its application to those cases where, formerly, a bill of interpleader would have accomplished the same purpose. (*Hornby v. Gordon*, 9 Bosw. 656.) It applies only to actions for the recovery of real or personal property. (*Kelsey v. Murray*, 28 How. 243; S. C. 18 Ab. 294; *Tallman v. Hollister*, 9 How. Pr. 508; *Judd v. Young*, 7 id. 79.) It does not apply to an action on a mere money demand; (*Kelsey v. Murray*, *supra*; *Judd v. Young*, *supra*; nor to an action for the dissolution of a partnership; (*Dayton v. Wilkes*, 5 Bosw. 655;) nor to an action in the nature of a creditor's bill to reach a surplus in the hands of the surrogate. (*Tallman v. Hollister*, 9 How. Pr. 508.) In a partition suit, however, one having an interest in the subject may be made a party, on application. (*Waring v. Waring*, 3 Ab. 246.) So, in an action to recover property seized on execution, the plaintiff in the execution may be made a party, on his application. (*Conklin v. Bishop*, 3 Duer, 646.) Where a party foreign to the suit asks for leave to come in and litigate the plaintiff's claim, his admission rests in the discretion of the court. (*Scheidt v. Sturgis*, 10 Bosw. 606.) If the party applying is plaintiff in another suit, wherein he may obtain all the relief he claims, the application should be denied. (*Ibid.*)

When new parties are brought in by amendment of the complaint, the summons must be amended accordingly. (*Follower v. Laughlin*, 12 Ab. 105.)

If an *unauthorized* amendment is made, the amended complaint may be struck out, on motion; (*ibid.*;) or, the defendant may refuse to accept the paper, or return it, or give notice that he will disregard it, specifying on what ground. (*Hollister v. Livingston*, 9 How. Pr. 140.) Receiving the paper and retaining it sixteen days without such notice, is a waiver of the defect. (*ib.*) Obtaining an order extending the time to answer an amended complaint, is also a waiver of such a defect. (*ib.*)

[*Variance.*] A referee has power to allow an amendment under sections 169, 170 of the Code, for a *variance*, provided the variance is immaterial, and the opposite

So where a complainant filed a bill, stating an agreement, and the defendant, by his answer, admitted that there was an agreement, but different from that stated by the complainant, it was held that the complainant might amend his bill by abandoning his first agreement and praying for a decree according to that admitted by the defendant. (*h*)

(*h*) *Lindsay v. Lynch*, 2 Sch. & Lef. 9. *Harris v. Knickerbacker*, 5 Wend. 638. 1 Paige, 209, S. C.

party has not been actually misled to his prejudice. (*Union Bank v. Mott*, 19 How. Pr. 506; S. C. 10 Ab. 372. See *Ford v. Ford*, 35 How. 321.) Whenever a party seeks to avail himself of the provisions of § 169, he must prove to the satisfaction of the court that he has been misled, and the proof must also show in what respect he has been misled. (*Catlin v. Gunter*, 10 How. Pr. 315; S. C. 11 N. Y. 368.) Sections 169, 170, contemplate a case where the alleged variance has been discovered, or is developed on the trial or hearing, at which time the relief, in a case to which it is appropriate, may be given at once, and the trial thereafter proceed upon the amended pleadings. (*Egert v. Wicker*, 10 How. Pr. 193; *Cothel v. Talmadge*, 1 E. D. Smith, 573; S. C. 9 N. Y. 551; *Therasson v. Peterson*, 22 How. Pr. 98.) Unless the party claiming to have been misled is able to prove it to the satisfaction of the court, the variance will be disregarded, and the pleadings may be amended to conform to the facts proved. (*Chapman v. Carolin*, 3 Bosw. 456.) The trial may proceed without an amendment, either before a judge or a referee, and if the plaintiff recovers a verdict, he may move to have the pleadings amended to correspond with the facts proved; provided the defendant has not been misled or surprised by the variance. (*Lettman v. Ritz*, 3 Sandf. 735. See also *Harmony v. Bingham*, 1 Duer, 210; S. C. 12 N. Y. 99; *Hart v. Hudson*, 6 Duer, 294; *DePeyster v. Wheeler*, 1 Sandf. 719; S. C. 1 Code R. 93; *Parsons v. Suydam*, 3 E. D. Smith, 276; *Craig v. Ward*, 36 Barb. 377; S. C. 3 Keyes, 355; *Relyea v. Beaver*, 34 Barb. 547; S. C. 25 N. Y. 123; *Coleman v. Playsted*, 35 Barb. 29; *Seaman v. Low*, 4 Bosw. 338; *Emery v. Pease*, 20 N. Y. 62.) It is not a fatal variance to declare on a promissory note, and to prove, on the trial, in order to rebut the defence of usury, that a part only of the face of the note was demanded. (*Schoop v. Clark*, 1 Keyes, 181.) Nor is an allegation that the note in question was payable to the order of one person, and proof that it was payable to the order of another, such a variance. (*Farmer v. Croam*, 7 Cal. 135.) An allegation of notice of non-payment of a note is sustained by proof of facts going to excuse notice. (*Purchase v. Mattison*, 6 Duer, 587; 3 Bosw. 310.) Where the complaint alleges that the plaintiff is the assignee of certain demised premises, proof that he is assignee of a part only of said premises will not entitle the defendant to a non-suit. (*Van Rensselaer v. Jones*, 2 Barb. 643.) Where the complaint sets up an express agreement, it will be sustained by evidence of an implied agreement. (*Smith v. Lippincott*, 49 Barb. 398.) It is too late, on appeal, to object that the agreement, as set forth in a pleading, is widely different from that found by the referee. If the allegations are not unproved in their entire scope and meaning, no one has been misled, and no question of variance was raised on the trial, the variance will be disregarded. (*Lobdell v. Lobdell*, 36 N. Y. 327; S. C. 33 How. 347; 4 Ab., N. S. 56.) But where the complaint alleges that the defendant was indebted for money paid, and further, that he guaranteed a note, the allegation will not be sustained by proof that he indorsed such note. (*Cottrell v. Conklin*, 4 Duer, 45.) So if the complaint sets forth simply a warranty, a recovery cannot be had on the ground of fraud. (*Fisher v. Fredenhall*, 21 Barb. 82.)

When the plaintiff proves the substance of the alleged cause of action, though he may fail to prove some particular or particulars of it, the variance is to be disregarded as an immaterial variance, unless the defendant shall prove at the trial, to the satisfaction of the court, that the alleged variance has actually misled him, and in what respect it has misled him. (*Poirer v. Fisher*, 8 Bosw. 258, 263. See *Catlin v. Gunter*, 11 N. Y. 368; S. C. 10 How. Pr. 315.)

It rests entirely within the discretion of the court to allow, or refuse to allow, an amendment of the pleadings on the trial, in order that proof of a new cause of action or defence may be admitted. (*Hendricks v. Decker*, 35 Barb. 298; *Roth v. Schloss*, 6 id. 808; *Brown v. McCune*, 5 Sandf. 224, 229.) And being so, it is no ground of review on appeal, that a request for leave to amend was made on the trial and refused. (*Phinckle v. Vaughan*, 12 Barb. 217; *Hendricks v. Decker*, 35 id. 302;

But the court will not permit a complainant to amend his bill so that he may continue to insist upon the agreement originally stated, and if he fails in that, to get the benefit of the one admitted by the defendant. (i)

(i) 1 Dan. 514. 2 Sch. & Lef. 1. 7 Ves. 222.

Dennis v. Snell, 50 id. 95; S. C. 34 How. 467; 54 Barb. 411; *N. Y. Marbled Iron Works v. Smith*, 4 Duer, 362, 367; *Gould v. Rumsey*, 21 How. Pr. 97.)

The allegations in a complaint were, that the defendant took, and unlawfully converted, the plaintiff's property. It was held that the plaintiff might amend on the trial by adding that the taking was wilful and malicious. (*Wilde v. Hexter*, 50 Barb. 449.) But in case the defendant is able to make it appear that he has been surprised or misled, the amendment will only be allowed upon terms. Usually the trial will be postponed, and the party who asked the favor must pay the costs. (*Ibid.*)

In *Rosboro v. Peck*, (43 Barb. 91.) which was an action to recover money paid by mistake, the complaint alleged a demand and refusal to pay. The defendant, in his answer, admitted the refusal to pay. It was held that proof that the defendant afterwards promised did not present a material variance, and would not preclude a recovery. That the court might amend the complaint to conform to the proof, and that after all the facts had been elicited, the pleading would be regarded as if the amendment had actually been made.

In *California*, pleadings may be amended, *first*, as a matter of course, after a demurrer is interposed, and before the hearing thereof; and, *second*, for other reasons which appeal to the discretion of the court. (Cal. Pr. Act, § 67.) Amendments, of course may be made, without costs to either party, to a pleading, before the trial of the issue of law, on a demurrer filed thereto. (*Ibid.*; *Allen v. Marshall*, 34 Cal. 15; *Lord v. Hopkins*, 30 id. 76; *Barber v. Reynolds*, 33 id. 497.) If the defendant demurs to the complaint, it is an error for the court to refuse the plaintiff leave to amend his complaint before the decision on the demurrer. (*Lord v. Hopkins, supra.*) Amendments should be liberally allowed by the court, in furtherance of justice. (*Cook v. Spears*, 2 Cal. 409; *Stearns v. Martin*, 4 id. 227; *Butler v. King*, 10 id. 342; *Smith v. Yreka Wat. Co.* 14 id. 201; *McMillan v. Dana*, 13 id. 333; *England v. Kreyenhagen*, id. 455; *Pierson v. McCahill*, 22 id. 127.) Where a pleading is defective, a demurrer should be sustained, and leave be granted to amend. (*Gallagher v. Delaney*, 10 Cal. 410.) And if the plaintiff then declines, final judgment should be given, (*ibid.*,) unless the complaint is so defective that it cannot be made good by amendment. (*Lord v. Hopkins*, 30 Cal. 76.) After demurrer sustained, amendments may be made upon motion. (*Smith v. Yreka Wat. Co.* 14 Cal. 201; *Gallagher v. Delaney*, 10 id. 410.) The party desiring to amend after demurrer sustained, must make his motion to the court; and he cannot object, on appeal, that he was not permitted to amend, when he made no offer. (*Ibid.*) The filing of a new complaint, after demurrer sustained, is not the commencement of a new action. (*Jones v. Frost*, 28 Cal. 245.) It simply takes the place of the original complaint. (*Barber v. Reynolds*, 33 Cal. 497.)

The allowance of amendments at the trial is in the discretion of the court, (*Thorn-ton v. Borland*, 12 Cal. 435; *Gillan v. Hutchinson*, 16 id. 153; *Cooke v. Spears*, 2 id. 438,) and that discretion will rarely be revised; (*Pierson v. McCahill*, 22 Cal. 127;) but, for its abuse, the appellate court will interfere. (*Cooke v. Spears, supra.*) Where, in the course of a trial, it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the court should allow amendments on such terms as may be just. (*Stringer v. Davis*, 30 Cal. 218; *Peters v. Foss*, 16 id. 357; *Gavitt v. Doub*, 23 id. 78.) A motion to amend is always in time when it immediately follows an objection to the pleading. (*Valencia v. Couch*, 32 Cal. 339.) It does not come too late, though made after the plaintiff has closed his testimony. (*Ib.*) A complaint may be amended after verdict and before judgment, so as to conform to the verdict. (*Hoofer v. Wells*, 27 Cal. 35.)

In *Kentucky*, the provisions of the Code, in respect to amendments by the court, are similar to those of section 173 of the Code of New York. (Code of Prac. § 161.) Courts may permit the amendments authorized by the Code to be made without being verified, unless a new and distinct cause of action or defence is thereby introduced. (Id. § 166.) Under section 161, the court may allow amendments to the complaint, even during trial, upon proper terms, by adding or striking out the names of parties; or correcting mistakes in the names of parties, or any other mistake; or

The question whether the court will or will not permit a bill filed for the mere purpose of discovery, to be converted into one for relief, by an amendment adding a prayer for relief, does not seem to be settled. (*k*) But as a cross-bill is entitled to be treated with greater indulgence than an original bill, in a case where the defendant filed a cross-bill for the purpose of getting a discovery, only, from the complainant in the original suit, but did not get any answer to it before the hearing of the original cause; in consequence of which the discovery became useless; whereupon the defendant amended his cross-bill by praying relief, it was held that under the circumstances, he was at liberty to do so. (*l*)

A bill for relief cannot be converted into a bill for a discovery by striking out the prayer. (*m*)

(*k*) See 1 Dan. 514

(*l*) *Severn v. Fletcher*, 5 Sim. 457.

(*m*) *Fair Cholmondeley v. Clinton*, 2 Ves. & B. 113, 2 Mer. 71.

inserting material allegations; or so changing the allegations thereof as to conform to the proof; provided the ground of action is not materially altered. (*Coil v. Howard*, cited *Myers' Code*, 426.) A plaintiff has the right to strike from his complaint any cause of action at any time before the final submission of the case to the jury, or to the court, where the trial is by the court. By amending the petition he may submit a distinct cause of action from that contained in the original complaint. (*Hord v. Chandler*, 13 B. Mon. 404.)

Section 137 of the Code of *Ohio* is the same as section 161 of the Code of *Kentucky*, and section 173 of the Code of *New York*. Under it, it has been held that striking out the name of the nominal plaintiff, and inserting that of the real party in interest, is not an amendment that changes substantially the original claim made, nor could it by any means operate as a surprise to the defendant. (*Ansonia Rubber Co. v. Wolf*, 1 Handy, 233.) The law respecting amendments for misnomer is substantially the same as before the statute authorizing actions to be brought against defendants in their firm name. (*Lane v. McCarty*, 2 Handy, 191.) Where an action was brought on a promissory note, but not in the name of the real party in interest, the court permitted an amendment to be made, by substituting the name of the real party, and filing an amended complaint in his name, upon payment of all costs, except for the issuing and service of process. (*Clawson v. Cone*, 2 Handy, 67.)

Section 131 of the Code of *Ohio*, which relates to variances between allegations in a pleading and the proof, and the power of the court to order the pleading to be amended, is the same as section 169 of the *New York Code*.

In *Indiana*, the court may, at any time, in its discretion, and upon such terms as may be deemed just, add or strike out the name of any party, correct a mistake in name, description, legal effect, or in any other respect; insert, strike out, or modify any material allegation to conform the pleadings to the facts proved, provided the cause of action or defence be not thereby substantially changed. (2 R. S. 43, § 99.) When the allegations of a pleading are so indefinite that the precise nature of the claim or defence is not apparent, the court may require the pleading to be made certain and definite by amendment. (*Id.* 45, § 90.) A variance between the pleading and the proof is disregarded, unless it be proved to the satisfaction of the court that such variance has actually misled the adverse party, to his prejudice in maintaining his action or defence, upon the merits. It must be proved, however, in what respect the party has been so misled; and even then the court may order the pleading to be amended upon such terms as may be just. (2 R. S. 46, § 94; 19 Ind. 290.) Where the variance is such as may be disregarded under the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. (*Ibid.* § 95.)

In *Wisconsin*, section 81 of the Code, relative to amendments by the court, is the same as section 173 of the Code of *New York*, *supra*. Section 147 of the Code of *Kansas* is also nearly identical with section 173 of the *New York Code*. So, also, is section 94 (xc) of the Code of *Minnesota*.

It is said, by Lord Chancellor Hart, that great latitude is allowed to a complainant in making amendments; and that wherever it can be done, an amendment is to be preferred to a supplemental bill. (*n*) (8)

*Yet, if a complainant takes advantage of an order to amend, [*209] so as entirely to change his case, and to make the bill a perfectly new one, he will be ordered, upon motion, to place the defendant in the same position, with regard to costs, that he would have been in had the complainant, instead of amending, dismissed his original bill, with costs, and filed a new one. Thus, where a complainant, by his original bill, sought to set aside a deed, and after the answer was filed, he amended the bill by making quite a different case, and sought to establish the deed, the court ordered him to pay the costs of the original bill, and of certain accounts set forth in the answer, in compliance with the prayer of that bill, and the costs of the motion. (*o*)

Upon the same principle, where a complainant takes advantage of an order to amend to strike out a portion of his bill, though he does not alter the nature of it, yet if expenses have been occasioned to the defendant by the part which has been struck out, which, in consequence of its having been so struck out, could not be awarded to him at the hearing, the court will, upon motion, order such costs to be taxed and paid to the defendant. (*p*)

In respect to amendments as to *parties*, the courts are more liberal than as to other amendments. A court of equity will not dismiss a bill absolutely, for want of proper parties, if the complainant shows enough to give color to his claim for relief against the parties not before the court. (*a*)

As respects the time within which an amendment may be made, it is settled that it must be done at the earliest opportunity, and that any

(*n*) *Hammond v. Hammond*, 2 Moll. 312.

(*o*) *Mayor v. Dry*, 2 Sim. & Stu. 113. See also *Smith v. Smith*, Coop. 141.

(*p*) *Dent v. Wardel*, 1 Dick. 339. *Bullock v. Perkins*, id. 110.

(*a*) *Allen v. Smith*, 1 Leigh, 331.

(8) Section 176 of the Code provides that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Where the summons stated that the complaint would be filed in the office of the clerk of the city and county of New York, and on demand a complaint was served which did not specify the venue, it was held that the complaint might be amended under the above section. (*Davison v. Powell*, 13 How. Pr. 237. See *Merrill v. Grinnell*, 10 id. 31.) This section must not be construed to make valid a bad pleading in an action brought under the old practice, when the defects are demurred to. (*Van denburgh v. Van Valkenburgh*, 8 Barb. 218.) Section 176 applies to the court of appeals equally with the court of original jurisdiction; and the appellate court will not reverse a judgment because of defects in the pleadings which have not affected the substantial rights of the appellant. (*Johnson v. Hathorn*, 3 Keyes, 126; S. C. 2 id. 476; *Bank of Havana v. Magee*, 20 N. Y. 360.)

unreasonable or improper delay will deprive the party of the favor of the court. (b) Thus the court will not give to a complainant leave to amend his bill, if he has not taken any step in the prosecution of the suit for an undue length of time, (as for instance, for two years after answers put in,) and be unable to explain this delay. (c)

When amendment may be made of course, and when only on special motion.] It is a general principle that no alteration can be made in any pleading or other matter after it has been filed, and by that means become a record of the court, without the sanction of a previous order.

The 43d rule of court, however, allows the complainant, in cases where the bill has not been sworn to, to amend it at any time before [*210] *plea, answer, or demurrer put in, of course, and without costs. He may also amend of course, after answer, at any time before replying, until the time for replying expires, and without costs, if a new or further answer is not thereby rendered necessary. He may also amend sworn bills, except injunction bills, of course, if the amendments are merely in addition to, and not inconsistent with, the original bill. (9)

(b) *Rogers v. Rogers*, 1 Paige. 424.

(c) *Altree v. Horden*, 3 Lond. Jurist, 81.

(9) By the Code, any pleading may be once amended, by the party, *of course*, without costs, and without prejudice to the proceedings already had, at any time within twenty days after it is served, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the court that it was done for the purposes of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is, or may be, noticed. If it appears to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. (Code; § 172.)

If the plaintiff is ignorant of the name of a defendant, such defendant may be designated, in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly. (Code, § 175.)

Under section 172, a plaintiff is authorized to amend his complaint, of course, by setting forth a new cause of action. The right is not restricted to setting forth a cause of action of the same class as that contained in the original complaint. The plaintiff may, by omitting the original cause of action, insert another of a different class, provided the summons be appropriate to it. (*Brown v. Leigh*, 12 Ab., N. S. 193.) But this cannot be done on the trial. (*Van Syckles v. Perry*, 3 Rob. 621.) A plaintiff may amend his complaint, of course, without costs, by *striking out* one of several causes of action, (*Watson v. Rushmore*, 15 Ab. 51.) or by *adding* a new cause of action. (*Mason v. Whitely*, 1 Ab. 85; S. C. 4 Duer, 611; *Jeroliman v. Cohen*, 1 Duer, 629.) Thus, a complaint upon a promissory note may be amended by setting forth both the note and a judgment obtained upon it in another state. (*Thompson v. Minford*, 11 How. Pr. 273.) But a verification cannot be added to a complaint by amendment. (*George v. McAvoy*, 6 How. Pr. 200.)

Section 172, allowing amendments, of course, without application to the court, is simply an enactment of what has been a standing rule of the supreme court ever since 1793, except that the rules gave more time for the exercise of this privilege. The section is not to be construed as allowing amendments which the court is prohibited from allowing upon special application. (*Spalding v. Spalding*, 3 How. Pr. 300; S. C. 1 Code Rep. 64.) But, in *Dows v. Green*, (3 How. Pr. 377,) where the action was brought for an unjust detention of personal property, and the plaintiffs demanded judgment for the *value thereof* merely, it was held that the court had power to allow an amendment of the complaint by altering the prayer for relief, so

But amendments of injunction bills, except creditors' bills, cannot be made without a special order of the court and upon notice.

Creditors' bills may be amended of course, in the same manner as bills not sworn to, if the amendments are merely in addition to, and not inconsistent with, what is contained in the original bill. But all such amendments must be sworn to. (q)

Amendments of course may be made without entering any order. (r)

On a demurrer for want of parties, or for any other defect which does not go to the whole bill, the complainant may amend of course, on payment of costs, at any time before the demurrer is noticed for argument, or within ten days after receiving a copy of the demurrer. On a demurrer for causes other than the above, the right to amend, and the terms of the amendment, are in the discretion of the court. (s)

(q) Rule 190.

(r) Rule 43.

(s) Rule 44.

as to claim the property itself, and damages for its detention. (But see *Morris v. Rexford*, 18 N. Y. 557, to the contrary.)

The necessity for a new assignment no longer exists, the amendment of the complaint, under this section, having taken its place. (*Stewart v. Wallis*, 30 Barb. 345.) The right to amend, of course, does not constitute of itself a stay of proceedings. (*Cusson v. Whalon*, 1 Code Rep., N. S. 27; *Plumb v. Whipples*, 7 How. Pr. 411.)

Section 172 is only applicable to a case where the pleadings first put in are regular. If the opposite party wishes to move to set aside the first pleading for irregularity, and has served the proper papers, notwithstanding the irregularity has been corrected by the amendment, still the party amending, although his amendment is in time under this section, must pay the costs of the motion. (*Prudden v. City of Lockport*, 40 How. 46; *Williams v. Wilkinson*, 5 id. 357; S. C. 1 Code Rep., N. S. 20.) An order directing a complaint to be amended in certain particulars, does not preclude the plaintiff from serving an amended complaint, containing new and material allegations, provided the time for amending, as of course, has not expired. (*Jeroliman v. Cohen*, 1 Duer, 629.) Yet the complaint so amended must not contain any matter that, by the first order, was directed to be stricken out. (*Ibid.*)

If there are more defendants than one, the plaintiff cannot amend as regards one defendant, unless he gives notice to the other. (*Fassett v. Tallmadge*, 15 Ab. 205.) Nor will an amendment, of course, authorize the striking out of any of the parties who have been served with the summons. (*Russell v. Spear*, 5 How. Pr. 142; S. C. 3 Code Rep. 189.) Neither can the names of additional defendants be inserted in the complaint by amendment without amending the summons. (*Follower v. Laughlin*, 12 Ab. 105; *Walkenshaw v. Perzel*, 32 How. 311; S. C. 7 Rob. 606.) In *Bemis v. Bronson*, (1 Code Rep. 27,) however, it is held that a defendant's name may be stricken out, or added, by amendment. And in *Fuller v. Webster Fire Ins. Co.* (12 How. Pr. 293,) it is held that the name of a defendant may be stricken out, and that of a receiver added.

Circumstances which have occurred since the commencement of the action cannot be introduced into the complaint by amendment. (*Hornfager v. Hornfager*, 1 Code Rep., N. S. 180; S. C. 6 How. Pr. 13; *Van Syckles v. Perry*, 3 Rob. 621.) If they are, they may be stricken out, on motion, for irregularity. (*Ibid.*) But where a new defendant is brought in by an amended instead of a supplemental complaint, and facts are set up which, as to such defendant, occurred after the service of the original complaint, it is an irregularity which does not affect any substantial right of the defendant, and a general appearance by him in the action will waive the defect. (*Beck v. Stephani*, 9 How. Pr. 193.)

An amendment, of course, will not be allowed where it is sought to change a cause of action from one for a money demand on contract to one for relief. (*Gray v. Brown*, 15 How. Pr. 555.)

The plaintiff may, under section 172 of the Code, and without costs, amend his complaint by changing the place of trial, even after the service of the answer

Amendment of sworn bills.] Amendments to pleadings which are sworn to are allowed with great caution, as a general rule. (t) Yet we have seen that a sworn bill (if it is not an injunction bill), may be amended of course, and without costs, if the amendments are merely in addition to, and not inconsistent with, what is contained in the original bill; such amendments being verified by oath, in the same manner as the bill is required to be verified. (u)

Amendment of injunction bills.] By the practice in England, if a complainant who has obtained an injunction for want of an answer, amends his bill before an opportunity has been afforded of discussing the propriety of the injunction upon the merits of the case, he will lose the benefit of the injunction. In other words, an injunction drops of course upon the complainant's amending his bill; unless leave is granted to amend without prejudice to the injunction; (v) which will

(t) *Verplanck v. The Mercantile Ins. Co.* 1 Edw. 46.

(u) Rules 43 and 190.

(v) *Bliss v. Boscawen*, 2 Ves. & B. 102.

(*Stryker v. New York Exchange Bank*, 42 Barb. 511; S. C. 28 How. 20.) But after notice of a motion by the defendant to change the place of trial (for good cause) has been served, an amendment of the complaint by merely changing the place of trial will not prevent the making of the motion. (*Toll v. Cromwell*, 12 How. Pr. 79.) If a party notices the cause for trial, he thereby waives the right to amend his pleading without leave. (*Phillips v. Suydam*, 6 Ab., N. S. 289; S. C. 54 Barb. 153.)

When a pleading is served by mail, the party may amend it, of course, and without costs, at any time within forty days, (double the usual time in case of personal service.) (*Washburn v. Herrick*, 4 How. Pr. 15.)

Where the summons and complaint had been served, and before the defendant's time to answer had expired, the plaintiff served an amended complaint, and within twenty days after the service of the original complaint entered judgment, it was held that it was irregular, the defendant being entitled to twenty days after the service of the amended pleading in which to answer or demur to it. (*Snyder v. White*, 6 How. Pr. 321.)

The right to amend, under § 172, is absolute, subject only to the power of the court to strike out for cause shown. The court must pass upon the question of *intent* as well as of the *effect*, and be satisfied that the amendment was made for the purpose of delay, and that such will be the effect of it, before it can be stricken out. (*Griffin v. Cohen*, 8 How. Pr. 451, 453.) There is nothing in that section authorizing the party upon whom an amended pleading is served to disregard it if served within the proper time. (*Ibid*; *Strout v. Curran*, 7 How. Pr. 36.) An amended complaint cannot be disregarded, and treated as a nullity, and an order taken dismissing the complaint when the cause is called upon the calendar. (*Rogers v. Rathbun*, 8 How. Pr. 466.) Where it is supposed that an amendment has been made in bad faith, and for the purpose of delay, the proper practice is to apply to the court for relief. (*Ibid*; *Griffin v. Cohen*, *supra*. See *Hollister v. Livingston*, 9 How. Pr. 140.)

The last paragraph of section 172, authorizing the court, in its discretion, to order actions to be divided, applies to actions in the different classes specified in section 167; that is, if the plaintiff has united in his complaint a cause of action in one class with a cause of action in another class, the court may, in its discretion, order the action to be divided into as many actions as may be necessary. (*Robinson v. Judd*, 9 How. Pr. 378, 383. See *Alger v. Scoville*, 6 id. 131; S. C. 1 Code Rep., N. S. 303; *Lord v. Vreeland*, 13 Ab. 195; S. C. 15 id. 122; 24 How. Pr. 316.)

A plaintiff may amend, of course, in the matter of changing or enlarging the relief demanded. Thus, where the original complaint claims damages only, he may amend the complaint by adding a demand for an injunction. (*Getty v. Hudson River R. R. Co.* 6 How. Pr. 269; S. C. 10 N. Y. Leg. Obs. 85.) Yet, in *Gray v. Brown*, (15 How. Pr. 557,) it was held that an action at law could not be turned into one for

not be given except upon special application specifying the amendment. (w)

In this state no amendment of an injunction bill, unless it be a creditor's bill, can be allowed without a special order of the court [*211] and upon due notice to the adverse party, if he has appeared in the suit. (x) And such a bill will not be amended unless the proposed amendments are distinctly stated and sworn to; and the application to amend must be made as soon as the necessity of an amendment is discovered. (y)

In the case of *Renwick v. Wilson*, (z) Chancellor Kent allowed an

(w) *Vesey v. Wilks*, 3 Mad. 475.

(x) Rule 43. See also *West v. Coke*, 1 Murphy, 191.

(y) *Rodgers v. Rodgers*, 1 Paige, 424.

(z) 6 John. Ch. Rep. 81.

equitable relief without leave of the court, and, also, without an amendment of the summons.

All objections to the propriety of an amended complaint are waived by the defendant amending his answer, and taking issue on the new cause of action. (*Secor v. Law*, 9 Bosw. 163.)

A bill of particulars forms a part of a complaint, and is amendable as such. (*Melvin v. Wood*, 3 Keyes, 533; S. C. 4 Ab., N. S. 438; 3 Trans. App. 297.)

In *California*, pleadings may be amended, as a matter of course, after a demurrer is interposed, and before the hearing thereof. (Cal. Pr. Act, § 67.) A complaint may be amended, as of course, at any time before summons is issued. (*Allen v. Marshall*, 34 Cal. 165.)

In *Kentucky*, a plaintiff may amend his complaint, without leave, at any time before an answer is filed, and without prejudice to the proceedings already had. (Code, § 159.) Section 134 of the Code of *Ohio* is the same.

In *Indiana*, any pleading may be amended by either party, of course, at any time before it is answered. (Bick. Civ. Pr. 110; 2 R. S. 48, § 97.)

Section 80 of the Code of *Wisconsin*, relative to amendments of course, is nearly identical with section 172 of the Code of New York. So, also, is section 93 of the Code of *Minnesota*.

By the Rules of Practice in Chancery in *Massachusetts*, "the plaintiff may amend his bill at any time before answer, plea or demurrer filed, of course, and without payment of costs; but if the defendant's appearance is entered, and he shall have procured a copy of the bill, the plaintiff shall, at his own expense, furnish the defendant with a certified copy of the amended bill. No amendment shall be allowed, as of course, to a bill which has been sworn to by the party." (Rule 10.) "Upon the coming in of the defendant's answer, if the plaintiff shall find it necessary to amend his bill in order to meet the case made by the answer, he may do so by furnishing to the defendant a certified copy of the amended bill at his own expense." (Rule 18.)

For the practice in *Maine*, see 3d Rule of Chancery Practice. (37 Maine, 581.)

In *New Hampshire*, amendments may be made to the pleadings, in proper cases, upon the order of the judge in vacation, and upon such terms as he may impose, the amendments being subject, however, to the order of the court. (Rule 18 of Chancery Practice, 3d N. Hamp. 608.)

In the *United States courts*, a general rule provides that "the plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling up blanks, correcting errors of dates, misnomer of parties, and generally in matters of form. But if he amend in a material point, (as he may do, of course,) after a copy has been so taken, before any answer, plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby." (Equity Rule, 28.)

injunction bill to be amended as of course, after the answer had been excepted to as insufficient, by inserting additional statements and charges, without prejudice to the injunction, and without costs, but refused to allow amendments, by striking out or altering any part of the bill, without due notice of the motion, accompanied by an affidavit stating the precise amendment asked for.

Amendments after demurrer.] Where a demurrer for want of parties is allowed, the cause is not considered so much out of court but that the complainant may afterwards have leave to amend, by bringing the necessary parties before the court. (a) The 44th rule provides, that if the defendant demurs to the bill for want of parties, or for any other defect which does not go to the equity of the whole bill, the complainant may amend of course on payment of costs, at any time before the demurrer is noticed for argument, or within ten days after receiving a copy of the demurrer. If the demurrer is for other causes than the above, the right to amend, and the terms of the amendment, are in the discretion of the court. (b)

Where a mere formal objection to the bill is made by demurrer *ore tenus*, the complainant will be permitted to amend without costs. (c) Though if he seeks, under such circumstances, to amend more extensively than by merely adding parties, he must pay the defendant the costs of the demurrer. (d)

Upon the allowance of a demurrer on the ground of a formal defect in the bill, the complainant will be allowed to amend, if his counsel has acted under a mistake as to the practice. Thus, where by mistake, the allegations in a creditor's bill, made necessary by the 189th rule, were omitted, a demurrer was sustained, but leave to amend was given. (e) (10)

(a) *Bressenden v. Deereets*, 2 Ch. Ca. 197. 6 Ves. 773. *Marshall v. Lovelass*, Cam. & Norw. 239. 264. *Benzein v. Lovelass*, id. 520.

(b) See also 4 Hen. & Munf. 475. 2 Mason, 342. 1 Bibb, 483.

(c) *Garlick v. Strong*, 3 Paige, 440. 4 Sim. 585.

(d) *Newton v. Lord Egmont*, 4 Sim. 585.

(e) *McElwain v. Willis*, 3 Paige, 505.

(10) After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over, upon such terms as may be just. (Code, § 172.)

If the demurrer be allowed on the ground that several causes of action have been improperly united, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned. (Code, § 172.)

If, after a demurrer for defect of parties, the plaintiff amends his complaint by adding the necessary parties, but does not amend the summons, the amended complaint may be struck out, on motion. (*Follower v. Laughlin*, 12 Ab. 105.) Such motion may be made by the original defendants. (Ib.)

When a pleading is sustained by overruling the demurrer, and leave is given to answer the pleading, the demurrant is put to his election to answer over or submit to judgment; and if he submit to judgment, the judgment is final. If such judgment is appealed from to the highest court, such appeal comes there on the question of

*Where a demurrer is about being argued, and the complain- [*212] ant would amend in a material matter, the court will only grant the permission upon special grounds. (f)

If a demurrer to the bill is overruled, the complainant may, within ten days thereafter, amend his bill of course, without costs. (g)

Amendment after plea.] Upon the argument of a plea for want of parties, the court, instead of allowing it absolutely, usually gives the complainant leave to amend his bill on payment of costs—a liberty which he may also obtain after allowance of the plea, according to the common course of the court, for the suit is not determined by the allowance of a plea. (h)

(f) *Holmes v. Waring*, 8 Price, 605.

(g) Rule 45.

(h) *Mitt. Eq. Pl.* 227.

affirmance or reversal only, and no leave to the demurrant to answer or plead anew can be given. (*Whiting v. Mayor, &c. of New York*, 37 N. Y. 600; S. C. 6 Trans. App. 193. See *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 643; S. C. 5 Trans. App. 180.) A demurrer must reach the whole cause of action. A paragraph in the complaint cannot be expunged on demurrer, unless it amounts to a separate cause of action, and is so stated. (*Lord v. Freeland*, 15 Ab. 122.) After a demurrer has been argued, and a decision rendered, leave to amend the pleading demurred to may be reserved; but it is not within the power of the court to order the pleading to be amended. (*Ibid.*)

The last paragraph of section 172 of the Code applies to actions in the different classes specified in § 167; that is, if the plaintiff united in his complaint a cause of action in one class with a cause of action in another class, the court may, in its discretion, order the action to be divided into as many actions as may be necessary. (*Robinson v. Judd*, 9 How. Pr. 373, 383. See *Alger v. Scoville*, 6 id. 131; S. C. 1 Code Rep., N. S. 303; *Lord v. Freeland*, 13 Ab. 195; S. C. 15 id. 122; 24 How. 316.)

Where the complaint is so defective that it cannot be amended so as to entitle the plaintiff to recover, the defendant is entitled to judgment absolute on his demurrer. (*Snow v. Fourth National Bank*, 7 Rob. 480.)

In *California*, amendments, of course, may be made to a pleading, without costs to either party, before the trial of the issue at law, on a demurrer filed thereto. (Cal. Pr. Act, § 67.) But a party cannot so amend more than once. (*Ibid.*) When a demurrer to a pleading is sustained, the adverse party shall have ten days from service of notice of the entry of the order in which to amend the pleading demurred to, and to file and serve such amended pleading. (3 *Estee's Pr.* 310.)

In *Kentucky*, if the court sustains a demurrer to the complaint, the plaintiff may amend, with or without costs, as the court may order. (Code, § 122.) In *Ohio*, at any time within ten days after a demurrer is filed, the adverse party may amend, of course, on payment of costs since filing the defective pleading. (Code, § 135.) Upon a demurrer being overruled, the party who demurred may answer or reply, if the court is satisfied that he has a meritorious claim or defence, and did not demur for delay. (Code, § 136.) If the demurrer be sustained, the adverse party may amend, if the defect can be remedied, by way of amendment, with or without costs, as the court in its discretion shall direct. (*Id.* § 139.)

In *Indiana*, if a demurrer to the complaint is sustained, the plaintiff may amend, on payment of the costs occasioned by the demurrer. (2 R. S. 38, § 53.)

Section 80 of the Code of *Wisconsin*, relative to amendments after demurrer, is the same as section 172 of the New York Code.

Section 145 of the Code of *Kansas* provides that at any time within ten days after a demurrer is filed the adverse party may amend, of course, on payment of costs since filing the defective pleading; and upon a demurrer being overruled, the party who demurred may answer or reply, if the court be satisfied that he has a meritorious claim or defence, and did not demur for delay. (*Id.* § 46.) If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct. (*Id.* § 149.)

If a plea is allowed to part of the bill, the complainant cannot amend his bill without a special order on notice, and stating the proposed amendment. Leave to amend in such a case, will not be given to enable the complainant to state facts as to the part covered by the plea, tending to disprove it. The complainant must take issue upon it. Nor, after allowance, will he be permitted to amend, by stating facts which, admitting the truth of the plea, seek to avoid or restrict its effects. (*i*)

If a plea is, upon argument, overruled, the complainant may, within ten days thereafter, amend his bill of course and without costs. (*k*)

If the complainant has replied to the plea, he cannot withdraw the replication and amend the bill except upon notice and special grounds. (*l*)

Amendment after exceptions to answer.] Where the answer is accepted to as insufficient, and the defendant submits to answer further, the complainant may amend his bill of course, and without costs, at any time within ten days after the defendant submits to answer. So, where, upon a reference on exceptions, the answer is found insufficient, the complainant may amend within ten days after confirmation of the master's report; and in either case, the defendant must answer the amendments and exceptions together. (*m*)

The complainant cannot amend under this rule, however, by leaving

(*i*) Taylor v. Shaw, 2 Sim. & Sta. 12.

(*l*) Carleton v. L'Estrange, 1 Tur. & Russ. 23.

(*k*) Rule 45.

(*m*) Rule 45.

By section xc of the Code of *Minnesota*, after the decision of a demurrer, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party demurring to withdraw the same, and plead over; or, if the demurrer is sustained, may allow the pleading demurred to to be amended or withdrawn, and a new pleading to be substituted on such terms as may be just.

By the rules of practice in chancery in *Massachusetts*, "if the defendant demurs to the bill for want of parties, or other defect which does not go to the equity of the whole bill, the plaintiff may amend at any time before the demurrer is set down for argument, or within fourteen days after the demurrer is filed, and notice thereof given to him, upon the payment of costs." (Rule 11.)

In the *United States courts* it is provided, by Equity Rule 29, that "after an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs, or without payment of costs, as the court or judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be at liberty to withdraw it, and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause."

"If the plaintiff so obtaining any order to amend his bill, after answer, or plea, or demurrer, or after replication, shall not file his amendments, or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made." (Equity Rule 30.)

out the name of the defendant whose answer is insufficient. (*n*) But he may amend by adding new parties and new charges, on payment of costs, if a new or further answer be required. (*o*)

*If an order to amend is entered, the defendant cannot put [*213] in a second answer without waiting for the amendments. (*p*)

Amendments after replication.] If the complainant has occasion to amend his bill after replication, *merely by adding parties*, he may, by the English practice, obtain leave to do so, as a matter of course; and upon this principle, liberty was given to a complainant to amend after replication, by charging that one of the defendants already before the court was the administrator of an individual whose personal representative would have been a necessary party to the suit; on the ground that such an amendment amounted to no more than the addition of a party. (*q*) Orders of this nature may be obtained without withdrawing the replication. (*r*) But such an order cannot be entered of course after proceedings subsequent to filing the replication have been had — such as rules to produce witnesses given, or an undertaking to speed the cause. (*s*)

By our practice, an amendment after replication is not a matter of course. An application to the court, upon notice to the opposite party, for leave to withdraw the replication and amend the bill, is necessary. (*t*) And the court will not grant such leave unless the complainant shows the materiality of the amendments, and the reason why the matter proposed to be introduced as an amendment was not before stated in the bill. (*u*)

In the case of *Small v. Atwood*, (*v*) a replication was allowed to be withdrawn and bill amended by striking out the name of a complainant and making him a defendant, and by stating such facts and circumstances relating to certain transactions between that complainant and the defendant as were material to show that the other complainants were not and ought not to be bound by the acts or misrepresentations of that complainant respecting the property in the pleadings mentioned, or the purchase thereof, and as were material to show that such acts and misrepresentations of the said complainant were evidence against the defendant. The complainants who made the application giving security for costs, and undertaking to amend within a given time, pay-

(*n*) *Chase v. Dunham*, 1 Paige, 572.

(*o*) *Beekman v. Waters*, 3 John. Ch. Rep. 410.

(*p*) *Coulston v. Richardson*, Bunb. 168.

(*q*) *Brattle v. Waterman*, 4 Sim. 125. *Andree v. —*, 2 Dick. 768.

(*r*) *Brattle v. Waterman*, 4 Sim. 125.

(*s*) *Lord Kilconrsey v. Lev*, 4 Mad. 212.

(*t*) *Thorn v. Germaind*, 4 John. Ch. Rep. 363.

(*u*) *Brown v. Ricketts*, 2 John. Ch. Rep. 425. 4 id. 363.

(*v*) 2 Young & Jer. 512.

ing the costs of the application, the usual costs of the amendments, and withdrawing the replication.

[*214] *In the court of exchequer, a motion to withdraw a replication and amend the bill was granted on payment of costs, and upon an undertaking to amend in a week, although it did not appear that the matter sought to be introduced had come to the party's knowledge subsequently to the filing of the replication. (*w*) But it has been decided in this state that where the complainant files a replication to the answer, after he is apprised of the necessity of an amendment of his bill, he precludes himself from making such amendment. (*x*) In a case where a special application to the court for leave to make the amendment is necessary, the complainant should obtain an order to extend the time for filing the replication until after the decision of the court upon the application to amend. (*y*)

Where it is intended to amend a bill after a replication filed, by the addition of *new facts or charges*, the proper course is to apply for leave to withdraw the replication, and amend. (*z*) It is ordered by the fifteenth of Lord Lyndhurst's Orders that after replication has been filed; the complainant shall not be permitted to withdraw it and amend his bill, without a special order of the court for that purpose made upon a motion of which notice has been given; the court being satisfied by affidavit that the matter of the proposed amendments is material, and could not, with reasonable diligence, have been sooner introduced into the bill.

It has been decided, however, that this order does not apply to amendments by adding parties, after replication. (*a*)

After a witness has been examined, the bill cannot be altered or amended, unless under very special circumstances, or in consequence of some subsequent event; except merely for the purpose of *adding parties*. (*b*) And where a complainant, by a false suggestion that the cause was *at issue only*, had obtained an order for liberty to amend his bill by the addition of a prayer which had been accidentally omitted, the order was discharged upon a motion made by the defendant at the opening of the cause, when it came on for hearing. (*c*)

But it seems that the court will, even after publication has been passed, and the cause set down, suffer the bill to be amended by adding par-

(*w*) Callanan v. Salwey, McCle. 598.

(*x*) Vermilyea v. Odell, 4 Paige. 121.

(*y*) Id. ib.

(*z*) Carleton v. L'Estrange. 1 Tur. & Russ. 23.

(*a*) Brattle v. Waterman. 4 Sim. 125.

(*b*) Thorn v. Germand. 4 John. Ch. Rep. 363. Goodwin v. Goodwin, 3 Atk. 371. Milligan v. Mitchell. 1 Mylne & Craig, 433.

(*c*) Harding v. Cox, 3 Atk. 383.

ties. (*d*) But not if the complainant has been guilty of laches. (*e*) It is *to be observed, however, that if the parties be added after [*215] publication has passed, the cause, as to such parties, must be heard upon bill and answer only. (*f*) If, therefore, a complainant, after publication passed, is advised that it will be necessary to bring other parties before the court, and in order to do that, must put new matter in issue, he must not proceed by amendment, but by supplemental bill. (*g*)

Amendment at the hearing.] If the defendant does not take the objection of the want of proper parties until the hearing, the complainant will be allowed a reasonable time to bring the proper parties before the court, either by an amendment of the original bill or by a supplemental bill; unless it should appear that the necessary parties were omitted in the bill by the fraudulent or wilful omission, or the bad faith of the complainant. (*h*) So if a formal charge of fraud is necessary in a bill, but has been omitted, the court will give leave to amend, at the hearing. (*i*)

Upon the hearing of a petition of appeal presented by the defendants, leave was given to the complainants to amend their bill, by making it either a bill and information, or an information. (*k*)

When it appears, upon the hearing, that the complainant is entitled to relief, although it be different from that which he has specifically prayed, the court will sometimes allow the cause to stand over, with liberty to the complainant to amend his bill. (*l*) And where it appeared, at the hearing, that the complainant was not entitled to the specific relief prayed for, and that in order to enable the court to grant the relief upon the case made by his bill, which might properly be given, viz. a foreclosure of the mortgage, it would be necessary to bring an additional party before the court; an order was made that the complainant should be at liberty to amend his bill by adding parties, and praying such relief as he might be advised. (*m*)

But the instances in which this will be done are confined to those cases where it appears by the bill that the complainant is entitled to relief, though different from that specifically prayed. Where the object *of the proposed amendment is to make a new case, it will not [*216] be permitted. (*n*)

(*d*) *Hinde*, 25.

(*f*) *Hinde*, 25.

(*h*) *Van Epps v. Van Deusen*, 4 Paige, 64. See also *Allen v. Smith*, 1 Leigh, 231. *Burston v. Nixon*, 2 McIl. 340. *Hutchinson v. Reed*, 1 Hoff. Ch. Rep. 320. *Malin v. Malin*, 2 John. Ch. Rep. 238. *Rogers v. Rogers*, Hopk. 515. 1 Paige, 183, 2 id. 467. *Bailey v. Dennett*, 3 Young & Coll. 439.

(*i*) *Wamburzee v. Kennedy*, 4 Desau. 480.

(*k*) *Mary Magdalen Coll. v. Sibthorpe*, 1 Russ. 154.

(*l*) *Beaumont v. Boulbee*, 5 Ves. 485. *Cook v. Martyn*, 2 Atk. 3.

(*m*) *Paik v. Lord Clinton*, 12 Ves. 63.

(*n*) *Deniston v. Little*, 2 Sch. & Lef. 11, n.

(*e*) *Milward v. Oldfield*, 4 Price, 325.

(*g*) *Goodwin v. Goodwin*, 3 Atk. 370.

After answer put in, it is not a matter of course to grant an amendment adding parties as co-complainants; the granting or refusal of such an order being in the discretion of the court. (*o*) And such an amendment will not be allowed without the consent of the person proposed to be added as a co-complainant. (*p*)

Accordingly, it has been recently decided that an order made at the hearing for leave to amend, by adding parties, did not authorize the introduction of new co-complainants. (*q*) But the court will sometimes allow a bill which has originally been filed by one individual of a numerous class, in his own right to stand over at the hearing, in order to be amended by the introduction of the words, "on behalf of himself," &c. (*r*)

And in the case of *Milligan v. Mitchell*, (*s*) an order was made at the hearing, that the complainants should be at liberty to amend their bill by adding parties as they should be advised, or by showing why they were unable to bring the proper parties before the court.

So, also, where a matter has not been put in issue with sufficient precision, the court has, upon hearing the case, given the complainant liberty to amend the bill for the purpose of making the necessary alteration. (*t*) And where a complainant had amended his bill, and by accident had omitted to insert in the amended bill the prayer for relief, although it was in the original bill, the court has put off the cause in order that the complainant might have an opportunity to re-amend his bill by inserting it. (*u*)

Whenever improper submissions have been made in a bill on behalf of infants, the court will, at the hearing, order that the bill shall be amended by striking out the submission. (*v*) Upon the same principle, where an infant heir-at-law had been made a co-complainant, the court ordered the cause to stand over, with liberty to the complainant to amend his bill by making the infant a defendant. (*w*) And where a [*217] matter *has not been properly put in issue by the bill, to the prejudice of an infant complainant, the court has generally ordered the bill to be amended. (*x*)

Where a mere formal objection to the bill was made by demurrer, *ore tenus*, the complainant was permitted to amend. (*y*) So also upon

(*o*) *The Governors of Lucton School v. Smith*, 1 McCle. 17. 4 Price, 325.

(*p*) *Id. ib.*

(*q*) *Milligan v. Mitchell*, 1 My. & Craig, 444, 511. 3 id. 72. 1 My. & Keen, 446.

(*r*) *Lloyd v. Loaring*, 6 Ves. 773. *Attorney Gen. v. Newcombe*, 14 Ves. 1. *Good v. Blewitt*, 13 Ves. 397.

(*s*) Cited 1 Dan. Pr. 388. 1 My. & Craig, 433, S. C.

(*t*) *Mitf. Pl.* 326. 2 Bro. P. C. 194.

(*u*) *Harding v. Cox*, 3 Atk. 583.

(*v*) *Serle v. St. Eloy*, 2 Peere Wms. 386.

(*w*) *Plunket v. Joice*, 2 Sch. & Lef. 159.

(*x*) *Mitf.* 327. 2 Peere Wms. 401, 403. 2 Atk. 529.

(*y*) *Garlick v. Strong*, 3 Paige, 440.

the allowance of a demurrer for want of equity, on the ground of a formal defect in the bill. (n) And this is now a matter of course. (o) But where a bill is dismissed, on demurrer, for want of equity, on the merits of the case as stated, leave to amend the bill will not be granted. (p)

Amendment after decree.] In the case of *Habergham v. Vincent*. (y) Lord Thurlow intimated an opinion that after a decree had been made, passed and entered, without bringing before the court a personal representative who had become so after the bill was filed, he might be added by amendment, and that a motion for that purpose would be regular; provided it was merely for the purpose of making him a witness to what was done in the master's office; but that if there was any thing in the decree affecting him in the way of order to pay, such an order would be out of the power of the court.

In a case in Ireland, (z) the prayer of a bill was amended after a decree, by adapting the prayer to the facts stated; but the defendant being allowed to put in a new answer to the amendment, the cause which had been set down for re-hearing, was heard as on the original hearing.

It is well settled, however, as we have already seen, that the bill cannot be amended at any time after publication passed and the cause set down for hearing, in any other respect than by making parties. (a) But an amendment merely changing the character in which the complainant sues, is not considered in conflict with this rule. Therefore, after a decree has been entered, leave has been given to the complainant to take out administration, and to state it by way of amendment; the decree being suspended in the meantime. (b)

Amendment upon appeal.] Leave to amend the bill will be granted upon appeal, by the appellate court, if it is there found necessary. (c)(11)

(n) *McElwain v. Willis*, id. 505.

(o) *Cunningham v. Pell*, 6 Paige. 655. S. C. 5 Paige, 613.

(p) *Lyon v. Tallmadge*, 1 John. Ch. Rep. 184.

(y) 1 Ves. jun. 68.

(z) *Blake v. Foster*, 2 Moll. 402. See also *Clifton v. Ex'rs of Haig*, 4 Desaus. 330.

(a) *Goodwin v. Goodwin*, 3 Atk. 370.

(b) *Bradford v. Felder*, 2 McCord's Ch. Rep. 170. *Humphreys v. Humphreys*, 3 Peer Wms.

349.

(c) *Rodgers v. Jones*, 1 McCord's Ch. Rep. 226. *Lenoir v. Winn*, 4 Desaus. 65. *Drummond v. Magruder*, 9 Cranch, 122.

(11) The power of amendment is confined to the court in which the action originated. The appellate court cannot amend on appeal. (*Gould v. Glass*, 19 Barb. 186.) When an appeal from a judgment is brought on for a hearing and argument, it is neither the time nor the place to request leave to amend for the first time. (*Ketcham v. Zerega*, 1 E. D. Smith, 562.) But, in *Pratt v. Hudson River R. R. Co.* (21 N. Y. 305,) the court of appeals caused the pleadings to conform to the proof, in order that a judgment for the plaintiff might be sustained. (See, also, *Bate v. Graham*, 11 N. Y. 237; *Lounsbury v. Purdy*, 18 id. 515.) And in *Loeschig v. Addison*, (7 Rob. 506,) it was held by the superior court of the city of New York that the court had power, at general term, to modify a judgment rendered at special term, dismissing a complaint absolutely, so as to add to it a direction to let the cause stand

[218] *In the case of *Mary Magdalen College v. Sibthorpe*, (d) upon the hearing of a petition of appeal presented by the defendants, leave was given to the complainants to amend their bill, by making it either a bill and information, or an information.

Second amendment.] By the 13th of Lord Lyndhurst's amended orders, (e) the complainant is entitled to only one order for leave to amend after an answer has been filed; unless the court is satisfied, by affidavit, that the draft of the intended amendments has been settled,

(d) 1 Russ. 154.

(e) 1 Russ. & My. 769.

to add parties in a proper case. In *Brown v. Colie*, (1 E. D. Smith, 265,) it was decided that, upon appeal to the general term, after judgment, the court cannot amend the pleadings so that the merits of the case will be affected, and a new trial required.

The general rule is, that *after judgment*, or after a *trial* and a hearing at general term, and a decision there of the questions of law arising at the trial, amendments of the pleadings will be allowed only for the purpose of *upholding* the judgment, when that would be just, but not for the purpose of making regular and correct proceedings erroneous. (*Williams v. Birch*, 6 Bosw. 674; *Gasper v. Adams*, 24 Barb. 287; *Englis v. Furniss*, 3 Ab. 83. See *Bulen v. Burdell*, 11 Ab. 381; *Cocks v. Radford*, 13 id. 207.)

In any case in which the court ought clearly to have allowed an amendment at special term, the general term, on appeal, may treat the pleadings as having been amended in conformity with the proof. (*Bowdoin v. Coleman*, 6 Duer. 183; S. C. 3 Ab. 431; *Bate v. Graham*, 11 N. Y. 237; *Harrower v. Heath*, 19 Barb. 338; *Clark v. Dales*, 20 id. 67; *Wright v. Whiting*, 40 id. 235; *Pratt v. Hudson River R. R. Co.* 21 N. Y. 305; *Coleman v. Playsted*, 36 Barb. 26. See *Lounsbury v. Purdy*, 18 N. Y. 515, 521.)

In an action to recover damages for breach of a covenant to pay assessments, an appellate court will not grant an amendment in order to sustain a demand for equitable relief by a judgment directing the defendant to pay the assessment. (*Rector, &c. of Trinity Church v. Higgins*, 4 Rob. 1.)

An amendment of the complaint will not be allowed by the court of appeals, which changes the cause of action. (*Smith v. Mayor, &c. of New York*, 37 N. Y. 518; S. C. 5 Trans. App. 225.) The court, on appeal, is authorized to decide that the court below has power, on the trial, to amend the complaint so as to conform it to the proof. (*Bedford v. Terhune*, 20 N. Y. 453; S. C. 27 How. 423; 1 Daly, 371.)

In *McGrane v. Mayor, &c. of New York*, (19 How. Pr. 144,) the plaintiff recovered a judgment, which was reversed on account of a defect in his pleading. A new trial was ordered, and the plaintiff had leave to amend his complaint on terms. (See also *Nash v. Wetmore*, 33 Barb. 155.)

No notice of motion for leave to amend need be given when the only ground for or against the amendment is furnished by the record. The amendment, in that case, may be granted on the hearing at the general term. (*Clark v. Dales*, 20 Barb. 67.)

In *California*, a complaint cannot be amended in the appellate court, (*Hooper v. Wells*, 27 Cal. 35,) unless the appeal be taken from a judgment on demurrer, (*Phelan v. Supervisors*, 9 id. 15;) or from an order denying a new trial. (*Argenti v. San Francisco*, 30 id. 458.) After an appeal, in which a judgment sustaining a demurrer is affirmed, leave cannot be granted to the plaintiff to amend his complaint. (*Bryan v. Berry*, 8 Cal. 134; *People v. Jackson*, 24 id. 633.) Where a demurrer to the complaint is sustained in the court below, and the plaintiff declines to amend, and appeals from the judgment and the order sustaining the demurrer, the supreme court, if it affirms the judgment, cannot grant the plaintiff leave to amend his complaint. (*People v. Jackson*, *supra*.)

In *Ohio*, by sec. 32 of the act of March 23, 1852, regulating appeals to the district court, it is provided that when any cause is removed by appeal into the district court, the appeal shall be tried on the pleadings made up in the court below, unless for good cause shown, the said court shall permit either or both parties to alter their pleadings, in which case such court shall lay the parties under such equitable rules and restrictions as they may conceive necessary to prevent delay. (Seney's Code, p. 468.)

approved, and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because they are material to the case of the complainant. But that order does not extend to amendments which are made only for the purpose of rectifying some clerical error, or error in names, dates, or sums. In which cases, the order to amend may be obtained upon motion or petition without notice.

In this state there is no rule of court upon the subject; but probably a similar practice must prevail. (12)

In the case of *Kirby v. Thompson*, (*f*) a second amendment of a bill was refused after an answer by one defendant, and a plea by another, which was allowed, and the bill dismissed as to him, and a motion for a re-hearing granted, and after eighteen months had elapsed since the first amendment—there being no evidence of any new information since acquired—and the second amendment being substantially the same as the first, though more directly charging the defendants with fraud.

In a case where a complainant had amended his bill, and by accident had omitted to insert, in the amended bill, the prayer for relief, although it was in the original bill, the court ordered the cause to stand over, to give the complainant an opportunity to re-amend his bill by inserting it. (*g*)

As an insufficient answer is not considered as an answer, an order to amend, obtained after exceptions for insufficiency allowed or submitted

(*f*) 6 John. Ch. 79:

(*g*) *Harding v. Cox*, 3 Atk. 583.

(12) It is not in furtherance of justice, and the court will not allow a second amendment of the complaint, in order that, if possible, the plaintiffs may reinforce their case. (*Louvy v. Luman*, 37 How. 237; S. C. 6 Ab., N. S. 394.) It seems that, when an amended complaint has been served in conformity to an order, it cannot be again amended without leave of the court, although the time for amending, as of course, may not have expired. (*Jeroliman v. Cohen*, 1 Duer, 629.) But an order directing a complaint to be amended in certain particulars, does not preclude the plaintiff from serving an amended complaint, containing new and material allegations, provided the time for amending, of course, has not expired. The complaint so amended, however, must not contain any matter that, by the prior order, was directed to be stricken out. (*Ibid.*) The plaintiff may amend once, of course. It is at his election to so amend, either before or after an answer or demurrer. If he amends before answer or demurrer, he has exhausted his right. If he deems it important to amend a second time, he must apply to the court. (*White v. Mayor, &c. of New York*, 14 How. Pr. 496; S. C. 6 Duer, 635; 5 Ab. 322; *Sands v. Calkins*, 3; How. Pr. 1.)

Striking out portions of the complaint, on motion, as irrelevant and redundant, cannot be considered an amendment thereof, within the meaning of § 172 of the Code. (*Ross v. Dinsmore*, 20 How. Pr. 325; S. C. 13 Ab. 4.) Where, in such a case, the order of the court gave the plaintiff the right to amend the *summons* and *complaint*, as he should be advised, without his solicitation or consent, and subsequently he amended the *summons* under the order, but gave notice at the same time that he elected *not* to amend the *complaint* under the order, it was held that this notice, if considered as a waiver of the right to amend the complaint in that stage of the action, did not foreclose the plaintiff's right to amend once, *of course*, upon service of the answer of the defendant. (*Ibid.*)

to, will not be considered as the one order to amend, which, by the terms of the 13th order above referred to, the complainant is entitled to have after answer. (*h*) And for the same reason it has been held that the amendment of a bill, by adding parties after a demurrer allowed, will not preclude a complainant from amending, as of course, after the answer has come in. (*i*)

[*219] **In what time amendment is to be made.*] This branch of the subject has been already anticipated. It will therefore be sufficient to refer the reader to the previous pages of the present section, and to the 43d, 44th and 45th rules of the court.

The time to amend the bill may be extended, if necessary, by the court, on special cause shown. (*k*)

Amendments, how made.] When an order to amend has been obtained, the first thing to be done is to serve it upon the defendant, in the usual way. (*l*) And where the order is granted upon payment of costs, those costs must be paid or tendered before any further proceedings are had; otherwise, such further proceedings will be nugatory. (*m*)

Amendments of course may be made without entering any rule or order for that purpose. But the registers and clerks are not to permit any amendments to be made unless they appear to be duly authorized. (*n*)

Upon an amendment of course, the complainant's solicitor must either file a new engrossment of the bill, or furnish the register or clerk with an engrossed copy of the amendments containing proper references to the folios and lines in the original bill on file, where such amendments are to be inserted or made. (*o*) (13)

Creditor's bills may be amended of course in the same manner as bills not sworn to, if the amendments are merely in addition to, and not in-

(*h*) Bird v. Hustler, 1 Russ. & My. 325.

(*i*) Pesheller v. Hammett, 3 Sim. 389.

(*k*) Rule 126.

(*l*) Woodhouse v. Meredith, 1 Jac. & W. 204, 8.

(*m*) Hinde, 22.

(*n*) Rule 43.

(*o*) Rule 43.

(13) No notice of motion for leave to amend need be given, when the only ground for or against the amendment is furnished by the record. The amendment in that case may be granted on the hearing at the general term. (*Clark v. Dales*, 20 Barb. 67.)

Irregularities in a judgment-roll, which may be cured by amendment—such as want of proof of service of complaint, and of no answer—may, if an order for the amendment has been made and filed, be regarded as having been actually made. (*Bogert v. Bogert*, 45 Barb. 121.)

In *California*, when a complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint as amended to be filed. (Cal. Pr. Act, § 43.) The party desiring to amend must serve an engrossed copy of the pleading, with the amendments incorporated therein, or a copy of the proposed amendments, referring to the page and line of the pleading where the amendment is to be inserted, together with the notice of application to amend. (*Ibid.*; 3 *Estee*'s Pr. 311.)

consistent with, what is contained in the original bill. But all such amendments must be verified by oath, in the same manner as the bill is required to be verified. (*p*)

With the exception of creditors' bills, no injunction bills can be amended without a special order of the court and upon due notice to the defendant, if he has appeared. (*q*) Nor can any amendments be allowed which are inconsistent with the original sworn bill. (*r*)

The complainant cannot amend under the 45th rule, by leaving out the name of a defendant whose answer is insufficient. (*s*)

Where the amendment is *not of course*, the record must be amended by interlining; provided it can be done so as to make the record fair and legible. Or, if the amendment be by omitting original matter, it *is done by drawing a pen through the same. (*t*) With respect [*220] to the quantity of matter which may be introduced into a record without requiring a new engrossment, that appears to be limited by the English practice, to two chancery folios, or 180 words, in each place. (*u*) If the amendment exceeds that quantity of words in any one place, or the bill has been so often amended that the amendment inserted, though under two folios, cannot be interlined upon the record, or are so considerable as to blot and deface it, a new engrossment must be made and annexed to the original record. (*v*)

It was held in the case of *Pierce v. West's executor*, decided in one of the circuit courts of the United States, (*w*) that the amendment should state only so much of the original bill as may be necessary to introduce and to make intelligible the new matter, which should alone constitute the chief matter of the amended bill.

After a defendant has put in his answer on oath, the complainant cannot amend his bill, and include in such amendments a waiver of the answer of the defendant on oath, so as to deprive him of the benefit of his answer to the amendments, so far as it may be responsive to the bill. (*x*)

A complainant cannot, by amendment, introduce matter which would constitute a new bill. (*y*) Therefore, after a decision upon a plea to the jurisdiction, that a bill between members of a manufacturing corporation cannot be sustained, the court will not grant the complainant leave to amend by averring that the corporation had been dissolved. (*z*)

In the case of *Hunt v. Holland*, (*a*) it was decided in this state, that

(*p*) Rule 190.

(*q*) Rule 45.

(*r*) *Hinde*, 22. 1 Fowl. Exch. Pr. 121.

(*s*) *Ricky v. Kemmis*, 1 Beat. 317.

(*t*) 1 Turn. & V. 169.

(*u*) 3 Wash. C. C. Rep. 354.

(*v*) *Verplanck v. Mercantile Ins. Co.* 1 Etlw. 47.

(*w*) *Pratt v. Bacon*, 10 Pick. 122.

(*q*) Rules 43 and 45.

(*s*) *Chase v. Dunham*, 1 Paige, 572.

(*r*) *Hinde*, 22. 1 Fowl. Exch. Pr. 121.

(*t*) *Id. ib.* *Hinde*, 22.

(*u*) *Burras v. Looker*, 4 Paige, 227.

(*a*) 3 Paige, 78.

if a bill which has been sworn to, is amended under the 190th rule, and a new engrossment of the bill and amendments is filed, the defendant is entitled to a copy of the bill as originally filed, as well as of the amended bill; unless the amendments are particularly designated in the copy of the latter which is served. In that case, Chancellor Walworth observes: "There is no pretence here that any part of the original bill has been left out, or that the additional matters are inconsistent with the original bill. It was probably necessary in this case, to re-engross the original matter with the amendments, as the latter were numerous and long. And from an examination of the whole, it is evident the amendments could not have been verified by oath, in such a [*221] manner as to make *them intelligible, without incorporating them in this manner with the original matter, or preceding them with recitals, which would have made them longer than the whole amended bill now is, including the original matter. If it was necessary to attach the amended bill to the original bill on file, it was the business of the clerk to do it. But in point of fact, it is seldom done, as all the papers in the cause are usually placed together in the same bundle, and without sealing the original bill and the amendments together where there has been a re-engrossment of the whole bill. As no copy of the original bill had been served, and no answer put in, or appearance entered, at the time of the amendment, in this case, there could have been no particular use or benefit to the defendants, or to any one, in having the amendments marked, as such, in the re-engrossment, or in the copy of the amended bill which was served. But as this was an injunction bill, the defendant might probably have compelled a delivery of a copy of the bill with the jurat annexed thereto, as originally filed, in order to move to dissolve the injunction, in addition to the copy of the bill as amended."

An original bill cannot be amended by incorporating therein matters which have arisen subsequent to the commencement of the suit. (*b*) Nor by inserting facts known to the complainant at the time of filing the bill; unless some excuse is given for the omission. (*c*)

The *signature of counsel* is necessary to an amended bill, as well as to an original bill. (*d*) Where, however, the same counsel who signed the original bill amends his former draft, which has his signature, it is not necessary that he should sign the draft again; as the signature will be applied as well to the amendments as to the former draft. Nor is it necessary that there should be a second signature to the record. But

(*b*) *Stafford v. Howlett*, 1 Paige, 200.
(*d*) *Kirkley v. Burton*, 5 Mad. 378.

(*c*) *Whitmarsh v. Campbell*, 2 Paige, 67.

if the amendments are made by another counsel, then it is necessary that there should be a second signature either to the draft or to the engrossment. (e)

The want of the signature of counsel to an amended bill is a good cause of demurrer. (f) The defendant may also move to have it taken off the file, for that defect. (g)

In a case where amendments were introduced into a bill irregularly, and the defendant, instead of coming to the court by motion to complain of the irregularity, put in his answer, in which he insisted upon the objection and reserved to himself the same benefit of it as [*222] if he had pleaded it in bar; to which answer the complainant replied and set the cause down for hearing; the court, after ordering the amended bill to be taken off the file, and all the proceedings upon it to be set aside as irregular, held that although the defendants might certainly have prevented considerable delay and expense by bringing the objection immediately before the court, the costs ought to be borne by the complainants. (h)

The proper course, however, to be pursued in general by the defendants, where a bill has been irregularly amended, is to apply to the court by motion either to have the amended bill taken off the file, or to have the amendments expunged. The former motion is applicable to cases where there has been a new engrossment, and the latter is adopted where the amendments have been merely made by interlineation of the old record. (i)

Service of amendments.] By the 43d rule of the court, no amendment is to be considered as made until it is served upon the defendant, if he has appeared in the cause. (14)

(e) Webster v. Throfall. 1 Sim. & Stu. 135.

(f) Kirkley v. Burton, *supra*.

(g) Pitt v. Macklew. 1 Sim. & Stu. 136, n.

(h) Milligan v. Mitchell, 1 Mylne & Craig, 433.

(i) 1 Dan. 551.

(14.) The Code requires that if the complaint be amended, a copy thereof shall be served upon the defendant. (Code, § 146.)

If, after a default, the plaintiff amends his complaint, (not in mere matter of form.) he must serve the same on the defendant, or a judgment entered thereon will be irregular. (*People ex rel. Rumsey v. Woods*, 2 Sandf. 652; S. C. 2 Code Rep. 18; *Mercier v. Pearlstone*. 7 Ab. 325. See *Thomas v. Allen*, 2 Wend. 618; *Aikin v. Albany Northern R. R. Co.* 14 How. 337; *Ward v. Dewey*, 12 id. 193; *Scudder v. Voorhis*, 1 Barb. 55.) The amended complaint must be served on the attorney, and not on the defendant personally. (*Mercein v. Pearlstone*, 7 Ab. 325.)

The right to answer an amended complaint is substantial, and a waiver of it should never be implied. (*Low v. Graydon*, 14 Ab. 443.) Hence, although a defendant omits to answer the original complaint, if it be amended he must have notice of the amendment, and time to answer (*People ex rel. Rumsey v. Woods*, 2 Sandf. 652; S. C. 2 Code R: 18.)

In *California*, after demurrer, and before argument and submission of the issue thereon, either party may amend a pleading by filing the same as amended, and serv-

According to the practice in England, the amended bill having been filed, (the order to amend having been previously served,) the complainant's clerk in court should, in cases where the order has been made upon the complainant's undertaking to amend the defendant's office copy, call upon the defendant to produce his office copy in order that it may be amended; and the defendant being thus apprised that the order to amend has been acted on, must leave his copy with the complainant's clerk in court for that purpose. (*k*)

But by our practice, the amendments should be served by delivering a copy of them, specifying the interlineations or passages stricken out, by the page and line, and any additions annexed to the bill, by the designating letter, and the page and lines where they are to be inserted. (*l*)

Terms of amendment.] The terms upon which the bill will be allowed to be amended under different circumstances, and in the various stages of a cause, are specified in the 43d, 44th and 45th rules of the court. (15)

(*k*) Woodhouse v. Meredith, 1 Jac. & W. 204.

(*l*) 1 Hoff. Pr. 292.

ing a copy on the adverse party or his attorney. (Cal. Pr. Act, § 67.) When the complaint is amended, a copy of the amendments must be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney. (Id. § 43.)

(15) The party who applies for leave to amend should bear all the expense of the amendment. (*Union Bank v. Mott*, 19 How. Pr. 267; S. C. 11 Ab. 42.) This includes the costs allowed by statute to the opposite party for his proceedings before notice of trial, and of resisting the motion to amend, and such disbursements as are chargeable by statute against the unsuccessful party. (*Hare v. White*, 3 How. Pr. 293.)

Where a case has been heard and reported on by a referee, if an order is made allowing the complaint to be amended by inserting a new cause of action, it ought only to be done upon the condition that the plaintiff allow the report to be set aside, and the order of reference to be vacated, with costs to abide the result. The order should also provide for the service of an amended summons and complaint, and the defendant should be allowed an opportunity to answer. (*Allaben v. Wakeman*, 10 Ab. 162.)

An amendment of the complaint by striking out counts or parts of counts, allowed by a judge during the trial to be made *without costs*, is authorized by the section of the Code which permits such amendments, and refers the *terms* to the discretion of the court. (*Cayuga County Bank v. Warden*, 6 N. Y. 19.) In *Vanderpool v. Tarbox*, (7 N. Y. Leg. Obs. 150,) where the complaint, in an action upon a promissory note, indorsee against maker, omitted to state that the note was *indorsed* by the payee to the plaintiff, it was held, on demurrer, that as the defect was technical, the plaintiff might amend without costs. In *Turner v. Hillerline*, (14 How. Pr. 231,) after the cause had been brought to a hearing before a referee, and testimony taken, the plaintiff was allowed to amend his complaint by striking out the name of one of the defendants, upon the terms of paying \$10 costs of the motion, all the costs before notice of trial, and the expense of amending the answer, if necessary.

After a trial has been had, and the court, on appeal, has decided that upon the facts alleged in the complaint the plaintiff cannot recover, if, after a lapse of eight months, the plaintiff can be permitted to amend by changing, substantially, his cause of action, it should only be on the payment of all the costs accrued since the original complaint was filed. (*Saltus v. Genin*, 3 Bosw. 639.)

The terms upon which an amendment is granted are not subject to review upon exceptions. (*Vibbard v. Roderick*, 51 Barb. 616.)

In *Indiana*, where a party amends by leave of the court, he must pay the costs of
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It has been decided that where a mere formal objection to the bill is made by demurrer *ore tenus*, the complainant will be permitted to amend without costs. (*m*)

*Where the complainant amends his bill by striking out the [*223] names of some of the defendants, the order will only be granted on the terms of paying their costs; as by striking them out as defendants, the complainant deprives them of the opportunity of applying for their costs at the hearing. (*n*)

Time to answer after amendment.] Whenever the complainant is permitted to amend his bill, if the answer has not been put in, or a further answer is necessary, the defendant has the same time to answer after such amendment as he originally had. (*o*) (16)

Effect of amending bill.] In general, an amendment before answer puts an end to all process of contempt which may have been issued for want of an answer; and the court will not allow an amendment to be made without prejudice to the process, even though the complainant undertakes not to require any further answer to the amendments. (*p*) (17)

(*m*) *Garlick v. Strong*, 3 Paige, 440.

(*n*) *Wilkinson v. Belsher*, 2 Bro. 272.

(*o*) Rule 45.

(*p*) *Symonds v. Duchess of Cumberland*, 2 Cox, 411.

the leave to amend. When the trial is not delayed by reason of the amendment, no other costs shall be taxed. When the amendment causes any delay, the party amending must pay the costs of such delay. (2 R. S. 43, § 97.)

In *Ohio*, unless otherwise provided by statute, the costs of amendments shall be taxed and paid, as the court, in its discretion, may direct. (Code, § 550.)

(16) A defendant must answer an amended complaint within twenty days after service of a copy thereof, or the plaintiff, upon filing with the clerk due proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 246 of the Code. But where an application to the court for judgment is necessary, eight days' notice thereof must be given to the defendant. (Code, § 146.)

It is held, in *Lovett v. Cowman*, (10 Paige, 559.) that where the complainant amends his bill before the defendant has answered the original bill, a new order to answer is necessary; and where the bill is amended after an order extending the time to answer has been made, the defendant has forty days to demur or answer after the service of a copy of the amendment upon him. (*Ibid.*)

In *California*, a party has ten days after service of an amended pleading upon him to answer or demur thereto (Cal. Pr. Act, § 67.) When an amendment is made by leave of the court, the defendant must answer in such time as may be ordered by the court; and judgment by default may be entered, upon failure to answer, as in other cases. (*Id.* § 43.) When a demurrer is overruled with leave to answer, though the court has power to fix the time for answering, it need not do so. If the time is not fixed, then the defendant should answer within the same time required in case of service of the original complaint. (3 *Estee's Pr.* 310; *People v. Rains*, 23 Cal. 128.) The party whose demurrer has been sustained, shall, upon service of the amended pleading, have ten days in which to answer or demur to the amended pleading. (3 *Estee's Pr.* 310.)

In *Ohio*, where the plaintiff amends his complaint, the defendant has the same time to answer the amended complaint, or demur thereto, after notice of the amendment, as to the original complaint. (Code, § 134.) Notice of filing an amended pleading must be forthwith served upon the other party, who shall have the same time thereafter to answer or reply thereto as to an original pleading. (*Id.* § 135.)

(17) If the plaintiff amends his complaint by adding new parties, after the defendant's default for want of an appearance has been entered, he thereby waives the default. (*Scudder v. Voorhis*, 1 Barb. 55.)

It seems, however, that if a specific amendment were to be proposed, and it should appear evident that the case, so far as relates to the original defendants, would not be varied by it, an order to make such amendments would be granted without prejudice to the process. But this must be shown distinctly; otherwise the court will not interfere. (*g*)

Upon a motion to amend without prejudice to process entered against some defendants for want of appearance, the master of the rolls in Ireland said he could not allow a bill to be amended without prejudice to process, unless every party who had appeared in the cause had notice of the application. (*r*)

On a petition to amend after answer, and exceptions submitted to by adding new charges and new parties, the order provided that such amendments should not prejudice the injunction issued, nor invalidate the order for taking the bill *pro confesso* against two of the defendants. (*s*)

Another effect of amending a bill is, that if there are exceptions to the answer then pending, the complainant will be considered as having waived them. (*t*) Where, therefore, a complainant, after taking exceptions to the answer, is desirous of amending his bill, he should make a special motion to that effect, and obtain an order that the amendment be without prejudice to the exceptions previously taken; unless indeed [*224] *the amendment consists in merely adding a defendant, and requires no further answer; which Lord Eldon considered an excepted case. (*u*)

So the complainant cannot, in general, after he has amended his bill, take exceptions to the answer to the original bill, without the special order of the court. (*v*)

Although the rule is inflexible that if a complainant who has obtained an injunction for want of an answer, amends his bill, he will lose the benefit of his injunction, unless the order by which the amendment is sanctioned expressly declares that it is to be without prejudice to the

(*g*) *Id. ib.*

(*s*) *Beekman v. Waters*, 3 John. Ch. 410.

(*u*) *De la Torre v. Bernales*, 4 Mad. 396.

(*r*) *Raymond v. O'Dell*, 1 Hogan, 230.

(*t*) *De la Torre v. Bernales*, 4 Mad. 396.

(*v*) *Jacob v. Hall*, 12 Ves. 458.

When a pleading has been amended, the original is superseded, and the amended pleading takes its place. (*Sands v. Calkins*, 30 How. Pr. 2; *Walker v. Granite Bank*, 1 Ab., N. S. 406; *Seneca County Bank v. Garlinghouse*, 4 How. Pr. 174; *Fry v. Bennett*, 3 Bosw. 200; S. C. 5 Sandf. 54; 9 N. Y. Leg. Obs. 330; *Dann v. Baker*, 12 How. Pr. 521; *Burrall v. Moore*, 5 Duer, 654; *Barber v. Reynolds*, 33 Cal. 497.) The effect of amending a pleading by adding new parties, is to strike out the issue that has been joined. And it is the right of the defendant, who has already answered, to put in a new answer to the amended complaint. (*Akin v. Albany Northern R. R. Co.* 14 How. Pr. 337, 338; *Ward v. Dewey*, 12 id. 193; *Scudder v. Voorhis*, 1 Barb. 56.)

injunction, or has been obtained upon the allowance of exceptions; (*w*) yet the rule is only to be understood as applying to cases where the injunction is a mere injunction to stay proceedings at law, and has been obtained in consequence of the defendant's default in not appearing or answering. Where an injunction has originally been granted upon an affidavit of merits, an order to amend without prejudice to the injunction may be obtained as a matter of course, unless the bill has been already amended; in which case the court will not make an order to sanction a re-amendment unless notice is given, and the proposed amendments stated, and unless the court is satisfied, upon affidavits, that the amendments relate to facts of which the complainant had no knowledge to enable him to bring them sooner before the court. (*x*)

What effect the amendment of the bill would have upon a *ne exeat regno*, does not appear to have been decided. In *Grant v. Grant*, (*y*) however, Sir John Leach, upon a special motion being made before him for leave to amend a bill without prejudice to the *ne exeat*, refused to entertain the motion, although it was supported by an affidavit in which the amendments were stated, and notice had been served upon the bail as well as upon the defendant. His honor observing that he had an unqualified aversion to the writ of *ne exeat*, but should abstain from expressing any opinion that might prejudice the question; and that the complainants' counsel, if they were satisfied with the analogy which had been pointed out to the practice at law, might take an order to amend without the special reservation, or might abandon their motion, but that in either case they must pay the costs.

Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an [*225] answer making an entire new defence, and contradicting his former answer. This was held in *Bolton v. Bolton*, (*z*) in which case the court, upon this ground, refused, with costs, a motion to take an answer to an amended bill off the file, which contradicted the original answer, and introduced no less than four new issues or defences.

And a defendant may not only answer an amended bill, but he may defend himself from the effect of the amendments by demurrer or plea; as where a complainant amends his bill and states a matter which has arisen subsequent to the filing of the bill, and properly the subject of a supplemental bill or bill of revivor. (*a*) And it has been held that a

(*w*) *Bliss v. Boscawen*, 2 Ves. & B. 101, 102.

(*x*) *Pratt v. Archer*, 1 Sim. & Stu. 433. *Sharp v. Ashton*, 3 Ves. & B. 144.

(*y*) 2 Sim. 14.

(*z*) Cited 1 Dan. Pr. 519.

(*a*) *Mitf.* 207, 290. 1 Atk. 29.

defendant may demur to an amended bill, even though he has previously put in a demurrer to the original bill. (b)

SECTION III.

DISMISSING BILL BY COMPLAINANT.

If the complainant, after the putting in of the defendant's answer, conceives that he shall not be able effectually to prosecute his suit, he may apply to the court for leave to dismiss his bill; either as against all the defendants, or against such of them as he thinks he can dispense with, with costs. This is a motion of course. (c)(18)

(b) Bancroft v. Wardour, 2 Bro. C. C. 66. 2 Dick. 67, S. C.

(c) Dixon v. Parks, 1 Ves. jun. 402.

(18) There is no provision in the Code for a dismissal of the complaint upon the application of the plaintiff.

As to dismissing complaint upon the *defendant's* application, see *post*, p. 242.

But the same result which was formerly reached by a dismissal of the complaint, by the plaintiff, may now be reached, in a proper case, by a *discontinuance of the action*.

The right of a plaintiff to discontinue his suit at pleasure and of course, as a general proposition, is undoubted; but the proposition is not unqualifiedly true. It is a right to be exercised at all times by the leave and with the consent of the court. The courts have uniformly held, for instance, that a plaintiff cannot be allowed to discontinue his action without the payment of costs to the defendant, except in certain cases where it has exercised the power to excuse him from the payment of such costs, which it has done in many cases. (*Young v. Bush*, 36 How. 240.) Where a defence of infancy is set up, the court has allowed the plaintiff to discontinue without the payment of costs, and without doubt of its power to do so. (*Van Buren v. Foot*, 4 Wend. 209; *Wellington v. Claason*, 9 Ab. 175.) So when a defendant becomes insolvent and obtains a discharge, (*Collins v. Evans*, 6 John. 383; *Lindley v. Hackett*, 18 id. 252;) or when a defendant has been declared a bankrupt, (*Park v. Moore*, 4 Hill, 592; *Smith v. Skinner*, 1 How. Pr. 122;) also in case of a change of practice. (*Sunney v. Roach*, 4 Ab. 16;) or where a defendant has been joined as a party by mistake. (*The Waterbury Manuf. Co. v. Krause*, 1 Hilton, 560.) In these and numerous other cases, the courts have claimed and exercised the power to restrict and control the right to discontinue, and to determine the grounds upon which it should be allowed. Unless the plaintiff has been excused, upon some ground, from the payment of costs, in such cases, it has uniformly been held that the cause was not and could not be discontinued until the defendant's costs were actually paid. (*Young v. Bush*, *supra*.) The right of a plaintiff to discontinue is not absolute; but is to be exercised under the control of the court, and equitable terms may be imposed in proper cases. And the right to discontinue may be disallowed, in the discretion of the court, or restricted, upon equitable considerations. (Ibid.) Where, in an action to foreclose a mortgage, the parties stipulated to have the testimony of a witness for the defendant, who was sick, taken before a referee, and when thus taken it was considered to be a complete defence to the action, and the witness died before the trial, it was held that the plaintiff could be allowed to discontinue the action only on payment of costs, and on serving a stipulation that the testimony of the deceased witness might be read and used on the trial of any subsequent action which might be brought for the foreclosure of said mortgage, in the same manner and to the effect, as on a trial in this action, pursuant to the stipulation under which the examination of such witness was taken. (Ibid.) The plaintiff should not be required to prosecute a suit if he wishes to put an end to it, and to the litigation entirely. But where he has long litigated a question, and put the defendant to much expense and trouble, and is

The rule is well settled, by the English decisions, that the court will not, after appearance, make an order to dismiss a bill, on the complainant's application, without costs, except upon the defendant's consent actually given in court; (*d*) even though the ground of the application be that, upon the hearing of the cause, the court would have ordered it to be so dismissed, and the defendant, although served with notice, does not appear to oppose the motion. (*e*) But a complainant, where he has been admitted to sue *in forma pauperis*, may move to dismiss his bill without costs, except in cases where his admission *in forma pauperis* has taken place subsequently to the filing of the bill. (*f*) So where a *defendant, by his own act, has rendered it impossible [*226] for the complainant to attain the object of his suit—*e. g.*, by surrendering a lease, to obtain an assignment of which is the object of the suit, and the defendant afterwards absconds, the court will permit the bill to be dismissed without costs. (*g*) But not where the object of the suit is defeated by the complainant's own act or procurement. (*h*)

Where also an executor or administrator has commenced a wrong suit, by mistake, or has ascertained that it would be useless to proceed, in consequence of facts subsequently discovered, he will be permitted to discontinue without the payment of costs. (*i*)

In this state it is provided by statute, that upon the complainant in a court of equity dismissing his own bill or petition, or upon the same being dismissed for want of prosecution, the complainant shall pay to the defendant his costs to be taxed; except in those cases where, according to the practice of the court, costs would not be awarded against such complainant upon a decree rendered, on hearing of the cause. (*k*)

(*d*) *Id. ib.* Anon. id. 140. See also *Lewis v. Germond*, 1 Paige. 300.

(*e*) Anon. 1 Ves. jun. 140. *Fidelle v. Evans*, 1 Cox. 27. 1 Bro. C. C. 267.

(*f*) *Prac. Reg.* 321.

(*g*) *Knox v. Brown*, 2 Bro. C. C. 186. 1 Cox, 359, S. C.

(*h*) *Hammersley v. Barker*, 2 Paige. 372.

(*i*) *Arnoux v. Steinbrenner*, 1 Paige, 82.

(*k*) 2 R. S. 613. § 1.

substantially defeated in it, if he wishes to discontinue, it should be upon terms that he will not commence a new suit, or transfer the right of action: and that the defendant's testimony, properly taken in it, may be used in any new action. (*Ibid.*)

The rules laid down in the above case of *Young v. Bush* were approved in the later case of *Wilder v. Boynton*, (63 Barb. —.) In that case, the plaintiffs, who were non-residents, came voluntarily into court and submitted themselves to its jurisdiction, entered upon a trial before a referee, and when the defendant produced evidence which not only established that they had no cause of action, or at most one upon which they were entitled to recover of the defendant a less sum than he was likely to recover of them, they asked for an interview, to negotiate a settlement, and for that purpose the referee suspended the trial. Failing in the negotiation for a settlement, they left the place where the trial was being had, and escaped from the state before the defendant was able to serve them with a summons to commence a second action. It was held that after having thus deliberately sought to avoid the jurisdiction of the court, the plaintiffs could not, by an *ex parte* order, discontinue the action; and the order was set aside, with costs.

It has been decided that this provision only extends to those cases where *prima facie* the complaint would not be chargeable with costs on a decree dismissing the bill at the hearing; as in the case of suits by executors in right of their testators. (*l*) If the complainant would, *prima facie*, be chargeable with costs if the suit was decided against him at the hearing, the court will not examine the whole merits of the cause merely to ascertain whether there are any equitable circumstances which might excuse him from the payment of costs. (*m*)

If a solicitor files a bill in the name of a person, as complainant, without having a proper authority from him for so doing, the course for the party to pursue, if he wishes to get rid of the suit, is to move that the bill may be dismissed with costs, to be paid by the solicitor filing the bill. This motion may be made by the complainant in person, or he may, by warrant under his hand and seal, disclaim the bill as being brought without his order or privity, and empower some counsel to make the motion. (*n*)

If a bill be exhibited in the name of a married woman, against her husband, it may, upon affidavit that she knew nothing of it, or had not consented to it, be dismissed. (*o*)

[*227] *A motion to dismiss a bill as having been filed without the privity or consent of the complainant, must be accompanied by an affidavit of the complainant himself that the bill had been filed without any authority from him. And to avoid the effect of such an application, the solicitor against whom it is made, must show distinctly, upon affidavit, that he had a special authority from the party to institute the suit; and it will not be sufficient to assert, generally, that authority had been given. (*p*)

If the name of a person is made use of in a bill as co-complainant with others, without his consent, he may move that his name be struck out, and that the solicitor who filed the bill may be ordered to pay the costs. (*q*) Such motion should be made at the earliest possible opportunity after the fact has come to the complainant's knowledge; for if there has been acquiescence or *laches* on the part of the complainant making the application, it will not be granted. (*r*)

And it seems that even when the suit is not disavowed, one co-complainant may dismiss a bill with costs, as far as concerns himself; and it is said that he may do so on motion of course. (*s*) But in a more mod-

(*l*) *Hammersley v. Barker*, 2 Paige, 372.

(*m*) *Id. ib.*

(*n*) *Prac. Reg.* 179.

(*o*) *Id.* 60.

(*p*) *Prac. Reg.* 60. *Wright v. Castle*, 3 Mer. 12.

(*q*) *Wilson v. Wilson*, 1 Jac. & W. 457.

(*r*) *Dundas v. Dutois*, 2 Cox, 235. 1 Ves. jun. 196. S. C.

(*s*) *Bathew v. Needham*, *Prac. Reg.* 179. *Langdale v. Langdale*, 13 Ves. 167.

ern case, (*t*) it is stated that counsel appeared, and that the court refused to make an order for such dismissal, unless upon terms framed so as to protect the other complainants in the suit from injury. The mere circumstance, however, that the rights of the complainant applying to be dismissed are concurrent, with those of the complainants who remain, will not be a sufficient reason for refusing the motion; since any defect which his withdrawal may make in the record, may be supplied by making him a defendant, by amendment. (*u*)

In the case of *Langdale v. Langdale*, (*v*) it was held that one of several complainants may have the bill dismissed as to himself, upon consent of the defendant, and without notice to, or consent of his co-complainants.

It is a rule that one complainant cannot be examined as a witness for another. In order to procure his testimony, the proper course is to move for an order that his name be struck out of the bill. But as the defendant has a right to the responsibility of each of the complainants for costs, security for the costs up to the time of the application must be given. (*w*)

*A complainant may move to dismiss his own bill *with* costs, [*228] as a matter of course, at any time before the decree. (*x*) After a decree, however, the court will not suffer a complainant to dismiss his own bill unless upon consent (*y*)—for all parties are interested in a decree, and any party may take such steps to have the effect of it, as he may be advised. (*z*)

And it seems that, after a decree upon a *creditor's bill*, the bill cannot be dismissed even by consent of all who have come in. There must be a re-hearing or appeal. (*a*) Though before a decree upon a creditor's bill is had, such a bill may be dismissed by consent, and the money in court paid to the complainants. (*b*)

In cases other than creditor's bills however, if, upon the hearing of the cause the court has merely directed *inquiries*, by a reference or issue, to satisfy the conscience of the court preparatory to its giving judgment, the complainant may, before the trial of the issue, or proceeding upon the reference, obtain an order to dismiss the bill with costs. (*c*) But if the issue has been tried and determined in favor of the defend-

(*t*) *Holkirk v. Holkirk*, 4 Mad. 51.

(*u*) 2 Dan. 355.

(*v*) 13 Ves. 187.

(*w*) *Lloyd v. Makeam*, 6 Ves. 145.

(*x*) *Carrington v. Holly*, 1 Dick. 281.

(*y*) *Guilbert v. Hawles*, 1 Ch. Ca. 40.

(*z*) 1 Dick. 281.

(*a*) *Lashley v. Hogg*, 11 Ves. 602.

(*b*) *Wood v. Westall*, 1 Young. 305. See also *White v. Lord Westmeath*, Beat. 174

(*c*) *Carrington v. Holly*, *ubi supra*. Anon. 11 Ves. 169.

ant, the complainant cannot move to dismiss, because the defendant may have it set down on the equity reserved, in order to obtain a formal dismissal of the bill, so as to enrol it as a final judgment, and thereby make it pleadable. (*d*)

With regard to the *effect* of a dismissal of the bill by the complainant, it may be stated, as a general rule, that a voluntary dismissal of a bill by the complainant, or a voluntary dismissal upon any interlocutory proceeding, will not prevent a new bill from being filed. It is not pleadable unless it is a dismissal by the court upon the hearing. (*e*) But a dismissal of an original bill on motion of the complainant, is a good bar to a bill of revivor and supplement, or either, founded upon it. (*f*)

[*229]

*SECTION IV.

MOTION FOR PRODUCTION AND INSPECTION OF PAPERS, &c.

General principles respecting.] Previous to the final hearing of a cause, the court only orders the production of books and papers upon two principles—security pending the litigation, and discovery or inspection for the purposes of the suit in this court. (*g*) And it will not make an order which will amount to an anticipation of the final decree, by giving the complainant any other advantages from the production than those above mentioned. (*h*) (19)

Where the answer admits that the defendant is in possession of deeds or documents, the court will, upon motion or petition founded upon the admission in the answer, and upon evidence that the complainant has

(*d*) *Id. ib.*

(*e*) *Brandlyn v. Ord*, 1 Atk. 571.

(*f*) *Bowden v. Beauchamp*, 2 Atk. 82.

(*g*) *Watts v. Lawrence*, 3 Paige, 159. 6 Mad. 290.

(*h*) *Id. ib.* *Lingen v. Simpson*, 6 Mad. 290.

(19) As to the production, discovery and inspection of books and papers, under the Code, see ante, p. 101, [210,] Note 3.

In addition to what is there said, it may be noticed that in an action to set aside a sale of partnership assets by one partner to the other, and to have the plaintiff's rights as a partner declared to be still subsisting, the plaintiff is not, before judgment, entitled, as a partner, to a general inspection of the books of the firm. (*Platt v. Platt*, 11 Ab., N. S. 110.) It seems that an examination of the adverse party, and a discovery and inspection of his books and papers cannot be had in one proceeding; and the provisions of section 388 of the Code, relating to the latter object, cannot be invoked to sustain an order for the former object. (*Havemeyer v. Ingersoll*, 12 Ab., N. S. 301.)

Where facts and circumstances are shown which warrant a presumption that a book or document sought contains evidence which will tend to prove some facts which the party applying has to establish, the application for a discovery should be granted. (*Union Paper Collar Co. v. Metropolitan Paper Collar Co.* 3 Daly, 171.)

a direct and immediate interest in such deeds or documents, grant an order for their production. (*i*) This is a special motion, and notice must be given of it.

A motion for production cannot be founded upon an affidavit that a deed is in the defendant's possession. An admission in the answer is necessary, and in order to obtain such an admission, leave to amend the bill will be given when requisite, although the cause is at issue. (*k*)

If the answer offers to produce the deed or documents for the inspection of the complainant, an order for their production, and giving leave to the complainant to inspect them, will be made, on reading the admission and upon notice. (*l*)

A *voluntary offer* of this nature by the defendant is considered as dispensing with some of those safeguards which the practice affords him. But an offer to produce a deed *as the court shall direct, or if the court shall require it*, is not a voluntary but a qualified offer, which ought not to fix the defendant. It is merely a submission to the discretion of the court, and only binds the party to produce the paper *if the court shall think it necessary*. And upon such a qualified offer the court will enter fully into the merits of the question as to the right of the complainant **to the inspection*, and be satisfied that the defendant [*230] cannot be prejudiced, before it will order such production. (*m*)

To entitle the complainant to an order for the production of documents, before the hearing, or issue joined, or publication, the documents must be described in the answer or schedule with reasonable certainty so as to be considered incorporated with the answer by the reference to them. And they must be admitted by the answer to be in the defendant's *possession or power*. It must further appear that the complainant has an interest in the production of the papers called for. (*n*) A mere general reference to them, in the answer, without describing them, is not sufficient. (*o*) As where the defendant "for greater certainty refers to the books of account of the said partnership, in case the same shall be ordered to be inspected by the complainants;" or alleges certain facts as *appearing* from the said books and accounts; or where he speaks of books, papers, and writings of R. *in his possession*: (*p*) or where an answer admits that such a deed was executed, and craves leave

(*i*) 2 Fowl. Ex. Pr. 46, 50. *Watson v. Renwick*, 4 John. Ch. 334. *Eager v. Wiswall*, 2 Paige, 369. 1 Jac. & W. 227.

(*k*) *Barnet v. Noble*, 1 Jac. & Walk. 227. *Erskine v. Bize*, 2 Cox's Ca. 226.

(*l*) 2 Fowl. Ex. Pr. 54.

(*m*) *Atkins v. Wright*, 14 Ves. 211. *Stanhope v. Roberts*, 2 Atk. 213. 4 John. Ch. 385, 6. 1 Fowl. Pr. 46.

(*n*) *Watson v. Renwick*, 4 John. Ch. Rep. 381. *Gibbons v. Ogden*, Halst. Dig. 174. 1 Swanst. 7, 114.

(*o*) *Gibbons v. Ogden*, *supra*.

(*p*) *Watson v. Renwick*, *supra*.

to refer to it when produced. (*q*) So, merely stating the contents of a deed is not sufficient to entitle the complainant to an order for its production. (*r*)

Nor is a reference to papers, in the answer, sufficient, without an admission also that they are in the custody or power of the defendant. (*s*)

The rule for producing papers rests upon the principle that the papers are, by the reference to them in the answer, incorporated therein and made a part of it. (*t*)

Yet the mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production, if in other respects such production would be inequitable. Thus, the court will not, upon motion, before the hearing, compel an incumbrancer to produce, at the hearing, deeds which are admitted by his answer, but which are his title deeds; even though the complainant may have an interest in them. (*u*)

But if the defendant, in his answer, states the effect of documents admitted to be in his possession, yet for greater certainty craves leave to [*231] *refer to them when produced, the complainant is entitled to move for their production, although the answer positively states that they form part of the defendant's title, and in no way assist or make out the title of the complainant. (*v*)

What is a sufficient possession by defendant.] As respects the kind of possession of a document which will induce the court to order the defendant to produce it, it has been held that it must be a present possession; and that an admission that at a certain time past it was in the defendant's possession, was not sufficient. (*w*) But it need not be an actual personal possession. Therefore where books and papers, the joint property of the defendants and of other persons not before the court, were admitted by the answer to be in the custody of a third party as the common agent of all, an order was made upon such agent to permit an inspection by the complainant, against the consent of those owners who were not parties; on the principle that the court has a right to give the complainant whatever access the defendant himself would be entitled to. (*x*) So, if papers belong to a defendant, they are in his possession, custody, or power, although they may be in a foreign

(*q*) *Darwin v. Clarke*, 8 Ves. 158.

(*r*) *Erskine v. Bize*, 2 Cox's Ca. 226.

(*s*) *Gibbons v. Ogden*, *supra*.

(*t*) *Evans v. Richard*, 1 Swanst. 7.

(*u*) *Sparke v. Montrieux*, 1 Young & Col. 103. *Sampson v. Swettenham*, 5 Mad. 16.

(*v*) *Hardman v. Ellames*, 2 My. & Keen, 732. S. C. 5 Sim. 640.

(*w*) *Heeman v. Midland*, 4 Mad. 391.

(*x*) *Walburn v. Ingilly*, 1 My. & Keen, 61. *Eager v. Wiswall*, 2 Paige. 369.

country, or are coming over to this country; and the court will order the defendant to produce them within a reasonable time. (y) And where books, papers, or writings are in the custody or hands of the defendant's solicitor, they are considered as being in the defendant's own custody or power, and he will be bound to produce them. (z) But the court will not, in such a case, make an order upon the solicitor; for he may have a lien on the papers, as against his client. (a) And where the defendant is ordered to produce papers which are in the hands of his solicitor, he must pay his bill of costs, if he cannot otherwise procure them. (b)

In the case of *Fencott v. Clarke*, (c) a voluntary deed belonging to the defendant, which the bill impeached for fraud, and which was in the custody of the defendant's solicitor, who claimed a lien on it, was ordered to be produced for the complainant's inspection, after it had been proved by the defendant, and *publication had passed*. But the court *will not order a defendant to produce letters which passed [*232] between him and his solicitor, in the relation of solicitor and client, in the progress of the cause, or with reference to it, previously to its being instituted, or which contain legal advice. (d) Nor will it order the production of a correspondence between the solicitor of the defendants and a person not a party to the suit. (e)

Complainant's interest in documents.] With regard to the nature of the interest of the complainant in a deed or document which will entitle him to an order for its production, it is laid down as a general rule that if the applicant has what is termed a *common interest* in the instrument, with the other party, he is entitled to the production. (f) And this term embraces the interests of landlord and tenant; (g) principal and agent; (h) copartners; (i) trustees and *cestuis que trust*; (k) and tenants in common. (l)

The complainant is entitled to the production of a deed which sustains his title; but he has no right to the production of a deed which is not connected with his title, and which gives title to the defend-

(y) *Farquharson v. Balfour*, Tur. & Russ. 190. *Hornby v. Pemberton*, Mosely, 57. 2 Paige, 269.

(z) 2 Dan. Pr. 259. *McCann v. Breere*, 1 Hogan, 129.

(a) *McCann v. Breere*, *supra*. But see *Furlong v. Howard*, 2 Sch. & Lef. 115.

(b) *Ex parte Shaw*, Jac. 272.

(c) 6 Sim. 8.

(d) *Garland v. Scott*, 3 Sim. 396. *Hughes v. Biddulph*, 4 Russ. 199. *Vent v. Pacey*, Id. 193.

(e) *Curling v. Perring*, 2 My. & Keen, 380.

(f) *Burton v. Neville*, 2 Cox's Ca. 242.

(g) *Smith v. Duke of Northumberland*, 1 Cox's Ca. 362. *Inman v. Hodgson*, 1 Young & Jer. 28.

(h) *Gerard v. Penswick*, 1 Swanst. 534. *Earl of Salisbury v. Cecil*, 1 Cox's Ca. 277.

(i) *Kelly v. Eckford*, 5 Paige, 458. *Pickering v. Rigby*, 18 Ves. 484. Mosely, 58.

(k) *Sparke v. Montrion*, 1 Young & Col. 103.

(l) 1 Hoff. Pr. 310.

ant. (*m*) A mere interest in such deeds, on the part of the complainant, is not sufficient. (*n*)

If, however, the defendant has in his possession a deed relating to the title of both parties, production of it will be ordered. (*o*) So if the complainant has a direct interest in deeds in the defendant's possession and they do not relate solely to any separate and independent title of the defendant, they will be ordered to be produced. (*p*)

An heir at law is not entitled to a general inspection of deeds, &c. in the hands of a devisee; because his title does not depend upon documentary evidence. But an heir in tail is entitled to inspect all deeds creating or relating to the entail. (*q*)

An application on behalf of a party having a vested interest in reversion, remainder, or otherwise, in real property expectant on a life interest [*233] est in *possession, for the production of the title deeds for the inspection of the remainderman or reversioner, to enable him to mortgage his interest, will not be entertained by the court. (*r*)

In a suit between partners, upon the application of either party, and in any stage of the suit, the adverse party will be compelled to deposit the partnership books and papers which are in his possession or under his control, in the hands of an officer of the court for the inspection of the party making such application, and that he may take copies if necessary. (*s*) This is upon the principle that both parties have an equal right to the inspection of such books and papers, and an equal interest in them.

Where, however, a document is not put in issue by the complainant in his bill, which is for an account of partnership dealings, but it is stated in the answer as part of the defendant's defence, and admitted to be in his possession, and is offered to be brought in, an order for its production will not be granted if no partnership property is shown in it. (*t*)

It does not establish a sufficient interest in a title deed relating to real estate, to warrant an order for its production, that if its effect be such as is sworn to by the party claiming the estate under it, legatees will lose the benefit of legacies bequeathed to them by that party's ancestor, from whom he immediately derives title. (*u*)

Upon a bill of discovery in aid of an action to try whether the com-

(*m*) *Tyler v. Drayton*, 2 Sim. & Stu. 309. 5 Mad. 16.

(*n*) *Sparke v. Montrion*, *supra*.

(*o*) *Bolton v. Corporation of Liverpool*, 3 Sim. 489.

(*p*) *Attorney Gen. v. Ellison*, 4 Sim. 238.

(*q*) *Lady Shaftsbury v. Arrowsmith*, 4 Ves. 66. See 3 Sim. 499.

(*r*) *Shaw v. Shaw*, 12 Price. 163.

(*s*) *Kelly v. Eckford*, 5 Paige. 548.

(*t*) *Shehan v. Glynn*, 2 Moll. 387.

(*u*) *Wilson v. Forster, McCle. & Young*, 274.

plainant's house was within the limits of a certain parish, and therefore liable to the parochial rates, the court ordered the defendants, the parish officers, to produce for his inspection the rate books, account books, and minute books, orders and other documents which related to the matter in question, and were admitted by their answer to be in their possession. (*v*) So where a tithe collector's books are admitted by the answer of the rector to be in his possession or power, and to relate to the matters in the bill mentioned, they will be ordered to be produced for the usual purposes; although the defendant states that they will not in any manner, assist or make out the complainant's case. (*w*)

In the case of *Bolton v. Corporation of Liverpool*, (*x*) the complainants filed their bill alleging that the defendants had in their custody *cases for the opinion of counsel, by which it would appear that [*234] the defendants had no right to levy the dues, and also various charters, deeds, &c. by which the truth of the statements in the bill would appear. The defendants admitted in their answer that they had in their custody several cases, two of which were prepared many years ago, and without reference to the existing proceedings, but which contained mistaken representations as to the nature of their title to the dues, and the rest of which were prepared, pending, or in contemplation of the existing proceedings; and that they also had in their custody charters, deeds, and copies of accounts from public offices, which evidenced their title to the dues. A motion by the complainants for the production of all the documents, was granted as to the two old cases only. This decision was upon the ground that the papers not ordered to be produced only evidenced the title of the defendants, and not the title of the complainant.

Other cases in which production will be ordered.] It is the practice of the court to order deeds and other papers contested as false and fraudulent to be brought into court for inspection. (*y*) And this will be done under special circumstances, although the deed sought to be impeached is in the custody of a purchaser for a valuable consideration. (*z*) But a deed, though impeached for fraud, will not be ordered to be taken out of the defendant's hands and left in an officer's possession before the hearing, except in a special case; as where there is reason to suppose the deed will not be forthcoming. (*a*)

Where a solicitor refused to allow a deed in his possession to be prov-

(*v*) *Burrell v. Nicholson*, 1 My. & Keen, 680.

(*w*) *Newton v. Beresford*, 1 Young, 377.

(*x*) 3 Sim. 467.

(*y*) *Comstock v. Aphorpe*, 8 Cowen, 336. Hopk. 144, S. C. *Balch v. Symes*, 1 Tur. & Russ. 87. *Fencott v. Clarke*, 6 Sim. 8.

(*z*) *Kennedy v. Green*, 6 Sim. 6.

(*a*) *Beckford v. Wildman*, 16 Ves. 438.

ed on behalf of the complainant, because he had a lien on it for costs due from the defendant, he was ordered to produce the deed at his own expense, and to pay all the costs consequent on his refusal. (*b*)

Under the general charge in a bill, that the defendant has divers papers, writings, &c., in his possession or power, relating to the matters in the bill mentioned, the complainant is entitled to the production of cases submitted for the opinion of counsel, admitted by the answer of the defendant to be in his possession, but not to the opinions given upon those cases. (*c*) Though a complainant is, generally speaking, entitled [*235] *to the production and discovery of all papers relating to the matters in the bill mentioned, in the defendant's possession or power; yet it seems that he is not entitled to the production of letters stated by the answer of the defendant to have been received by him since the filing of the bill, in answer to inquiries made by him in respect to some of the matters in question, with a view to his proofs in the cause, nor to any particulars respecting such letters, which would disclose the names of the witnesses, or the facts likely to be proved by them. (*d*)

So upon a bill which sought to charge a solicitor with a fraud practiced on the complainants in the course of proceedings on his client's behalf, the court refused to order the production of entries and memorandums contained in the defendant's books, or of written communications made or received by him, relating to those proceedings, and admitted by the answer to be in the defendant's custody. (*e*)

The court will not, on motion by a defendant, compel a complainant to produce documents in his possession, although the defendant swears that an inspection of them is necessary to enable him to answer the bill. (*f*) But if the complainant, upon request, refuses to permit the defendant to inspect such documents, he cannot afterwards object that the answer is insufficient in not stating their contents. And where the books or documents of the complainant are material for the defendant's defence of the suit, the defendant must file a cross-bill against the complainant for the discovery of them. (*g*)

Mode of inspecting documents, &c.] Where a party establishes his right to inspect books in the adverse party's possession, it is of course to grant the order for inspection, with liberty to take copies. (*h*) The defendant may seal up such parts of the books, &c., as he swears do not relate to the claims of the complainant. (*i*)

(*b*) *Brassington v. Brassington*, 1 Sim. & Sta. 455.

(*c*) *Preston v. Carr*, 1 Young & Jer. 175.

(*d*) *Preston v. Carr*, 1 Young & Jer. 175.

(*e*) *Greenough v. Gaskell*, 1 My. & Keen. 93.

(*f*) *Penfold v. Nunn*, 5 Sim. 409. *Denning v. Smith*, 3 John. Ch. 409. 5 Paige. 548.

(*g*) *Kelly v. Eckford*, 5 Paige, 548.

(*h*) *Ilide v. Holmes*, 2 Moll. 372.

(*i*) *Campbell v. French*, 2 Cox's Ca. 286. *Dias v. Merle*, 2 Paige, 594. *Gerard v. Penswick*, 1 Wils. Ch. Rep. 222.

It seems to be a rule, that under an order for inspection, the examination may be conducted without the presence of the defendant or his solicitor. The papers must be delivered into the possession of the officer of the court, to be open to the view of the complainant whenever he pleases; and it will not be a compliance with the order, to deposit a box containing the papers, under lock, with a notice to send for the key *whenever it is wanted.^(k) In the master's office, however, [*236] when papers are produced, it is the practice to give notice of inspection to the opposite party.^(l)

Where books, papers, and writings, mentioned in a schedule to the defendant's answer, are deposited by the defendant with his clerk in court for the inspection and examination of the complainant, under the usual order for that purpose, the defendant is entitled to have them restored to him as soon as such inspection and examination have taken place, and the complainant is entitled to have them retained in the custody of the clerk in court, notwithstanding it may be necessary that they should be produced before the master in taking the accounts directed by the decree, or in the hearing of an appeal from the decree.^(m)

SECTION V.

MOTION FOR THE PAYMENT OF MONEY INTO COURT.

In some cases, the court, upon the application of the complainant, will order money in the hands of a defendant to be paid into court by him, to abide the event of the suit. The *time* at which the application for this purpose is *usually* made, is after the defendant's answer has been put in. But it may be made at any stage of the cause, provided the court is satisfied that money in which the complainant has an interest is in the defendant's hands, who has no equitable right to it, or that it is in danger of being lost.

Thus, the application for payment of money into court may be made either upon an admission in the defendant's answer, or, under special circumstances, upon affidavit before answer. Therefore, in a case of gross fraud appearing, the court, upon the affidavit of the complainant, and upon consideration of the affidavit of the defendant in answer

(k) *Preston v. Carr*, 1 McCle. & Y. 457.

(l) Hoff. Off. of Mast. 12.

(m) *Small v. Atwood*, 1 Young & Col. 37.

thereto, ordered money to be paid into court before answer, upon a special application of which notice was given.(n) But the court will not, in any case, order money to be paid into court before answer, where there is a probability of a balance in favor of the defendant.(o) [*237] **In what cases proper.*] The cases in which the application for this order is most usually made are, upon admission—in cases of executors and trustees—and vendors and purchasers.

1. *Upon admissions.*] Where the defendant's answer contains a clear admission that there is trust money in his hands, the court will always, on an interlocutory application, order it to be paid into court. (p)

Formerly, in order to move for payment of money into court, upon an admission in the defendant's answer, it was thought necessary, where the defendant was an executor, to show that he had abused his trust, or that the fund was in danger from his insolvent circumstances. (q) But by the present practice, money may be ordered to be paid into court, on motion, upon the ground of admission alone. (r) These admissions may be made by the answer, or by schedules, or books containing an account of receipts and payments, and referred to, so as to be part of the answer; but not upon the affidavit of an accountant that from the schedules to the answer, and from the books of account not made part of the answer, such a balance was due. The reference to books must be sufficient to make them parts of the answer or examination. (s) The motion, however, may be founded upon the schedules to an examination added up under oath, where the defendant has omitted to add them up. (t)

The admission may also appear from the examination of the defendant before the master. (u) And if after the defendant's examination on interrogatories, and motion for the payment of money into court founded thereon, the complainant is permitted to file further interrogatories, under which he extracts an admission of a further sum in the defendant's hands, it will also be ordered to be paid into court. (v)

Where the defendant, who is sued as an executor, admits that he has money of the testator in his hands, he cannot protect himself from payment of the amount into court, by alleging that he has lent it upon a promissory note bearing interest. (w) For it is a well settled rule that,

(n) *Jervis v. White*, 6 Ves. 737.

(o) *Id. ib.*

(p) *Rothwell v. Rothwell*, 2 Sim. & Stu. 217. *Jervis v. White*, *ubi supra*. *Clarkson v. De Peyster*, Hopk. 274. 4 Sim. 359.

(q) *Strange v. Harris*, 3 Bro. C. C. 365.

(r) *Mill v. Hemson*, 8 Ves. 67.

(s) *Id. ib.*

(t) *Quarrell v. Beckford*, 14 Ves. 177.

(u) *Id. ib.*

(v) *Hatch v. —*, 19 Ves. 116.

(w) *Vigrass v. Binfield*, 3 Mad. 62.

however wide the power given to executors, by the will, to lend the assets, they cannot lend upon personal security; and if so lent, the court will, upon motion, before hearing, make them bring in the money. (*x*)

So if an executor admits a large balance of the personal estate to be *in his hands, he will be ordered to pay the whole into court, [*238] although he states an action at law is depending against him for a debt to a considerable amount, due from the testator; but with liberty, in case the complainant in the action at law should recover, to apply to the court to have a sufficient sum paid out again. And if the complainant in the action at law recovers, the court will order the amount to be paid out to him and not to the executor. (*y*) So, if an executor admit a balance due from him to the testator, upon an unsettled account, he will be ordered to pay the amount into court, notwithstanding there are debts of the testator still outstanding, if the testator has been dead three years before, within which time all the debts ought to have been paid. (*z*)

In general, a partner in trade admitting the receipt of money, but insisting there is a balance in his favor, will not be ordered to pay the sum in his hands into court; but if he has received it contrary to good faith, and which he ought not to have received, he will be ordered to bring it into court. (*a*)

But although a defendant makes an admission which would entitle the complainant to a decree, the complainant cannot, for that reason, move for payment of money into court. (*b*)

2. *In cases of executors and trustees.*] An executor admitting himself to be a debtor to the testator at the time of his death, will be ordered to pay the debt into court. (*c*) So, also, where in a suit by legatees against an executor, he admits a balance due them, on his examination, the court will order him to pay it into court, before report. (*d*) So where the master reports a balance in the hands of an executor, and the party interested calls for the investment of it pending an appeal by the executor, the court will compel the executor to bring in the sum reported. (*e*) And money admitted by an executor to be in the hands of his partner, is considered in his own hands, for the purpose of being ordered to be paid into court. (*f*)

As a general rule, upon a bill filed against an executor or administrator for a distribution of the estate of the decedent, if it appears that there is a clear balance in his hands uninvested, beyond all just claims

(*x*) *Morrissey v. Foley*, 2 Moll., 346.

(*z*) *Mortlock v. Leathes*, 2 Mer. 491.

(*b*) *Peacham v. Daw*, 6 Mad. 98.

(*d*) *Curgevan v. Paters*, 3 Aust. 751.

(*f*) *Johnson v. Aston*, 1 Sim. & Stu. 73.

(*y*) *Yare v. Harrison*, 2 Cox, 377.

(*a*) *Foster v. Donald*, 1 Jac. & W. 252.

(*c*) *Rothwell v. Rothwell*, 2 Sim. & Stu. 218.

(*e*) *Carmichael v. Wilson*, 3 Moll. 92.

made by him upon the fund, such balance will be directed to be brought into court and invested pending the suit. (*g*) But the mere fact that an executor is an octogenarian, if he is in possession of his faculties in [*239] *other respects, is not a sufficient reason for taking the property out of his hands. (*h*)

Where the application is against an executor or trustee, the admission is all that is required. It need not appear that the fund was in danger or insecure. (*i*)

Where, by a marriage settlement, moneys were directed to be laid out on government or real securities, and the trustees had lent the money to the husband, on bond, they were ordered, on motion, to pay the money into court. (*k*)

Though executors have a power of laying out money on good and sufficient security for an infant, yet, after a decree for an account, and notice to them by the *prochein amy* not to lend the money on mortgage, they will be ordered to pay it into court, but not to the extent of replacing the amount by so much stock as the same would have produced at the time of the investment; (*l*) for after a decree an executor cannot deal with the assets, for the purpose of investment, without leave of the court. (*m*)

3. *In cases of vendor and purchaser.*] The court will also, upon motion, order the purchaser of an estate, being in possession under the agreement, to pay the purchase money into court, where he has approved of the title; (*n*) or even in a case where it appears upon the face of the abstract that the title is bad, but the purchaser has sold the estate to another person; (*o*) or where a time is fixed for the payment of the purchase money by instalments, and the property is a coal mine, and the defendant is deriving a benefit from working it; (*p*) or where the purchaser exercises acts of ownership on the estate, as by cutting down timber and underwood; (*q*) or where the purchaser has taken possession without the consent or privity of the vendor. (*r*) But if the vendor permits the purchaser to take possession before the completion of the title, without any stipulation as to the purchase money, he cannot, on motion, have the purchase money paid into court. (*s*) Yet the

(*g*) *Hosack v. Rogers*, 6 Paige, 415.

(*h*) *Hosack v. Rogers*, 6 Paige, 415.

(*i*) *Strange v. Harris*, 3 Bro. C. R. 365. *Blake v. Blake*, 2 Sch. & Lef. 26.

(*k*) *Collis v. Collis*, 2 Sim. 365.

(*l*) *Widdowson v. Duck*, 2 Mer. 494.

(*m*) *Id.* 499.

(*n*) *Walters v. Upton*, Coop. 92, n. *Boothby v. Walker*, 1 Mad. 197.

(*o*) *Booth v. Ketley*, Sugd. Vend. 7th ed. 213.

(*p*) *Buck v. Lodge*, 18 Ves. 450.

(*q*) *Burroughs v. Oakley*, 1 Mer. 52, 376. *Dixon v. Astley*, 1 Mer. 133, 378. 2 *id.* 492. *McKin v. Thompson*, 1 Bland. 161.

(*r*) *Blackburn v. Stace*, 6 Mad. 69.

(*s*) *Clark v. Elliott*, 1 Mad. 606.

court will not permit a purchaser in possession with the assent of the vendor, or under an agreement, to commit acts of ownership tending to alter the nature *of the property which constitutes the se- [*240] curity of the vendor.(t) And affidavits have been allowed to be read, under those circumstances, to show that acts of this nature have been committed, even though the bill should contain no allegation to that effect.(u) Such affidavits may be read upon motion made after answer is put in. And slighter acts of ownership are sufficient to call for this interference of the court, where the acts were committed after the discovery by the purchaser of the objections to the vendor's title, than where the objections have arisen subsequently, and there is no evidence of acts committed since the discovery made.(v)

But if the possession of the purchaser is not under the contract of purchase, but prior to, and independent of it, the purchaser will not be compelled to pay his purchase money into court, particularly if there has been laches in the vendor in making out his title.(w)

4. *In other cases, and generally.*] The general rule, as to the payment of money into court, is that the complainant must be solely entitled, or have such an interest jointly with others as to entitle him, on behalf of himself and of those others, to have the fund secured.(x)

If it appears upon a master's report that the defendant is indebted, the balance thus ascertained will be directed to be paid into court, before the hearing.(y) But if the report is excepted to, the court will not, pending the exceptions, order the money to be paid in. Yet where it is evident that the exception is taken merely for delay, the complainant may apply for the immediate hearing of the exception.(z)

The application for the payment of money into court, upon a master's report of the amount due, should not be made until such report has been confirmed by the court, or the exceptions thereto have been disposed of.

Money may be ordered to be paid into court after the usual decree for an account, and before the hearing on further directions.(a)

It is competent for the court, on the hearing of exceptions, at the same time it allows an exception taken by the defendant and directs the master to review his report, generally, to order the defendant to pay a *sum of money into court, if it is satisfied that ultimately [*241] that sum will be found due from the defendant.(b)

(t) *Bradshaw v. Bradshaw*, 2 Mer. 492.

(u) *Cutler v. Simons*, 2 Meriv. 103. *Wickham v. Evered*, 4 Mad. 53.

(v) *Dixon v. Astley*, 1 Mer. 133, 135. 19 Ves. 564, S. C.

(w) *Freebody v. Perry*, Coop. 91. *Fox v. Birch*, 1 Mer. 105.

(x) *Freeman v. Fairlie*, 3 Mer. 29.

(y) *Gordon v. Rothby*, 3 Ves. 572.

(a) *Wood v. Downes*, 1 Ves. & B. 49.

(z) *Creak v. Capel*, 6 Mad. 114.

(b) *Brown v. De Tastet*, 4 Russ. 126.

Upon moving, on the answer of the defendant, for the payment of money into court, the complainant may show that upon the case stated in the answer he has an interest in the sum in question, or that a larger sum is due than is admitted, though the defendant, in his answer, expressly denies that the complainant has any such interest, or that such sum is due.(c)

Where an executor admitted that he had received certain sums, but said he had paid money on account of the estate, without specifying the amount, he was allowed to verify the amount by affidavit, and was ordered to pay the actual balance only into court.(d)

Although the court has no authority to make any compulsory order on any person not a party to the suit, yet it will order that a person who had received money on behalf of the complainant, previous to the suit, although not a party, may be at liberty to pay the amount into court.(e)

The court will, in general, only order the principal sum due from the defendant to be paid in, and not the interest.(f) But where a defendant, by his answer, admits that he has received a principal sum, and *interest* to a greater amount, he will be ordered, on motion, to pay in the interest.(g)

In what time money to be paid in.] If the court is satisfied that the order applied for ought to be made, the defendant is directed to pay the money into court on a certain day named in the order; the practice of ordering it to be paid "forthwith" being altered.(h)

Effect of paying money into court.] It is provided by statute that the party bringing money into court, pursuant to an order thereof, shall in all cases be thereby discharged from all further liability, to the extent of the money so paid in.(i)

Money, how deposited and invested.] All money brought into court and paid to the register or assistant register, for or by any suitor, is to be deposited in such banks as the court shall direct; and accounts thereof are to be kept in such manner and form as the court shall direct. When such money is paid to a clerk of the court it is to be deposited in [*242] *such bank, and the accounts are to be kept in such manner and form, as the vice chancellor shall direct.(k)

The chancellor may cause any monies brought into court pursuant

(c) *Domville v. Solly*, 2 Russ. 372.

(d) *Anon.* 4 Sim. 359.

(e) *Francis v. Collier*, 5 Mad. 75. See *Johnson v. Chippindale*, 2 Sim. 55.

(f) *Wood v. Downes*, 1 Ves. & B. 49.

(g) *Fairly v. Freeman*, cited 1 Ves. & B. 50.

(h) *Higgins v. —*, 3 Ves. 381.

(i) 2 R. S. 171, § 24, (orig. § 21.)

(k) 2 R. S. 171, §§ 20, 21, (orig. §§ 17, 18.)

to his order, to be invested in any public stock, or to be placed at interest, on approved landed security, and from time to time to be transferred or disposed of as he shall think proper. And the same power may be exercised by a vice chancellor, in respect to monies paid into court pursuant to any order of such vice chancellor.(?)

CHAPTER VIII.

PROCEEDINGS ON THE PART OF THE DEFENDANT PREVIOUS TO REPLICATION.

Sect. 1. MOTION TO DISMISS BILL.

2. CROSS BILL.

3. PUTTING COMPLAINANT TO HIS ELECTION.

SECTION I.

MOTION TO DISMISS BILL.

The 65th rule of the court provides that if the complainant does not reply to the defendant's answer within ten days after it is deemed to be sufficient, (see Rule 50 as to the time when it is to be deemed sufficient,) he shall be precluded from replying, and the cause shall stand for hearing on bill and answer, and either party may notice it for hearing as soon as it is in readiness for hearing against the other defendants, if any there are.

Where the complainant amends his bill, after answer, however, he cannot file a replication to the original answer, until the time for answering the amended bill expires; although he waives a further answer to the amendments.(a)

*By the 66th rule it is provided, that where the cause stands [*243] for hearing on bill and answer against part of the defendants, if the complainant does not use due diligence in proceeding against the other defendants, any of those who have perfected their answer may apply to dismiss the bill for want of prosecution; and on such application further time shall not be allowed to the complainant, of course, without any excuse shown for the delay.(20)

(b) *Id.* § 24.

(a) *Richardson v. Richardson*, 5 Paige, 58.

(20) It is provided by the Code (§ 274,) that the court may dismiss the complaint with costs, in favor of one or more defendants, in case of unreasonable neglect on the

This rule applies only to a case where there is more than one defendant. In case of a sole defendant, the motion is unnecessary; as, under the 65th rule, he can speed the cause by noticing it for hearing himself on bill and answer, after the expiration of ten days from the time when his answer is deemed sufficient; unless a replication is filed within that time.

Accordingly, in the case of *Whitney v. The Mayor, &c. of New-York*, (b) the court decided that a motion by a defendant to dismiss the bill for want of prosecution, can only be made where there are other defendants against whom the cause is not in readiness for hearing, by the neglect of the complainant to expedite the proceedings against them

(b) 1 Paige, 548.

part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

And if the plaintiff does not serve a copy of the complaint, within the time required, after demand made, and no order to enlarge the time has been served on the defendant's attorney, the defendant may move for an order dismissing the summons, and for judgment. (*Van Sant. Eq. Pr. 147*; *Littlefield v. Murin*, 4 How. Pr. 306; *Monell's Pr.* 2d ed. 508.)

If a valid summons has been properly served, and the defendant has given notice of appearance, and an irregular complaint be subsequently served, the motion should not be to dismiss the suit, and for judgment, but only to *set aside* the complaint for the irregularity, with costs. (*Van Sant. Eq. Pr. 149.*) So where the summons and complaint are served together, and the irregularity consists in the complaint only. (*Ibid*; *Shafer v. Humphrey*, 15 How. Pr. 564; *Ridder v. Whitlock*, 12 id. 203; *Allen v. Allen*, 14 id. 248; *Boington v. Lapham*, id. 360.) A failure to serve a complaint within the statutory time is an unreasonable neglect to proceed, within the meaning of section 274 of the Code, and a motion to dismiss the complaint may be made, though no complaint has been actually served. (*Colvin v. Bragden*, 5 How. Pr. 124; *Baker v. Curtiss*, 7 id. 478; *Skinner v. Noyes*, 7 Rob. 228.) Twenty days from the time of demand has been held a reasonable time for the service of the complaint. (*Ibid*; *Luce v. Tremper*, 6 How. Pr. 212; *Baker v. Curtiss*, 7 id. 478.) In a previous case, (*Littlefield v. Murin*, 4 How. Pr. 306,) twenty-four hours was considered a reasonable time.

Where a complaint or summons is dismissed for want of prosecution, it operates as a discontinuance, and does not prevent the plaintiff from bringing a new suit. (*McBrown v. Somerville*, 2 Stew. 515.)

A defendant should not sleep upon his right to dismiss the complaint, but should make his motion at the earliest special term or circuit after that at which it could be tried. (*Hawley v. Seymour*, 8 How. Pr. 96; *Whipple v. Williams*, 4 id. 28.)

Under the rule allowing a defendant his motion to dismiss, he can have nothing but a simple dismissal of the complaint. If he requires other relief against the plaintiff, his only remedy is to notice and bring on the cause for trial himself. (*Roy v. Thompson*, 8 How. Pr. 283; *Wilson v. Wheeler*, 6 id. 49.)

Section 274 of the Code is to be considered independent of the rule providing for cases to which the rule does not apply, viz.: cases in which there is no other mode of compelling the plaintiff to proceed. Thus, where the plaintiff dies, and the cause of action survives, and the representative in interest unreasonably neglects to be made a party, this motion may be made; and it is no answer for the plaintiff's attorney to say that he hopes to find a representative. (*Crawford v. Whitehead*, 1 Code Rep., N. S. 345. See *Chapman v. Foster*, 15 How. Pr. 241.)

By the terms of section 274 of the Code, the motion to dismiss may be made by the defendant served, in case of unreasonable neglect to serve the summons on other defendants. But a plaintiff may serve a summons containing the names of several parties defendants, on one of them only, and afterwards serve on him a complaint containing only the name of such defendant served, taking no proceeding against the defendants not served. In such a case the motion to dismiss will not be granted.

And that where the defendant himself is in a situation to notice the cause for hearing, a motion to dismiss for want of prosecution will not be granted. (c)

Where the defendant's answer is accompanied by a plea or demurrer, he cannot obtain an order to dismiss the bill for want of prosecution until the demurrer or plea have been disposed of. (d)

Neither can the defendant, by the English practice, move to dismiss the bill after the complainant has obtained and served an order to

(c) See also *Vermilyea v. Odell*, 4 Paige, 121.

(d) 2 Dan. Pr. 356, 85, 221.

(*Van Sant. Eq. Pr. 321; Travis v. Tobias*, 7 How. Pr. 90; *Robinson v. Frost*, 14 Barb. 536.)

A defendant who has not been served with a summons cannot voluntarily appear and make a motion to dismiss the complaint, (*Tracy v. Reynolds*, 7 How. Pr. 327;) unless, perhaps, in a case where the defendant not served has some right to protect, and the plaintiff neglects "to proceed in the cause against the defendant or defendants served." (*Van Sant. Eq. Pr. 322; Code, § 247, sub. 4.* And see *Higgins v. Rockwell*, 2 Duer, 650; *Waffle v. Vanderheyden*, 8 Paige, 45; *Georgia Lumber Co. v. Bissell*, 9 id. 226.) So, should the plaintiff, after serving the summons upon all the defendants, unreasonably neglect to proceed against one or more of them, by serving the complaint, they neglecting to take advantage of the delay, the parties served with the complaint may, under this section, move to dismiss the complaint; for the issues cannot be moved for trial until joined as to all, and the defendants served have no other remedy. (*Ibid.*)

If, after notice of motion to dismiss is served, a copy of the complaint is served on the defendant, the latter is not bound to return it immediately, or be deemed to have waived the right to make his motion. (*Baker v. Curtiss*, 7 How. Pr. 478; *Manderville v. Winne*, 5 id. 461; *Wirts v. Norton*, 25 Wend. 699.) Where the defendants' attorney served notice of retainer, and demand of a copy of the complaint, on the plaintiff at two several times (for several defendants), it was held that on proof of service of the first notice and demand, the defendant was entitled to move for a dismissal of the complaint at the end of twenty days after such first notice, and without waiting for the expiration of twenty days from the second notice and demand. (*Luce v. Tremper*, 9 How. Pr. 212.)

In *Travis v. Tobias*, (7 How. Pr. 90,) which was an action against non-residents, in which an attachment was issued and one of the defendants was served personally in this state, it was said the defendant thus served had no right to move for a dismissal of the complaint, under section 274. It is for those defendants who are not served to make the motion on the ground stated in that section.

It does not lie with the defendant served, and who is severally liable to the extent of all the damages in an action, without the right of contribution from the other defendants, to object that the summons has not been served on them. (*McKenzie v. Hackstaff*, 2 E. D. Smith, 75. And see *Robinson v. Frost*, 14 Barb. 536.) When the defendants are jointly liable, the rule is different. Then the defendants served may move for dismissal on these grounds. (*Kimberly v. Parker*, 34 How. 275, 280.)

Where a summons is served, stating that the complaint will be filed in the clerk's office of a certain county, a motion for judgment in favor of the defendant, not serving a copy of the complaint, must be made in that district, or in another district in a county adjoining the one in which it is stated that the complaint will be filed. (*Johnson v. Bryan*, 5 How. Pr. 355; S. C. 1 Code Rep., N. S. 46.)

A motion for judgment as in case of non-suit cannot be made by a single defendant, under section 274 of the Code, as that section provides only for those cases where there are several defendants, and the plaintiff has unreasonably neglected to serve the summons on some one of them, or to proceed in the cause against the defendant or defendants who may have been served. (*Kimberly v. Parker*, 34 How. 275; *Unger v. Forty-Second Street, &c., R. R. Co.* 6 Rob. 545; S. C. 4 id. 682; 30 How. 443.) If a plaintiff fails to prosecute his action against several defendants with diligence, one of such defendants may, in a proper case, and upon motion for that purpose, have the action dismissed as against him, leaving it to stand as against the other defendants. (*Ward v. Dewey*, 12 How. Pr. 193; *Bishop v. Morgan*, 1 Code Rep., N

amend. (e) But merely obtaining an order to amend, if it is not drawn up and served before the defendant moves to dismiss, will not prevent the dismissal of the bill. (f) The order to amend will, however, be in

(e) *Gully v. Van Bodicoate*, 5 Sim. 668.

(f) *Anon. l Ves 222. Morris v Owen*, 1 Ves. & B. 523.

S. 340; *Hoyt v. Loomis*, 1 Code R. 128.) The Code has not altered the rule of the former practice in suits in equity that where the plaintiff does not use due diligence a defendant who has perfected his answer may move to dismiss the suit. (*Salters v. Pruyn*, 15 Ab. 224.)

Where, after service of the summons and complaint, the defendant stays the plaintiff's proceedings until the costs of a former suit are paid, the defendant cannot move, under § 274, to dismiss the complaint, where the costs have not been paid, and the stay is still in force. (*Unger v. Forty-Second Street, &c.*, R. R. Co. 30 How. 443; S. C. 6 Rob. 545.) In order to move for a dismissal of the complaint, a defendant is not bound to notice the cause for trial, but may make the motion at special term. (*Miller v. Ring*, 18 Ab. 244; *Corbett v. Clafin*, 17 id. 418; *Bowles v. Van Horne*, 11 id. 84; S. C. 19 How. Pr. 346; *Roy v. Thompson*, 1 Duer. 636; S. C. 8 How. Pr. 253.) Yet if he places the cause on the calendar, he thereby waives his right to move, at a special term, to dismiss the complaint; especially if he neglects to move at the circuit. (*Miller v. Ring*, *supra*; *McCarthy v. Hancock*, 6 How. 28; S. C. 1 Code Rep., N. S. 188.) The defendant served may, without either demanding a copy of the complaint, or requiring the complaint to be filed, move to dismiss on the ground of unreasonable neglect to prosecute the action. (*Skinner v. Noyes*, 7 Rob. 223, 232.)

It seems that, as either party may notice and bring on the trial, where both parties notice the cause, neither can charge delay or default upon the other for not bringing on the hearing. (*Thompson v. Krider*, 8 How. Pr. 218.) Yet in *Corbett v. Clafin*, (17 Ab. 418,) it was decided that although the defendants had had the cause reserved on a former calendar, yet it was not their duty to keep it there; and when the plaintiffs allowed the cause to go off the calendar, the defendants might move to have the complaint dismissed for neglect to prosecute.

A defendant may, in all cases, move for a dismissal of the complaint where the plaintiff neglects to bring the cause to trial according to the course and practice of the court. The affidavit, however, upon which the motion is founded, must show that the cause was at issue in time to have been noticed, and that at the term for which it ought to have been noticed younger issues were tried. (*Roy v. Thompson*, 8 How. Pr. 253.) In *Hawley v. Seymour*, (8 How. Pr. 96,) on a motion by the defendant to dismiss the complaint, for the reason that the plaintiff did not bring the cause for trial at a previous circuit, it was held that the defendant was not guilty of laches in moving, where but one general term had intervened, and no special term had been held before that general term, at which he could have noticed the motion. Where the defendant has been offered his costs, he cannot successfully move for a dismissal on the ground of neglect to proceed. (*Ibid.*) In *Bowles v. Van Horne*, (19 How. Pr. 346; S. C. 11 Ab. 84,) where the court, viewing the plaintiff's conduct in a favorable light, thought the neglect to proceed had not been unreasonable, he was allowed to try the cause, provided he would pay the defendant's costs up to that time.

Delays, caused by frequent promises of the defendant to settle, are not good grounds for dismissing the complaint for want of prosecution. (*Doyle v. O'Farrell*, 5 Rob. 640.)

In *Chapman v. Foster*, (15 How. Pr. 241,) where one of several defendants died, pending the reference of an action which survived to his representatives, and the surviving defendant, who had appeared and answered, moved for a dismissal of the complaint, as to himself, for the plaintiff's neglect to proceed and bring in the heirs or devisees of the deceased defendant, either by motion or by supplemental complaint, the court directed an order that the complaint be dismissed as to the surviving defendant, with costs, unless the plaintiff, within sixty days from the service of the order, obtained leave to file, and filed, a supplemental complaint, and issued a summons thereon against the persons representing the interest of the deceased defendant.

If no sufficient evidence to sustain a verdict in favor of the plaintiff is given, it is the duty of the court to take the case from the jury, and to dismiss the complaint. (*Meyer v. Betz*, 3 Rob. 172; *Wilds v. The Hudson River R. R. Co.* 24 N. Y. 430, 433; *Johnson v. The Same*, 20 id. 73.)

time, if it be drawn up and served before the motion to dismiss is actually made; although it be after notice of the motion has been served. (g)

But by our practice, as we have already seen, amendments may be made without a special order of the court, except in cases of injunction bills. And indeed amendments of course may be made without entering any rule or order for that purpose. But no amendment is to be *considered as made until it is served upon the defendant, if he [*244] has appeared. (h)

If, upon the hearing of a cause, it is ordered to stand over, with liberty to the complainant to amend his bill by adding parties, in pursuance of which the complainant amends, but does not proceed any fur-

(g) *Peacock v. Sievier*, 5 Sim. 553.

(h) *Ante*, p. 222. Rule 43.

The dismissal of a complaint, on motion, at a special term, for want of prosecution, is a judgment in the action in favor of the defendant. (*Tillspough v. Dick*, 8 How. Pr. 33. And see *Robbins v. Wells*, 26 id. 15; S. C. 13 Ab. 191; 1 Rob. 666.)

A referee has no authority to dismiss the complaint and turn a plaintiff out of court for unreasonable neglect to proceed in the cause. That is a matter of practice which belongs solely to the court, and over which a referee has no jurisdiction. (*Holmes v. Slocum*, 6 How. Pr. 217.)

A judgment for the defendant, upon a dismissal of the complaint, in an action at law, is no bar to a subsequent action by the plaintiff for the same cause. (*Harrison v. Wood*, 2 Duer, 50.) A judgment of dismissal, under the Code, in such an action, has no other effect than that of a *non-suit* under the former practice. (*Ibid.* See, also, *Holmes v. Slocum*, *supra*.)

Where, by agreement of counsel, the trial was set down for a later day, at the circuit, and the court adjourned *sine die* before that day was reached, it was held that this agreement was a waiver, by the defendant, of any right of dismissal on account of the plaintiff's neglect to proceed previously. (*Fuller v. Sweet*, 9 How. Pr. 74.) Where the cause is not at issue as to all the defendants, and the plaintiff does not proceed as to those who have answered, the better practice is for the defendants served to move, at chambers, to dismiss the complaint as to them. (*Morris v. Crawford*, 16 Ab. 124; *Ward v. Dewey*, 12 How. Pr. 193.)

When a new trial is granted, on the application of the defendant, the order must be served on the plaintiff, or his attorney, before the defendant can move for a dismissal of the complaint for not proceeding to trial. Otherwise, where a new trial is granted on motion of the plaintiff. (*Robb v. Jewell*, 6 How. Pr. 276.)

A motion to dismiss the complaint, for delay in bringing the cause to trial, will be denied if the delay be shown to be not unreasonable. (*Perkins v. Butler*, 42 How. 102.) Even if the delay be shown to be *unreasonable*, the court is not absolutely required, under subdivision 4, of section 274 of the Code, to dismiss the complaint. It may give the plaintiff an opportunity to bring the cause to trial, on such terms as may be just, even though the delay may be unreasonable; and may also refuse to entertain the application, altogether, on the ground that there is no necessity for it, inasmuch as the defendant had it in his power to bring the cause to trial as soon as it was reached, according to the course and practice of the court. (*Ibid.*) Were it not that, by recent statutes, the sum of \$15 is required to be paid on placing a cause upon the calendar, which outlay primarily devolves upon the plaintiff, it seems the courts would refuse to entertain special motions to dismiss for omitting to bring to trial. But, in view of this required payment, it seems to be proper to entertain these motions; since it is hardly just to require the defendant to make an advance payment (which the plaintiff ought to make,) for the purpose of getting an action against him in a situation that the plaintiff may try it. (*Ibid.*)

Where the receiver of an insurance company is appointed pending an action in which the company is plaintiff, the receiver may continue the action in the name of the original party. Hence, when such action is regularly called, on the calendar, the defendant may move for, and obtain, a regular order dismissing the complaint, without first substituting the receiver as plaintiff. (*Albany City Ins. Co. v. Van Franken*, 42 How. 251.)

ther, the defendant may move specially to dismiss the bill for want of prosecution, and is not bound to set the cause down again. (i) And it seems that if the order allowing the cause to stand over directs that it shall stand over for a limited time, within which the complainant is to add the necessary parties, in default of which, the bill is to be dismissed with costs, and the complainant does not add the parties within the limited time, no further application need be made to dismiss the bill; as it is already out of court. (k) (21)

If notice of motion to dismiss for want of prosecution be given for too early a day, the defect is not cured by the motion being accidentally postponed to a day when it might have been regularly made. (l)

The defendant cannot move to dismiss the bill for want of prosecution pending an abatement of the suit by the death, marriage, or bankruptcy of a complainant. (m)

It has been decided in this state, however, that upon the abatement of a suit by the death of one of several complainants, it is at the election of the surviving complainants whether they will revive the suit. And the court will limit a time within which they shall make that election; and if they do not revive within the time limited, the court will order that they be precluded from any further prosecution of the suit. (n)

In order to prevent a dismissal of the bill upon the application of the defendant, the complainant must show that he is unable to go on, because some of the defendants have not answered, and that he has used due diligence to obtain their answers.

As to what is due diligence, that is a question necessarily depending upon the circumstances of each case. It is necessary, however, for the complainant to show, that where it has been in his power to do so, he has resorted to the usual process of the court to compel an answer. Thus where the complainant's solicitor made an affidavit that he had [*245] *frequently called on the clerk in court for the defendants who

(i) *Mitchell v. Lowndes*, 2 Cox. 15.

(k) *Vide Stevens v. Praed*, 2 Cox, 374.

(l) *De Genere v. Hannan*, 1 Russ. & My. 494.

(m) 2 Dun. 359. *Caulham v. Vincent*, 8 Sim. 277. *Sellers v. Dawson*, 2 Dick. 733. *Hall v. Chapman*, 1 Dick. 348. *French v. Barton*, 18 Ves. 425, n. 2 Sim. & Stu. 496. But see *Adamson v. Hall, Tur. & R.* 238. 23 Legal Obs. 411.

(n) *Pells v. Coon*, Hopk. 450.

(21) It was in the discretion of the court of chancery, where the necessary parties had not been brought in, and an objection for want of parties was taken, either to dismiss the bill on the hearing, or to order the cause to stand over, and the proper parties to be brought in. (*Van Eps v. Van Deusen*, 4 Paige, 75; *Greenleaf v. Queen*, 1 Peters, 138; *Van Sant. Eq. Pr.* 84.) But it is said by WILLARD, J. (in *Vanderwerker v. Vanderwerker*, 7 Barb. 221,) the rule indicated by the Code (§ 173,) is, in all cases, to allow an amendment by ordering, at the hearing, the cause to stand over, and the proper parties to be brought in, on such terms as the court may prescribe.

had not answered, and threatened an attachment, but had not issued one, the court was of opinion that an attachment ought to have been issued. (*o*)

Where a bill has been amended against the other defendants, and they have been served with a subpoena to answer the amended bill, the circumstance of their time for answering the amended bill not having expired, will be a sufficient reason for not dismissing the bill. (*p*) So, if one of the other defendants has died, without answering the bill, and the complainant has had no opportunity to revive the suit against his representatives, either from the circumstance of no representatives having been constituted, or from their not having been constituted in sufficient time to enable the complainant to revive against them, the court will probably allow the complainant sufficient time to enable him to get the representatives before the court. But in a case of that nature, he must show that previous to the abatement of the suit, he used due diligence to procure the answer of the original defendant. (*q*)

Although a bill which has been dismissed for want of prosecution, is so effectually out of court that no motion or proceeding can be had in the cause, except for the purpose of carrying the order of dismissal into effect, it seems that the court will, under certain circumstances, entertain a motion to restore it. (*r*) It is not, however, the ordinary course of the court to restore a bill which has once been dismissed. It must be shown that substantial justice requires that it should be done; and then, upon the particular circumstances, the court will make the order. (*s*) And there is no instance to be found in which the court has restored a bill which has been regularly dismissed, for the mere purpose of agitating the question of costs. (*t*)

The method of restoring a cause, after a dismissal for want of prosecution, appears to be by obtaining an order to discharge the order dismissing the bill; which can be procured only upon the terms of the complainant's paying the costs of obtaining that order and of the application for the order to discharge it. In *Jackson v. Purnell*, (*u*) the order appears to have been made upon the complainant's undertaking to amend within a week, amending the office copy, and not requiring any *further answer, and to reply forthwith, and speed his cause [*246] to a hearing. (*v*)

(*o*) *Gully v. Van Bodicoate*, 5 Sim. 668.

(*p*) *Partington v. Bailie*, 5 Sim. 667.

(*q*) 2 Dan. 371.

(*r*) *Jackson v. Purnell*, 16 Ves. 204. For. Rom. 112.

(*s*) *Hannam v. South London Waterworks Co.* 2 Mer. 63.

(*t*) *Id. ib.*

(*u*) 16 Ves. 204.

(*v*) *Vide* 3 Ves. & B. 1 n. S. C.

Where a bill is dismissed for want of prosecution, it operates as a discontinuance of the suit, and does not prevent the bringing of a new bill. (*w*)

In order to procure a dismissal of the bill for want of prosecution, draw up an affidavit stating that the cause is in readiness for hearing on bill and answer as to the defendant applying; the time when his answer was put in, and so much of the complainant's proceedings with respect to the other defendants, as to show that he has not used due diligence in proceeding against them.

Swear to this affidavit, and serve a copy upon the complainant's solicitor, together with a notice of motion to dismiss the bill for want of prosecution, to be made on some regular motion day within the time specified in the 89th rule.

A motion to dismiss the bill may be made by a person named as a defendant in the prayer for process, and who has appeared and answered without the service of a subpoena. (*x*)

SECTION II.

CROSS-BILL.

This is the proper stage of the cause for filing a cross-bill, but it will be more convenient to reserve the consideration of the subject until we come to speak of the different kinds of bills. (See *post*, Book IV, chap. 9.)

SECTION III.

PUTTING COMPLAINANT TO HIS ELECTION.

If a complainant sues a defendant at the same time, and for the same cause, at law and in equity, the defendant may apply to this court for [*247] *an order that the complainant make his election in which court he will proceed. (*y*) (22)

(*w*) *McBroom v. Sommerville*, 2 Stew. 515.

(*x*) *Hume v. Babington*, 1 Hogan, 8.

(*y*) *Mitr.* 249.

(22) *Rogers v. Vosburgh*, (4 John. Ch. 84;) *Livingston v. Kane*, (3 id. 224; *Sawyer v. Wood*, (id. 416;)) *Gibbs v. Perkinson*, (4 Hen. & Munf. 415.) In such a case, the defendant cannot plead the pendency of the suit at common law in bar of the suit in equity. (1 Dan. Ch. Pr. 3d Am. ed. 658; Story's Eq. Pl. §§ 741, 742; *Jones v. Earl of Strafford*, 3 Peere Wms. 90.)

A party cannot be put to his election between his remedies at law and in equity,

This motion must be made after the defendant has put in his answer; and the order is, that the complainant elect within eight days after the service thereof; and that if he elects to proceed at law, the bill be dismissed.(z)

If the complainant, after an order to elect, elects to proceed in equity, this court will restrain his proceedings at law by injunction.(a) But if he elects to proceed at law, and fails there, the dismissal of his bill will be no bar to his filing a new bill for the same matter.(b)

Where a judgment had been given at law, that a power of sale had not been well executed, the defendants at law, under the alleged execution of the power, filed a bill in equity to have the defect in the execution of the power supplied, and the instrument by which it had been executed rectified; and they, at the same time, prosecuted a writ of error on the judgment; the suit in equity having been brought to a hearing, it was held that the complainants in equity were bound to elect either to have the bill dismissed, or to abandon the writ of error.(c) So where a creditor filed a bill to set aside or obtain relief against a judgment at law, confessed by his debtor, in favor of a third person, on the ground of fraud, and during the pendency of his suit in equity, he proceeded at law, recovered a judgment and issued execution, under which the property of the debtor was advertised for sale, the court ordered the complainant to make his election, either to stay execution during the continuance of the injunction, or consent to have the in-

(z) *Jones v. Earl of Stafford*, 3 P. Wms. 90. 1 Ves. & B. 381. *Rogers v. Vosburgh*, 4 John. Ch. Rep. 84.

(a) Mitf. 249. *Rogers v. Vosburgh*, *supra*.

(b) Id. ib. *Countess of Plymouth v. Bladon*, 2 Vern. 32.

(c) *Cockerel v. Cholmeley*, 1 Russ. & My. 418. 6 Bligh, N. S. 120, S. C.

where he is plaintiff in one suit and defendant in the other. (*Botts v. Cozine*, 2 Edw. 583.) But where, pending an appeal, in an action at law, a party files a bill for relief as to the same subject matter, he will be compelled to elect in which court he will proceed. (*Gibbs v. Perkinson*, 4 Hen. & M. 415.)

Where a party proceeds both at law and in equity, though the object of the suit is to recover the same property, in each, yet if the ground relied upon for relief in each tribunal is different, and a full remedy cannot be afforded by either, upon the ground relied on in the other, he will not be put to his election. (*Coleman v. Cross*, 4 B. Monr. 268.) Where a complainant filed his bill in a court of chancery, for relief against a judgment at law, and subsequently sued out a writ of error to the supreme court, on the judgment, an order was granted compelling him to elect in which court he would proceed. (*Webb v. Williams*, Walker Ch. 452.) On a motion to compel a complainant so to elect, it is not necessary to serve a copy of the proceedings in the supreme court, with notice of the motion. (Ibid.)

Where two proceedings are carried on in equity for the same object, the court may compel the complainant to elect which bill he will dismiss, and need not require a plea in abatement. (*Moore v. Gibbs*, 3 B. Monr. 77.)

Where the remedies at law and in equity are inconsistent, any decisive act of the party, under either jurisdiction, with knowledge of his rights, and of the facts, determines his election. (*Sawyer v. Wood*, 3 John. Ch. 416. See *Combs v. Turlton*, 2 L. Monr. 194.)

The court will allow the party a reasonable time to make his election. (*Brocken v. Martin*, 3 Yerges, 55.)

junction dissolved. And the complainant refusing to make an election, the injunction was forthwith dissolved. (*d*)

But the complainant will not be put to his election where the bill is for discovery only, and no relief prayed; for from the discovery he may be able to proceed at law, when without it he could not. (*e*)

If the complainant considers that the bill and action are for different matters, and that he ought not to be compelled to elect, he may oppose the motion on that ground; and the court will examine the pleadings in each suit, and generally decide without further inquiry. But the [*248] ordinary practice is to obtain an order of reference to ascertain if the complainant's proceedings at law and in equity relate to the same matters. (*f*) This, however, is granted only in cases of difficulty. If it clearly appears that both suits are not for the same matter, the court will determine without the reference. (*g*)

If a reference is granted, it operates as a stay of proceedings in both suits, in the meantime. (*h*)

If the master reports that the matters of the two suits are distinct, the order for the complainant to elect will be discharged, with costs. (*i*)

The right to put the complainant to an election is not confined to suits brought in our own courts; but he may be compelled to elect whether he will proceed in this, or in a foreign court. (*k*) (23)

The complainant is entitled to a complete answer before he can be put to his election; for possibly he cannot decide in which court it would be most advisable he should prosecute his claim, until he has a full and complete answer from the defendant. He therefore cannot be put to his election, after exceptions are filed, until they are answered. And it is irregular to obtain an order to elect, before the common time for filing exceptions has expired. (*l*)

And inasmuch as a plea avers there is no relief to be given in equity,

(*d*) *Livingston v. Kane*, 3 John. Ch. Rep. 22.

(*e*) *Forum Romanum*, 201.

(*f*) *Boyd v. Heinzelman*, 1 Ves. & B. 381. *Mouselle v. Basnet*, id. 382. *Mills v. Fry*, 3 id. 9.

(*g*) *Mills v. Fry*, *supra*.

(*h*) *Ibid.* *Carwick v. Young*, 2 Swanst. 239.

(*i*) *Mouselle v. Basnet*, *supra*.

(*k*) *Pieters v. Thompson*. Coop. Rep. 294.

(*l*) *Browne v. Poyntz*, 3 Mad. Rep. 24. *Abel v. Cave*, 2 B. Monro, 159.

(23) The mere pendency of a suit in a foreign court, or in a court of the United States, cannot be pleaded in abatement, or in bar, to a suit for the same cause in a state court. (*Mitchell v. Bunch*, 2 Paige, 606; *Salmon v. Wooton*, 9 Dana, 423. But see *Hart v. Granger*, 1 Conn. 154.) But where a judgment debtor has been sued upon the judgment, in the circuit court of the United States, sitting within the state, and held to bail in that suit, and a bill has also been filed against him in the court of chancery to obtain payment of the same judgment, and a *ne exeat* issued thereon against him, the *ne exeat* will be discharged, unless the complainant elects to release the defendant from his arrest and bail in the circuit court of the United States. (*Ibid.*)

if the defendant has pleaded, even to a part of the bill, the order to elect will be discharged; as such an order supposes that relief can be obtained in both tribunals. (*m*)

A special application to the court, on notice to the complainant's solicitor, is necessary, to obtain an order that the complainant elect. (*n*) Which application should be founded on an affidavit stating that the two suits were brought for the same purpose, and upon copies of the pleadings in each suit, to show that the matters in both suits are identical. (24)

*CHAPTER IX.

[*249]

REPLICATION.

Nature and office.] A replication is the complainant's reply to the defendant's plea or answer. It is a mere averment of the truth and sufficiency of the bill, and a denial of the allegations in the answer. (*a*) Its office is merely the production of the issue. (1)

(*m*) *Vaughan v. Welsh*, Mosely, 210. *Anon.* id. 304. *Fisher v. Mee*, 3 Mer. 45.

(*n*) *Livingston v. Kane*, 3 John. Ch. 224. 4 id. 84. 1 Hoff. Pr. 342.

(*a*) *Barton*, 142.

(24) *Judgment by consent, upon the offer of a party*, see ante, p. 201, (98,) Note 5.

(1) REPLY, WHEN ALLOWED; WHEN NECESSARY OR PROPER.

Since the Code, the reply is equivalent to, and takes the place of, the replication under the former practice.

Section 153 of the Code provides that when the answer contains new matter, constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer; and the plaintiff may demur to one or more of the defences or counter-claims contained in the answer, and reply to the residue of the counter-claims.

In other cases, when an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case the reply shall be subject to the same rules as a reply to a counter-claim. (*Ibid.*)

No reply will be allowed unless the answer contains a counter-claim. (*Devlin v. Bevins*, 22 How. Pr. 290; *Brown v. Spear*, 5 How. Pr. 146; S. C. 3 Code R. 192; *Williams v. Upton*, 8 How. Pr. 205; *Silliman v. Eddy*, id. 122; *Putnam v. De Forest*, id. 146; *Simpson v. Loft*, id. 234; *Loomis v. Dorshimer*, id. 9; *Reilay v. Thomas*, 11 How. Pr. 266.) And if an unnecessary reply is pleaded, a motion to set it aside for irregularity in the verification will be denied, the irregularity being of no consequence. (*Silliman v. Eddy*, *supra.*) The word "defence" in section 154 of the Code is to be understood as meaning "counter-claim." (*Devlin v. Bevins*, 22 How. Pr. 290.) An answer containing a counter-claim will be taken as true, unless replied to. (*Clinton v. Eddy*, 1 Laus. 62; S. C. 54 Barb. 54; 37 How. 23.) A reply that the plaintiff denies all those allegations of the answer contained within certain specified folios, is good as a general denial. (*Gassett v. Crocker*, 9 Ab. 39.) By replying to a

If the complainant wishes to prove any fact, on the hearing, not admitted by the answer, he must file a replication. (b) And sometimes,

(b) *Mills v. Pittman*, 1 Paige, 490.

counter-claim, the plaintiff thereby waives all objections to its form, or amendable defects. (*Ayres v. O'Farrell*, 10 Bosw. 143. See *Smith v. Countryman*, 30 N. Y. 655.)

In an action for an accounting, against a general assignee for the benefit of creditors, an answer alleging that the defendant has incurred expenses in relation to the assigned property does not require a reply. (*Duffy v. Duncan*, 35 N. Y. 187; S. C. 32 Barb. 587.) So an answer, in an action to recover possession of personal property, alleging that the defendant has a lien on the property, and claims damages for the taking of it from him in the action, does not set up a counter-claim, so as to require a reply. (*De Leyer v. Michaels*, 5 Ab. 203; *McKenzie v. Farrell*, 4 Bosw. 193.)

A counter-claim in the answer may be met by one in the reply. (*Miller v. Losee* 9 How. Pr. 356. But see *Stewart v. Travis*, 10 id. 148.) Setting out the cause of action a second time, in the reply, is not allowable. (*Stewart v. Wallis*, 30 Barb. 344; *Shull v. Green*, 49 id. 311; S. C. 34 How. 418.)

An answer of the statute of limitations presents a proper case for an order that the plaintiff reply. In such a case, it is not generally necessary that the defendant should allege his ignorance of the grounds on which the plaintiff intends to rely. (*Hubbell v. Fowler*, 1 Ab., N. S. 1.)

Where an answer and demurrer on one paper—the demurrer immediately following the answer—were served, and a reply to the answer was served, and the demurrer noticed for argument, but before the expiration of the twenty days from the service of the reply, an amended answer was served, which was an exact copy of the original, except the demurrer, which was left off; it was held that the plaintiff was not bound to reply to the amended answer; the reply already served being sufficient. And that the answer was not, in fact, amended. (*Howard v. Michigan Southern R. R. Co.* 5 How. Pr. 206; S. C. 3 Code Rep. 213.)

A reply denying averments in the answer which are material to the pleading of a proper counter-claim, will not be stricken out as frivolous. (*Wood v. Mayor, &c., of New York*, 3 Ab., N. S. 467; S. C. 4 id. 152.)

Every material allegation of new matter, in an answer, constituting a counter-claim, not controverted by the reply, as prescribed in section 153 of the Code, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require. (Code, § 168.)

Sometimes the form of the pleading will render a fact material which otherwise would not be so. (*Livingston v. Miller*, 8 N. Y. 289; *Hatch v. Peet*, 23 Barb. 575.)

Section 168 must be confined to allegations of fact, and cannot refer to an averment of the legal construction or effect of written instruments; and it never can be applied to the intention or meaning of the parties, when they execute a written instrument. To adopt any other construction would be to subvert the rules of pleading, as well as the plainest principles of justice. That part of an answer which relates to the meaning of an agreement must be deemed an immaterial allegation, and as the plaintiff cannot interpose a demurrer, it will be disregarded at the trial. Nor is such an answer ever to be deemed equivalent to an allegation of mistake, or surprise, in the execution of the agreement, so that the defendants will be entitled to have it modified on either of these grounds. (*Barton v. Sackett*, 3 How. Pr. 358; S. C. 1 Code Rep. 96.)

Where the complaint alleged that on a day named, the parties to the action entered into an agreement, which was signed by the defendant, setting forth its terms, and the answer admitted that the defendant signed and executed the contract, as alleged in the complaint, it was held that no proof of a contract was necessary. (*Spear v. Hart*, 3 Rob. 420.)

If the facts set up in an answer as a counter-claim are neither demurred nor replied to, they are to be taken as true, and the defendant will be entitled to relief thereon. (*Lawrence v. Bank of the Republic*, 3 Rob. 142.) Where an answer sets forth a demand against the plaintiff; but it contains no expressions importing that the defendant claims to recover on it against him, such statement will not constitute a counter-claim, but is a defence, merely; and such an averment will not stand admitted, though not replied to. (*Bates v. Rosekrans*, 37 N. Y. 410; S. C. 4 Ab., N. S. 276.) Where the defence of infancy is interposed, it may be deemed controverted and denied, under section 168, without any reply. (*Hodges v. Hunt*, 22 Barb. 152.) So as to the defence of the statute of limitations, (*Esselstyne v. Weeks*, 2 E. D. Smith, 116; or usury. (*Cutler v. Wright*, 22 N. Y. 472.)

though he should happen to need no witness on his part, yet it may be necessary to reply, for the purpose of putting the defendant to prove

If the assignee of a claim brings an action thereon, a demand in favor of the defendant and against the assignor, which existed prior to the assignment, cannot be set up as a counter-claim; and if it is so pleaded, no reply thereto is necessary. (*Dillage v. Niles*, 4 Ab. 253.) In an action to recover the price of personal property sold, an answer claiming to recoup for a breach of warranty as to such goods, is a counter-claim, and unless replied to will be considered admitted, on the trial. (*Lenon v. Trull*, 13 How. Pr. 248.)

A reply is only called for where the new matter set up in the answer constitutes a cause of action against the plaintiff to the record, independent of the plaintiff's cause of action, and which would entitle the defendant to maintain an action against the plaintiff if the latter had not sued the defendant. (*Nichols v. Boerum*, 6 Ab. 290.) If the new matter set up in an answer shows that the plaintiff had no cause of action, or tends to defeat his recovery, in whole or in part, this needs no reply. (*Ibid.*)

When an action is brought upon a promissory note, against the maker thereof, and the defendant answers that she is a married woman and was such when she gave the note, this answer is sufficient to throw upon the plaintiff the necessity of a reply, which shall show the consideration of the note, and that it was given to benefit her separate estate. (*Scudder v. Gori*, 18 Ab. 223; S. C. 3 Rob. 661.) Where the facts pleaded in an answer constitute, in contemplation of law, the defence of payment, no reply is necessary; and an averment that the defendants will insist upon these facts as constituting a counter-claim will not alter their legal effect. (*Burke v. Thorne*, 44 Barb. 363.)

A reply is limited to matter set up as a counter-claim, and is not proper to an answer setting up payment, in whole or in part. The allegation of such payment is considered as denied without a reply, and must be proved by the defendant, on the trial; which proof may be refuted by the plaintiff. (*Bracket v. Wilkinson*, 13 How. Pr. 102.) When an answer has set up the statute of limitations, as a defence, it is proper for the court to require, upon the defendant's motion, that the plaintiff serve a reply. (*Hubbell v. Fowler*, 1 Ab., N. S. 1.) And where the defendant thus moves to compel a reply, it is not, usually, necessary that he should state that he does not know upon what ground the plaintiff intends to rely, to defeat such answer of the statute. (*Ibid.*)

When the complaint avers the sale and delivery of a bill of goods, on a certain day, whereby the defendant is indebted, &c., and the answer avers that the goods were bought on credit, and that the term of credit is unexpired, a reply is unnecessary. (*Gilbert v. Cram*, 12 How. Pr. 455.)

The Code of *Kentucky* provides that there shall be no reply, except upon the allegation of a counter-claim or set-off in the answer. (Code, § 132.) Yet where lapse of time is relied on by the defendant, the plaintiff has a right, on application to the court, to amend his petition and allege a subsequent promise. (*Taylor v. Pendleton*, cited, *Myers' Code*, p. 392.) When a reply contains matter inconsistent with the petition [complaint], the defendant should object to the filing of it, or move to strike out the inconsistent matter. If he fails to do so, he cannot raise the objection in the court of appeals. (*Barbaroux v. Barker*, 4 Met. 47.) A reply to a counter-claim or set-off may contain any matter of avoidance which might, under the former system of pleading, have been set forth by replication; provided it is not inconsistent with the petition. (*Ibid.*) The rule laid down in 16 B. Mon. 335, and in *Francis v. Francis*, (18 id. 66,) as to general denials being insufficient, on demurrer, applies to a reply to a counter-claim. (*Mercantile Ins. Co. v. Phillips*, cited, *Myers' Code*, p. 392.) A reply to a set-off, denying the correctness of each and every item in an account setting forth specific services performed, is too vague and general, and the reply not good. (*Whitaker v. Sandifer*, 1 Dav. 231.)

In *California*, under the statute, the affirmative allegations of the answer stand controverted by the plaintiff, the burden being on the defendant to prove their truth, rendering a reply unnecessary. (*Bryan v. Munno*, 28 Cal. 235.) And a counter-claim or matter in avoidance, set up in an answer, need not be denied by the plaintiff, to put the defendant upon his proof. (*Herold v. Smith*, 34 Cal. 120.) The amendments of 1866 introduced a new pleading, called a cross-complaint. When the answer contains a cross-complaint, it must be replied to, so far as the cross-complaint is concerned, or the matters therein alleged will be taken as confessed; but in no other respect is the plaintiff required to reply to the answer. (*Ibid.*)

In *Pennsylvania*, when the replication puts in issue the averments of the answer, it

the allegations in his answer; as where he confesses the matter alleged by the complainant, but sets forth some further matter in bar of the complainant's equity. (c) For if no replication is filed, the defendant's answer will be taken as true, and no evidence can be given by the complainant to contradict it. (d) (2)

(c) Prac. Reg. 375.

(d) *Pierce v. West*, 1 Peters' C. C. Rep. 351. *Pickett v. Chilton*, 5 Munf. 467.

throws upon the defendant the burthen of sustaining them. (*Naglee's Estate*, 52 Penn. 154.)

In *Ohio*, when the answer contains new matter, the plaintiff may reply to such new matter, denying generally or specifically, each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition [complaint], constituting an answer in law to such new matter. (Code, §§ 84, 101.) Where the plaintiff fails to demur to the new matter set up in the answer, and replies, thereby waiving any objection that he might have made to its consideration by the court, the court will not, of its own motion, refuse to consider it. (*Evans v. Hall*, 1 Handy, 434.) No reply is allowed by the Code in proceedings in mandamus. Section 577 of the Code provides that "no other pleading or written allegation is allowed than the writ and answer." The allegations of fact in the answer inconsistent with the statements of fact in the writ will, for the purposes of the proceeding, and to join an issue or issues therein, be deemed controverted, as upon a specific denial, without reply. (*State ex rel. Beckel v. Union Township*, 9 Ohio State Rep. cited Seney's Code, p. 146.) A statement, in a reply, that the plaintiff "knows nothing" of an allegation, "except what he learns from the counter-claim itself," is neither a general nor a specific denial. The allegation must be considered as not controverted, and must, for the purposes of the action, be taken as true, under section 127 of the Code. (*Smith v. Woodruff*, 1 Handy, 276.) When it appears that a new party is necessary to a final decision upon the counter-claim, the court may either permit the new party to be made by a summons, to reply to the counter-claim, or may direct the counter-claim to be stricken out of the answer and made the subject of a separate action. (Code, § 96.) Upon a demurrer being overruled, the party who demurred may answer or reply, if the court be satisfied that he has a meritorious claim or defence, and did not demur for delay. (Code, § 136.)

Section 59 of the Code of *Wisconsin* is the same as section 153 of the Code of *New York*, and contains the additional provision that the section shall not be construed to permit a plaintiff to reply a separate cause of action which he might have inserted in his complaint.

In *Kansas*, section 110 of the Code provides that there shall be no reply, except upon the allegation of a counter-claim or set-off, in the answer. Section 111 is nearly identical with section 153 of the Code of *New York*. So, also, is section 75 of the Civil Code of *Minnesota*. Section 137 of the Code of *Kansas*, as amended in 1862, provides that every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the reply shall be deemed controverted by the adverse party, as upon direct denial or avoidance. Allegations of value, or of amount of damage, shall not be considered as true by failure to controvert them. (Comp. Laws of 1862, p. 236, § 2.)

(2) MOTION FOR JUDGMENT, ON FAILURE TO REPLY.

Section 154 of the Code provides that if the answer contains a statement of new matter constituting a counter-claim, and the plaintiff fails to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement; and if the case require it, a writ of inquiry of damages may be issued. Section 60 of the Code of *Wisconsin* is the same.

The omission of a defendant to move for judgment, under this section, will not preclude him from taking advantage, on the trial, of admissions made by the pleadings. (*Bridge v. Payson*, 5 Sandf. 210.)

All the papers required for a motion, under this section, are, the summons, complaint, answer and notice of motion. The motion clearly relates only to a case where the answer relies on new matter. (*Brown v. Spear*, 5 How. Pr. 146; S. C. 9 N. Y.

And on a bill for a divorce, or to annul a marriage contract for any other cause than physical incapacity, if the material allegations in the bill are denied by the answer, the complainant must file a replication; otherwise the defendant may apply to have the bill dismissed. (e)

A replication may be filed as well to a plea as to an answer; and this, whether the plea be accompanied by an answer or not. It is to be observed, however, that if the complainant replies to a plea before it has been argued, he admits the plea to be valid, if true; and that he cannot afterwards object to it on the ground of its invalidity or irregularity. (f).

Where a defendant puts in a general disclaimer to the whole bill, the complainant ought not to reply to it. It is otherwise, however, where the disclaimer is to part, and there is an answer or plea to another part *of the same bill. In such cases there may be a replication to [*250] such plea or answer. (g)

(e) Rule 167.

(f) *Hinde's Ch. 225. Harris v. Ingledew, 3 P. Wms. 94. Danels v. Taggart, 1 Gill & John. 312.*

(g) *Williams v. Longfellow, 3 Atk. 582. Curs. Canc. 209.*

Leg. Obs. 97; 3 Code Rep. 192.) In all cases judgment can be rendered only by the court, when sitting as such. (*Dymar v. Chace, 12 Barb. 301; S. C. 1 Code Rep., N S. 330.*)

Where the complaint and answer formed an issue of law, without bringing up the merits, and the plaintiff alleged that through a mistake he omitted to reply, he was allowed to reply on terms, although the case had been heard before a referee. (*Merritt v. Slocum, 3 How. Pr. 309; S. C. 1 Code Rep. 63.*) In *Montecarbole v. Mundel, (16 How. Pr. 141.)* where the plaintiff had leave to reply on payment of \$10 costs, and instead of replying and paying the costs, he noticed the cause for trial, it was held, on motion for judgment for want of a reply, that he must pay \$10 for costs accrued previous to the order, and \$10 costs of the motion for judgment, and serve his reply in three days.

Where, under section 154 of the Code, the plaintiff fails to reply or demur to the new matter in an answer constituting a counter-claim, the defendant is not entitled to a judgment for the full amount thereof, unless the plaintiff fails to establish his cause of action; and he can only recover the excess over the plaintiff's recovery where the plaintiff succeeds as to any part of his claim. (*Kelsy v. Tremaine, 29 How. 439.*) Where the counter-claim sets up that the plaintiff took and detained the defendant's property, the plaintiff, by omitting to reply, does not admit the value of the property, nor the amount of damages. (*McKenzie v. Farrell, 4 Bosw. 192.*) A claim of set-off under the statute, (2 R. S. 354, § 12, sub. 9,) against a plaintiff who sues on a note assigned to him after maturity, is no counter-claim within the definition of the Code, and does not require a reply. (*Thompson v. Sickles, 46 Barb. 49.*) Where an answer does not deny any allegation in the complaint, except incidentally, in the course of pleading new matter, and the plaintiff serves no reply, the defendant is entitled to a judgment dismissing the complaint. (*Comstock v. Hallock, 1 Code Rep., N. S. 200.*)

In *Indiana*, if the plaintiff does not reply within the time prescribed, the court is required forthwith to enter judgment as upon a default. (2 R. S. 42, § 69.) When, through mistake or otherwise, no order to reply is entered, the plaintiff, under the new practice, by failing to reply to any one of the defences, admits the truth of the substantial new matter therein contained. (2 R. S. 44, § 74; 8 Ind. 150; 6 id. 385.)

By section 75 of the Civil Code of *Minnesota*, if the answer contains a statement of new matter constituting a defence or counter-claim, and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move, on a notice of not less than eight days, for such judgment as he may be entitled to upon such statement, and the court may thereupon order a reference, or assessment of damages by a jury, in its discretion.

Formerly, if the defendant, by his plea or answer, offered new matter by way of defence, the complainant replied specially to the new matter. But latterly the use of a special replication has been discontinued. And if the complainant wants to avoid the effect of matter pleaded in bar, his proper course is to apply to amend the charging part of his bill. This charging part, containing the alleged pretences of a defendant, and the complainant's denial of them, amounts, virtually, to a special replication. (*h*)

Indeed, by the 65th rule, special replications are prohibited from being filed, except by leave of the court, on cause shown; the general replication being sufficient to put the cause at issue. (3)

By the existing practice the complainant is to be relieved according to the form of his bill, whatever new matter may have been introduced by the defendant's plea or answer. (*i*) (4)

Form of.] A replication is entitled in the same manner, *mutatis mutandis*, as an answer; and commences with a general saving of the advantage of exception to the manifold insufficiencies of the answer; which is followed, (when it is a general replication,) by an averment and offer to prove that the matters in the bill are true, certain, and suf-

(*h*) *Storms v. Storms*, 1 Edw. 338. *Dupote v. Massy*, Cox's Dig. 146. Mitf. Pl. 322.

(*i*) Mitf. 322.

(3) By the 45th Equity Rule of the *United States* courts, no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

In *Massachusetts*, by rule 14 of the rules for practice in chancery, "no special replication to an answer shall be filed but by leave of the court, or one of the justices thereof, for cause shown."

(4) DEMURRER TO REPLY.

If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof (Code, § 155.)

The term "insufficient," used in this section, seems to refer to the matter stated in the replication. (*White v. Joy*, 13 N. Y. 83, 89.) A reply may be demurred to for insufficiency. The demurrer must state wherein it is insufficient; otherwise the plaintiff may move to have it struck out, or made more definite. (*Ib.*) Departure is when a party quits or departs from the case he has first made, in his complaint, and has recourse to another, in his reply. It is not a ground of demurrer, but is an irregularity, which may be corrected on motion. (*Ib.*)

It is a well settled principle that, upon the determination of a demurrer to any pleading, judgment must be given against the party who has committed the first error. (*Newman v. Supervisors of Livingston County*, 1 Lans. 476. See *Noxon v. Bentley*, 7 How. Pr. 316.) Therefore, on demurrer to a reply, although the reply is bad, yet if the answer is bad, in substance, the plaintiff is entitled to judgment. (*Halliday v. Noble*, 1 Barb. 138; S. C. 1 N. Y. 330.)

In *Kentucky*, where the facts stated in the reply do not amount to a sufficient defence, the defendant may demur. (Code, § 134.) A demurrer to a reply will extend to the complaint for the purpose of attacking the jurisdiction of the court. (*Freeman v. Robinson*, 7 Ind. 321.)

In *Ohio*, the defendant may demur to a reply. (Code, §§ 84, 101.) So, also, in *Wisconsin*, (Code, § 61,) *Kansas*. (Code, § 112,) *Minnesota*, (Civil Code, § 75.)

ficient in law to be answered unto, and that the answer of the defendant is uncertain, untrue, and insufficient to be answered unto. It then concludes with a general traverse of all the matters contained in the answer. (5)

(5) FORM AND REQUISITES OF REPLY.

The form of the reply is prescribed by section 153 of the Code.

In all cases of more than one distinct cause of action or reply, the same must not only be separately stated, but plainly numbered. (Rule 25 of Supreme Court.) A failure to comply with this rule subjects every allegation which is not essential to a single cause of action, to be stricken out, if objected to as redundant. (*Benedict v. Seymour*, 6 How. Pr. 298; *Lippencott v. Goodwin*, 8 id. 242, 243, a.; *Robinson v. Judd*, 9 id. 378, 382.)

Where distinct causes of action are not separately stated, or plainly numbered, the remedy is by motion to set aside the pleading, (*Dorman v. Kellam*, 14 How. Pr. 184; S. C. 4 Ab. 202; *Blanchard v. Straight*, 8 How. Pr. 85;) or by motion to have the pleading made more definite and certain. (*Colton v. Jones*, 7 Rob. 164; *Wood v. Anthony*, 9 How. Pr. 78.) An objection, for this defect, cannot be raised by demurrer. (*Bass v. Comstock*, 38 N. Y. 21; S. C. 5 Trans. App. 22; 36 How. 382; *Colton v. Jones*, *supra*; *Dorman v. Kellam*, *supra*.)

When a party intends to insist on this objection he should return the pleading with his objection specified thereon, or the objection will be deemed waived. (*Corbin v. George*, 2 Ab. 465; *Sawyer v. Schoonmaker*, 8 How. Pr. 193; *Strauss v. Parker*, 9 id. 342.)

A reply, exceeding two folios in length, must be distinctly numbered and marked at each folio, in the margin thereof; and all copies, either for the parties or the court, must be numbered or marked in the margin so as to conform to the original draft, and to each other, and must be indorsed with the title of the cause. And it, and copies thereof, must be fairly and legibly written. If not so written and folioed and indorsed, the clerks shall not file the same, nor will the court hear any motion or application founded thereon. But the party upon whom a reply is served will be deemed to have waived the objection, unless, within twenty-four hours after the receipt thereof, he returns the same to the plaintiff, with a statement of the particular objection to its receipt. (Rule 26 of Supreme Court.)

When either party receives a pleading not properly folioed, he should return it at once: as an unreasonable delay in this respect will be construed as a waiver of the irregularity. (*Strauss v. Parker*, 9 How. Pr. 372; *Chatham Bank v. Van Veghten*, 5 Duer, 625.) He should, at the same time, explicitly state his objections. (*Chemung Canal Bank v. Judson*, 10 How. Pr. 133; *Broadway Bank v. Danforth*, 7 id. 264.) He should seek his remedy by motion to set aside the pleading, and not by demurrer. (*Dorman v. Kellam*, 14 How. Pr. 184; S. C. 4 Ab. 202; *Bass v. Comstock*, 38 N. Y. 21.) But if the moving papers contain the defects objected to, the motion will be denied, with costs. (*Sawyer v. Schoonmaker*, 8 How. Pr. 193.)

A reply must be subscribed by the plaintiff or his attorney. And if the previous pleadings are verified, it must be verified also. (Code, § 156.)

Thus, if a defendant verify his answer, as he may do, the reply, if any, must be sworn to. All subsequent pleadings, in order, after a verified pleading, must themselves be verified. (*Levi v. Jakeways*, 4 How. Pr. 126; S. C. 2 Code Rep. 69.)

Where a contract, which is set up as new matter, is denied in a reply, first, because it is incorrect and not a true statement of the transaction, and second, because the plaintiff has not sufficient knowledge thereof to form a belief, the latter reason overrules the former, and the positive assertion in the one statement is destroyed by the allegation in the other. (*Lewis v. Acker*, 11 How. Pr. 163.) If such inconsistent allegations can avail the plaintiff, they must be construed as a denial from want of sufficient knowledge, &c., and if tolerated, the rule must not be extended beyond the limits of the late court of chancery, viz.: that where acts are charged as the acts of the defendant himself, and are of such a nature that he can be presumed to recollect them if they took place, a positive answer is required. (*Ibid.*) A hypothetical denial, in a reply, of the performance of a contract, recently made by the defendant himself, was never tolerated by any system of pleading. (*Ibid.*)

Where an answer sets forth a cause of action upon contract which is not a set-off, the plaintiff may reply any facts which would have made a defence if the defendant had brought an action for such cause. (*Miller v. Losee*, 9 How. Pr. 356.) A plain

A special replication is nearly in the same form, except that it points out the parts of the answer which it admits to be true, and traverses the rest. (*k*)

The signature of counsel is required to a replication only when it is special; not when it is general. (*l*)

Nor is it necessary that a replication be signed by the complainant; the signature of his solicitor being sufficient.

Within what time to be filed.] The 65th rule requires the replication to be filed within ten days after the answer is deemed to be sufficient; (*m*) and if it is not filed within that time, the cause will stand for hearing on bill and answer. (*6*)

(*k*) *Hinde's Pr.* 285, 6.

(*l*) *Id.* 287.

(*m*) See Rule 50 as to when an answer is to be deemed sufficient.

tiff may, by his reply, set up a counter-claim, not inconsistent with his complaint to the counter-claim set up by the defendant to the complaint. (*Ibid.*) Where the defendant states, in his answer, that another suit is pending for the same cause of action, the plaintiff may discontinue the former action, and set up such discontinuance in his reply. (*Beals v. Cameron*, 3 How. Pr. 414.)

In *Massachusetts*, it is provided by Rule 14 of the rules for practice in chancery, that "as a substitute for the general replication now in use, the plaintiff shall enter in the cause, that he joins issue on the answer."

In *New Hampshire*, it is directed by Rule 22 of Chancery Practice, that a replication shall be entitled as an answer, and shall be, in substance, "The plaintiff says his bill is true, and the defendant's answer as set forth is not true; and this he is ready to prove."

In *Kentucky*, when the answer contains new matter constituting a counter-claim or set-off, the plaintiff may reply to such new matter, denying each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief, and may allege, in concise language, any new matter not inconsistent with the petition, constituting a defence to the counter-claim or set-off. (Code, § 133.)

In *Indiana*, the reply may deny one of several defences, or a part of any one defence, but must state to what defence, or part of a defence, it is pleaded. The matter of the reply must be a denial, or new matter not inconsistent with the complaint, and avoiding the effect of the answer. (2 R. S. 42, § 67; 16 Ind. 1.) It has been held that a reply ought to show facts sufficient to avoid the answer, and maintain the plaintiff's right to recover. (18 Ind. 226.) The plaintiff may set up in his reply several independent defences, and tender several issues, provided they are not inconsistent with the complaint. The inconsistency of the reply and the complaint is the same defect known in common law pleading as a departure. (*Zehner v. Beard*, 8 Ind. 96.) The reply must be in plain terms, without repetition or redundancy, and is governed by the same rules of construction as the answer. (Bick. Civ. Prac. 93.) A set-off may be replied to a set-off. (16 Ind. 303.)

In *Minnesota*, a plaintiff may demur to one or more of several defences or counter-claims, and reply to the residue. (Civ. Code, § 75.) So in *Kansas*. (Code, § 111.)

(6) WHEN REPLY TO BE SERVED.

A reply, if one is put in, must be served within twenty days after service of the answer. (Code, § 153.)

In *Maine*, "within thirty days after the answer is filed, unless exceptions are filed, or within fifteen days after it is perfected, the plaintiff's counsel shall file the general replication, and give notice thereof; or give notice of a hearing at the next term, on bill and answer." (Rule 9 of Chancery Practice.)

As to the practice in *New Hampshire*, see Rule 17, Chancery Practice, 38 N. Hamp. 608.

By the 66th Equity Rule of the *United States courts*, whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the

The replication must be filed within the ten days, although the answer was served on an agent instead of the solicitor in person. (*n*)

If the complainant amends his bill after answer, he cannot file a replication to the original answer until the time for answering the amended bill expires, although he waives a further answer to the amendments. (*o*)

Where an answer is allowed to be amended, the complainant has thirty days after service of a copy of the amended answer, to put in his replication. (*p*)

A replication *may* be filed immediately after the answer has come in.

If a replication is filed and served after the time limited by the rule, without an order having been obtained extending the time, the defendant's solicitor, if he wishes to take advantage of that objection, should refuse to receive it, or return it immediately.

Extending time to reply.] By the 125th rule, further time to file a replication, not exceeding twenty days, may be granted on application, and sufficient cause shown, by affidavit, to a vice-chancellor or injunction master. But no such order can be granted by an injunction master, or by a vice-chancellor out of court, after the time for replying has expired, or where the time has before been extended.

The court also, upon special cause shown, may extend the time for filing a replication. (*q*) But it is not necessary to apply to the court itself, except in cases where the time for replying has expired, or where it has been already once extended. (*7*)

Whenever the application is made to the court, it must be upon notice to the defendant.

It is not a matter of course for the court to permit the filing of a replication after the time limited by the rule has expired. But the

(*n*) Kane v. Van Vranken, 5 Paige, 62.

(*o*) Richardson v. Richardson, 5 Paige, 53.

(*p*) Taylor v. Bogert, id. 33.

(*q*) Rule 126.

plaintiff must file the general replication thereto on or before the next succeeding rule day thereafter; and in the cases where the general replication is filed, the cause will be deemed to all intents and purposes, at issue, without any rejoinder or other pleading on either side.

In *Ohio*, the reply must be filed on or before the fifth Saturday after the return day of the summons or service by publication. (Code, § 103.) When an answer is amended, after demurrer, the plaintiff has the same time to reply thereto as to an original answer. (Id. § 135.)

(7) ENLARGING TIME FOR REPLYING.

The time for replying may be enlarged, upon an affidavit showing the grounds therefor, by a judge of the court; or, if the action be in the supreme court, by a county judge. The affidavit, or a copy thereof, must be served with a copy of the order; or the order may be disregarded. (Code, § 405.)

It has been held that the application of this section is to the powers of a judge of the court at chambers, and not to the powers of the court. (*Haase v. New York Central R. R. Co.* 14 How. Pr. 430; *Traver v. Silvernail*, 2 Code Rep. 96.)

In *Ohio*, the court, or the judge thereof, in vacation, for good cause shown, may extend the time for filing a reply, upon such terms as may be just. (Code, § 104.)

court must be satisfied there is a probability that injustice will be done if the complainant is compelled to bring his cause to hearing on bill and answer. Upon such an application, if it appears that an answer was put in upon oath, denying any material allegation in the bill, the complainant must show that the bill was sworn to, or he must state in an affidavit, that he believes and expects to be able to prove that the [*252] allegations denied or *put in issue by the answer are true. If new matters are set up in a sworn answer, as a defence to the suit, the complainant should state upon oath, that the matters thus set up, or some material parts thereof, are not true, or at least, that he believes them to be untruly stated. (r)

If the complainant wishes to amend his bill, and an application to the court for leave to do so is necessary, he should not file a replication—which is wholly inconsistent with the idea of an amendment of the bill—but should obtain an order to extend the time for filing the replication until after the decision of the court upon the application to amend. (s)

Filing replication nunc pro tunc.] A replication is considered a mere formal instrument, and if the complainant has omitted to file one at the proper time, the court will allow it to be done afterwards *nunc pro tunc*. And where the omission arose from a mistake or inadvertence, it has been allowed to be supplied after the cause had been set down for hearing upon bill, answer, and proofs. (t) And this has been permitted even after the cause has come on for hearing, and the reading of the proofs has been commenced. (u) The like permission has also been given after the cause has been set down for hearing on bill and answer, and a reference ordered. (v) (8)

So, where there are several defendants, one of whom only has answered, the court, on special cause shown, will permit a replication to his answer to be filed *nunc pro tunc*, after the time for replying has expired; although the cause is not at issue as to the other defendants; if the complainant is proceeding with due diligence. (w)

(r) *The Sea Ins. Co. v. Dav.* 9 Paige, 247. *Kane v. Van Vranken*, 5 Paige, 63.

(s) *Vermilyea v. Odell*, 4 Paige, 122.

(t) *Scott v. Clarkson's Ex'x*, 1 Bibb, 277. *Prac. Reg.* 397.

(u) *Rodney v. Hare*, Mos. 296. *Coop. Eq. Pl.* 331, 335.

(v) *Pierce v. West*, 1 Peters' C. C. Rep. 351. *Smith v. West*, 3 John. Ch. Rep. 363. *Scott v. Clarkson's Ex'x*, supra. *Danaree v. Driskill*, 3 Black, 115. *Glenn v. Hebb*, 12 Gill & J. 271. *Armistead v. Bozman*, 1 Ired. Ch. 117.

(w) *Utica Ins. Co. v. Lynch*, in Chan. June 19, 1831.

(8) By the 66th Equity Rule of the *United States courts*, if the plaintiff omits to file a replication within the prescribed period, the defendant will be entitled to an order of course for a dismissal of the suit; and the suit will thereupon stand dismissed, unless the court, or a judge thereof, shall upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

The general rule of the court, however, is, that unless a replication be filed, the complainant, if he brings the cause on to a hearing, must submit to take the answer as wholly true; because the defendant has been deprived of the opportunity of proving the truth of his answer.

Effect of filing.] If the complainant files a replication to the answer after he is apprised of the necessity of an amendment of his bill, he precludes himself from making such amendment. (*x*)

The filing of a replication after notice given of a motion to dismiss *the bill for want thereof, is good cause against the motion; [*253] but it will only be allowed on payment of costs. (*y*)

The effect of filing a replication to a *plea*, as we have already seen, (*z*) is to admit its validity as a bar, if true.

Withdrawing.] If the necessity for an amendment arises after the filing of the replication, the complainant should make a special application to the court for leave to withdraw the replication, for the purpose of amending. (*a*) Upon which application he must satisfy the court, by affidavit, that the matter of the proposed amendment is material, and could not, with reasonable diligence, have sooner been introduced into the bill. (*b*)

But this practice does not apply to amendments by merely adding parties, after replication. (*c*)

If the answer of a defendant has been replied to, such defendant cannot be examined by a co-defendant, as a witness, until the replication is withdrawn. (*d*) (9) (10) (11)

(*x*) Vermilyea v. Odell, 4 Paige, 121.

(*y*) Griswold v. Inman, Hopk. 86.

(*z*) Ante. p. 119; Hughes v. Blake, 7 Wheat. 453.

(*a*) 1 Dan. 546. 2 id. 389. Coop. Eq. Pl. 333.

(*b*) Id. ib.

(*c*) Brattle v. Waterman, 4 Sim. 125.

(*d*) Duugannon v. Skinner, 1 Hogan, 271. Dixon v. Parker, 2 Ves. sen. 219. 2 Fowl. 100.

(9) SUPPLEMENTAL REPLY.

The plaintiff may be allowed, on motion, to make a supplemental reply, alleging facts material to the case occurring since the former reply, or of which the plaintiff was ignorant when the former reply was made. And either party may, by leave of the court, set up, by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of the action, determining the matters in controversy in the action, or any part thereof. If such judgment be set up by the plaintiff, the same shall be without prejudice to any provisional remedy theretofore issued, or other proceedings had in said action, on his behalf. (Code, § 177.)

A supplemental pleading is in addition to, and not a substitute for, the original. (*Dann v. Baker*, 12 How. Pr. 521.)

It is the proper practice to demur to a supplemental pleading, if defective. (*Goddard v. Benson*, 15 Ab. 191.)

The supplemental pleadings allowed by section 177 must not contradict the statements in the first, but must be consistent with them. (*Stauson v. Englehart*, 34 Barb. 198; *Dann v. Baker*, 12 How. Pr. 521; *Watson v. Thibou*, 17 Ab. 184.)

The motion for leave to file a supplemental pleading setting up new matter, must be made on notice, or order to show cause. It cannot properly be made at the trial. (*Garner v. Hannah*, 6 Duer, 262.) The court may compel a party applying for leave to file a supplemental pleading, to elect to substitute it in the place of the previous

one; but unless it does so, both remain. (*Brown v. Richardson*, 4 Rob. 603; *Bate v. Felloes*, 4 Bosw. 638.)

An order allowing a supplemental pleading may be appealed from. (*Harrington v. Slade*, 22 Barb. 164; *Guild v. Parsons*, 16 How. Pr. 382; *Cheesman v. Sturges*, 19 Ab. 293.)

Matters which have occurred since the original pleading was made should be introduced by a supplemental pleading, and not by amendment. (*Hornfager v. Hornfager*, 6 How. Pr. 13; S. C. 1 Code Rep. N. S. 180; *Drought v. Curtiss*, 9 How. Pr. 56; *Williams v. Hernon*, 16 Ab. 173; *McMahon v. Allen*, 1 Hilt. 103; S. C. 12 How. Pr. 39; 3 Ab. 89; *Sage v. Mosher*, 17 How. Pr. 367; *Lampson v. McQueen*, 15 id. 345.)

Where a counter-claim set up a demand against the plaintiff which, if true, would have entitled the defendant to a judgment, and the plaintiff put in a supplemental reply, setting up payment of such demand since the service of the answer and the first reply, it was held that this occurrence having arisen since the previous reply, and constituting a complete answer to the counter-claim, it was properly the subject of a supplemental reply. (*Ormsbee v. Brown*, 50 Barb. 436.)

In *Ohio*, a plaintiff may be allowed, on motion, and on such terms as to costs as the court may prescribe, to file a supplemental reply, alleging facts material to the case occurring after the former reply. (Code, § 142.)

In *Wisconsin*, the plaintiff may be allowed, on motion, to make a supplemental reply, alleging facts material to the case occurring after the former reply, of which he was ignorant when the former reply was made. (Code, § 85.)

(10) JUDGMENT ON FRIVOLOUS REPLY.

If a reply be frivolous, the party prejudiced thereby may, upon a previous notice of five days, apply to a judge of the court, either in or out of court, for judgment thereon; and judgment may be given accordingly. (Code, § 247.) The Code of *Wisconsin* contains the same provision. (Code, § 159.)

It is not necessary to serve an affidavit on the opposite party with notice of motion for judgment under this section. (*Darrow v. Miller*, 5 How. Pr. 250; S. C. 3 Code Rep. 241; *Stokes v. Hagar*, 1 Code R. 84.)

A judge, at chambers, has the same power as at special term, and may make either an absolute or a conditional order for judgment, on account of the frivolousness of a pleading. (*Witherspoon v. Van Dolar*, 15 How. Pr. 266; *Witherhead v. Allen*, 28 Barb. 661.) The motion must be on a previous notice of five days. In no case can it be made on an order to show cause, returnable in two days. (*Lefferts v. Snediker*, 1 Ab. 41.)

A reply denying averments in the answer which are material to the pleading of a proper counter-claim, will not be stricken out as frivolous. (*Wood v. Mayor, &c. of New York*, 3 Ab., N. S. 467; S. C. 4 id. 152.)

(11) PLEADING, GENERALLY.

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13. Disregarding errors or defects not affecting substantial rights.

I. KINDS OF PLEADINGS.

The only pleadings under the Code are:

1. The complaint.
2. Demurrer or answer to the complaint.
3. The reply.
4. The demurrer to answer or reply. (Code, §§ 141, 143, 149, 153, 155.)

II. GENERAL RULES.

The Code has only abolished those rules of pleading which are technical and formal, and arose chiefly from an arbitrary classification of actions. These rules, which, as founded in good sense and sound logic, lend an important aid in the investigation of truth, it has been careful to retain. (*Fry v. Bennett*, 5 Sandf. 54.)

Certain general rules of pleading, applicable to all the pleadings authorized therein, are established by the Code, as follows:

1 *Subscription and verification.*] Every pleading in a court of record must be subscribed by the party, or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (Code, § 156.)

Under this section it has been held that where a party, or his attorney, has omitted to subscribe a pleading, notice of the defect should be given, and the pleading promptly returned. That a demurrer was not subscribed by the defendant or his attorney, will furnish no ground for objection on appeal from an order sustaining such demurrer. (*Ehle v. Haller*, 6 Bosw. 661; S. C. 10 Ab. 287.)

An agent with power of attorney, but who has not been admitted as an attorney, cannot subscribe a pleading for either party. (*Weir v. Slocum*, 3 How. Pr. 397; S. C. 1 Code Rep. 195; *Dixey v. Pollock*, 8 Cal. 570.) But the attorney or guardian who conducts a suit where an infant is a party, may sign the pleadings. (*Hill v. Thaxter*, 3 How. Pr. 407; S. C. 2 Code R. 3; *Anable v. Anable*, 24 How. 92.) And in *Hubbell v. Livingston*, (1 Code Rep. 63,) where the defendant signed the *verification*, that was held to be a sufficient subscription.

In regard to the *mode* of verification, section 157 provides that "the verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true, and must be by the affidavit of the party; or, if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit.

"The affidavit may also be made by the *agent or attorney*, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney.

"When the pleading is verified by *any other person than the party*, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party.

"When a *corporation* is a party, the verification may be made by any officer thereof; and when the *state*, or any officer thereof, in its behalf, is a party, the verification may be made by any person acquainted with the facts.

"The verification may be *omitted* when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading."

A verification is no part of a complaint; and a new complaint, served after answer, which corresponds with the original, except verification, may be disregarded as not an amended complaint. (*George v. McAdoo*, 6 How. Pr. 200; S. C. 1 Code Rep., N. S. 518.) If the answer be required to be verified by the oath of the defendant, and an answer be served without such verification, it may be returned, and the plaintiff may proceed as if no answer had been served. (*Strout v. Curran*, 7 How. Pr. 36.) If the complaint is not verified, or the verification is imperfect, the pleading will not be irregular. In either case the defendant may answer without verification. The regularity of a subsequent judgment will not be affected by the irregularity of the verification of the complaint. (*Quinn v. Tilton*, 2 Duer, 648; *Fitch v. Bigelow*, 5 How. Pr. 237; S. C. 3 Code Rep. 216; *Mason v. Brown*, 6 id. 481; *Stannard v. Maltice*, 7 id. 4; *Treadwell v. Fissett*, 10 id. 184; *Lune v. Morse*, 6 id. 394; *Webb v. Clarke*, 2 Sandf. 649; S. C. 2 Code R. 16; *Waggoner v. Brown*, 8 id. 212; *Strauss v. Parker*, 9 id. 342; *Williams v. Riel*, 11 id. 374; S. C. 5 Duer, 601.)

When there are several defendants, each must verify his answer, notwithstanding they have a common defence, whether it be put in unitedly or separately. If only one defendant verifies, it is good as to him, and cannot be returned. Prompt notice

must be given in that case by the plaintiff's attorney, that he insists upon an answer. After having kept the answer forty days without notice, he cannot insist on any defect in the verification. (*Hull v. Ball*, 14 How. Pr. 305.) A pleading cannot be retained nineteen days, and then returned as defective. If returned as defective, *e. g.*, as not verified, the party returning the paper must point out the defect. (*White v. Cummings*, 3 Sandf. 716; S. C. 1 Code Rep. N. S. 107.)

The term "subsequent pleading," in section 156, means subsequent in the order of pleading, or in answer to the pleading verified, and not subsequent in time. (*Hempstead v. Hempstead*, 7 How. Pr. 8.) An amended complaint cannot be called a subsequent pleading when spoken of with reference to a previously served answer. (*Ibid.*) When a complaint is served without verification, and the answer, denying the material allegations of the complaint, but setting up no new matter, is also served without verification, the plaintiff cannot subsequently, on an affidavit of verification of the complaint merely, move to strike out the answer as false. (*White v. Bennett*, 7 How. Pr. 59.)

Service of both the answer and the verification must be made. If there is any omission, it may be assumed that the original is in all respects like the copy; and if it is defective, the adverse party may move to set aside the pleading. To omit the name of the officer before whom the answer is sworn, is a fatal defect. (*Graham v. McCoun*, 5 How. Pr. 353; *Hughes v. Wood*, 5 Duer, 603, n.; *Littlejohn v. Mann*, 3 Paige, 280.)

If a defendant verify his answer, as he may do, the reply, if any, must be sworn to. All subsequent pleadings in order after a verified pleading must themselves be verified. (*Levi v. Jukeways*, 4 How. Pr. 123; S. C. 2 Code R. 69, 22.)

The practice of moving to set aside an answer for want of a sufficient verification, is not to be commended, although it may not be improper. (*Wilkin v. Gilman*, 13 How. Pr. 225.) Where the verification is so clearly defective that the attorney is willing to take the risk of treating it as insufficient, the better practice is promptly to return the answer, with the reasons for not receiving it (*Ibid.*) If it be doubtful whether the verification is sufficient or not, it is better, generally, to make no question about it, and treat it as sufficient. (*Ibid.*) Where the verification was made by the attorney, who stated that his *knowledge* of all the material allegations in the answer was founded on communications made to him by the defendant's son, &c., it was held that the language, though inappropriate, was insufficient. He should have stated his *information* instead of *knowledge*. (*Ib.*)

By an act of the legislature, passed March 23, 1854, "The verification of any pleading, in any court of record in this state, may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading." (Laws of 1854, ch. 75.) By this act the law, as laid down in *Thomas v. Harpor*, (7 How. Pr. 57,) is changed. Where it is evident from the pleading to be amended, that an admission of the truth of its allegations might subject the party answering to a prosecution for felony, or might lead to such a result, his general affidavit to that effect should be received in the place of a verification of the answer, and he need not state the particular facts and circumstances in his affidavit which lead him to that conclusion. (*Springsted v. Robinson*, 8 How. Pr. 41.)

Where the complaint does not state whether the defendant is prosecuted as winner or as stakeholder, but simply alleges that he received a sum of money contrary to the statute against betting, and the answer is a mere denial, the defendant must verify it if the complaint is verified. There is no allegation in such a complaint that the act was criminal. (*Lynch v. Todd*, 13 How. Pr. 546.) If the complaint shows that the defendant would be privileged from testifying as a witness in the matter, the answer may be served without a verification, and need not contain any affidavit stating the grounds for so doing. (*Wheeler v. Dixon*, 14 How. Pr. 151; *Clapper v. Fitzpatrick*, 3 id. 314; S. C. 1 Code R. 69.)

The verification must, in all cases, be complete. The omission in a copy of the complaint served of the name of the officer before whom the verification was made, is a fatal defect; and the defendant may answer, in such a case, without verifying his pleading. (*Hughes v. Wood*, 5 Duer, 603, n.; *Williams v. Riel*, id. 601; S. C. 11 How. Pr. 374.)

The criterion by which to determine whether a party may omit to verify his pleading, is to inquire, not whether the pleading may be used against him in a criminal prosecution, but whether, if called as a witness to testify to the same matter contained in the pleading, he would be excused from answering. (*Clapper v. Fitzpatrick*, 3 How. Pr. 314; S. C. 1 Code Rep. 69.) The verification may be omitted when the court can see that the matter contained in the pleading is such as might aid in

forming a chain of testimony to convict the party of a criminal offence, if properly receivable in evidence. (Ibid.) It is enough to excuse the verification if *any* of the parties would be privileged from testifying to the matter of the pleading, though *other* parties might not be so privileged. (Ibid.) Nor is it necessary that *all* the statements in the pleading should be such as would excuse the party from testifying as a witness. If any part of the pleading is of such a character, it need not be verified. (Ibid.)

Where the complaint charges a defendant with fraud in making an assignment, and the object of the action is to set such assignment aside, he must verify his answer. (*Holcott v. Winston*, 8 Ab. 422.)

Verification by attorney or agent.] Where a party is not within the county in which the attorney resides, the attorney may verify a pleading, though the action or defence be not founded on a written instrument in possession of the attorney, and though all the material allegations of the pleading may not be within the personal knowledge of the attorney. But in such a case the attorney must set forth, in the affidavit of verification, his knowledge, or the grounds of his belief, on the subject, and the reasons why it is not made by the party. (*Stannard v. Mattice*, 7 How. Pr. 4; *Fitch v. Bigelow*, 5 id. 237; S. C. 3 Code R. 216; *Treadwell v. Fassett*, 10 How. Pr. 184; *Hubbard v. Nat. Protec. Ins. Co.* 11 id. 149; *Bank of the State of Maine v. Buel*, 14 id. 311; *Boston Locomotive Works v. Wright*, 15 id. 253; *Dizwell v. Wordsworth*, 2 Code R. 1; *Soutter v. Mather*, 14 Ab. 440. But see *Smith v. Rosenthal*, 11 How. Pr. 442; *Myers v. Gerrits*, 13 Ab. 106, *contra.*) In *Fitch v. Bigelow*, (5 How. Pr. 237; S. C. 3 Code R. 216,) where the verification was by attorney, it was held that the omission to state the reasons why the oath was not made by the party was error, and that the verification was insufficient.

If a summons is served on an agent of a corporation, who, by reason of his being an officer in it, is authorized to verify the answer, no grounds of belief need be stated, as the agent's verification is that of the corporation. (*Glaubensklee v. Hamburg & American Packet Co.* 9 Ab. 104.) In *Bowen v. Powell*, (1 Laus. 1,) the complaint averred a contract with A. as the agent of the defendants. A. verified the answer, and recited, in the affidavit, his agency for the defendants in making the contract. It was held that the affidavit was inadmissible as evidence of A.'s agency in making the contract.

In *Mason v. Brown*, (6 How. Pr. 481,) after a verified answer, the plaintiff put in a reply, verified by the affidavit of his attorney, in which it was stated that "the reply is true of the deponent's own knowledge, except as to those matters stated upon information and belief, and as to those matters he believes it to be true; that the ground of his belief is information derived from W. L., the payee of the note mentioned in the complaint; that the action is founded upon a written instrument, which is in the possession of the attorney; that the reason why the affidavit was not made by the plaintiff was that he resided at N. in the State of New Hampshire, and was not present to make it." The verification was held to be sufficient. (See, also, *Stannard v. Mattice*, 7 How. Pr. 4.)

In every case, where the verification is not made by the party, the agent or attorney making it, so far as he speaks of his own knowledge, must state what knowledge he has, and when he speaks of his belief, he must state the grounds of such belief. The Code expressly requires this, and it cannot be dispensed with. (*Treadwell v. Fassett*, 10 How. Pr. 184.)

In *Myers v. Gerrits*, (13 Ab. 106,) an affidavit that the complaint was true, to the deponent's own knowledge, "except as to those matters stated on information and belief, and as to those matters he believes it to be true; that the plaintiff is now absent from this state, which is the reason why this verification is not made by him; that deponent's knowledge is derived from possession of the notes, and from other sources"—was held a sufficient verification.

In the verification of an answer, by an agent of the defendant, in an action on a written instrument, where the allegations of the answer are made positively and without qualification, it is not necessary that the agent should state his knowledge, or the grounds of his belief, in the verification. (*Ross v. Longmuir*, 24 How. Pr. 49; S. C. 15 Ab. 326; *Gourney v. Wersuland*, 3 Duer, 613.) An attorney of a non-resident client, although the latter has a resident agent from whom the attorney has derived all the information that he possesses, may himself make the affidavit. And where it appears that the party has more than one agent, it is not imperative that the agent who knows most about the matters should make the verification. (*Drevert v. Appert*, 2 Ab. 165.) Where a verification, made by the defendant's attorney for the reason that the defendant resided in the city of New York, and the attorney in the county of Sullivan, stated that "deponent's knowledge of all the material allegations

in the answer is founded upon communications made to him by the defendant, through his son, and that the answer is true to deponent's own knowledge, except," &c., it was held sufficient. (*Wilkin v. Gilman*, 13 How. Pr. 225.) In *Wheeler v. Chesley*, (14 Ab. 441.) the verification was as follows: "R. B. says he is attorney for the plaintiff in the above action; that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; that the reason why the verification is not made by the plaintiff is, that the action is founded on a written instrument for the payment of money only, and such instrument is in the possession of deponent, and that his knowledge is derived from said instrument, and from information received by deponent from plaintiff; and that the grounds of deponent's belief are the statements of plaintiff to deponent." Held, this was sufficient.

In the following cases the verification was held to be insufficient: *Treadwell v. Fasset*, (10 How. Pr. 184;) *Soutter v. Mather*, (14 Ab. 440;) *Hubbard v. National Protec. Ins. Co.* (11 How. Pr. 149;) *Meuds v. Gleason*, (13 id. 309;) *Tibballs v. Selfridge*, (12 id. 64;) *Bank of the State of Maine v. Buel*, (14 id. 311;) *People ex rel. Smith v. Allen*, (id. 334;) *Boston Locomotive Works v. Wright*, (15 How. Pr. 253.)

If the written instruments for the payment of money only are in the attorney's hands, that fact alone will authorize him to make the verification, (*Treadwell v. Fasset*, 10 How. Pr. 184,) even though the party be in the same county. (*Wheeler v. Chesley*, 14 Ab. 441.)

It seems that in the case of an infant plaintiff, the guardian, or the guardian's attorney, should verify the complaint. (*Hill v. Thaxter*, 3 How. Pr. 407; S. C. 2 Code R. 3; *Anable v. Anable*, 24 How. Pr. 92.) In an action for a divorce on the ground of adultery, brought by an infant plaintiff, the defendant may put in his answer without verification. (*Anable v. Anable*, *supra*.)

Verification by the party. When the verification is made by the party, the statements contained therein are evidence against him on the trial. (*Morrell v. Cawley*, 17 Ab. 76.)

When an action is prosecuted or defended for the immediate benefit of one who is not a party on the record, but who is the party in interest, a pleading may be verified by him. (*Taber v. Gardner*, 6 Ab. N. S. 147.) An affidavit verifying a complaint which merely states that the complaint is true, without stating that it is true to the knowledge of the party making it, is substantially defective. (*Williams v. Riel*, 11 How. Pr. 375; *Tibballs v. Selfridge*, 12 id. 64; *Wuggoner v. Brown*, 8 id. 212.) Nor will it suffice to say that the party has read the pleadings, and that they are true, according to the best of his knowledge and belief. (*Van Horne v. Montgomery*, 5 How. Pr. 238.) But in *Harnes v. Tripp*, (4 Ab. 232,) where the pleading was wholly on information and belief, and the affidavit stated that the deponent believed it to be true, the verification was held to be sufficient.

The words "except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true," may be omitted in a verification, if the affiant states that it is true to his own knowledge, and where he makes the allegations positively, and not upon information and belief. (*Kinkaid v. Kipp*, 1 Duer, 692; S. C. 11 N. Y. Leg. Obs. 313; *Ross v. Longmuir*, 15 Ab. 326; S. C. 24 How. Pr. 49.)

Section 157 does not necessarily imply that it appears in the pleading what matters are stated on personal knowledge, and what on information and belief. (*Truscott v. Dole*, 7 How. Pr. 221.)

Where the party swears that the facts set forth in the affidavit were true, in the past tense, this will not vitiate the affidavit; nor will the substitution of the word "facts" for "matters" make it void. (*Whelpley v. Van Epps*, 9 Paige, 332.) If a defendant has answered jointly and severally, he cannot swear to a want of sufficient information to form a belief on the part of a co-defendant. But where the defendants answered jointly, "as to each and every allegation of the complaint, they say that they have no knowledge or information thereof sufficient to form a belief," and the verification was as follows: "A. B. and C. D. being severally duly sworn say, each for himself, that the foregoing answer is true, of his own knowledge, except so far as the same alleges a want of sufficient information to form a belief on the part of the other defendant, and that, as to such allegations, he believes the same to be true;" this was held to be sufficient. (*Kinkaid v. Kipp*, 1 Duer, 692; S. C. 11 N. Y. Leg. Obs. 313. See, also, *Patterson v. Bly*, 19 Cal. 25.)

In *Radway v. Mather*, (5 Sandf. 655,) it is said, by DUEK, J.: "It is true that the form of the verification requires the party to swear to his belief of the matters stated in the pleading, on information and belief, and hence it is inferred that this statement

must be found in the pleading; but even upon the supposition, which I am far from admitting, that this form of the verification must be literally followed, a statement on belief may be fairly construed as a statement by implication, on information; since, as a general rule, it is on information that the belief must be founded."

In *Waggoner v. Brown*, (8 How. Pr. 212,) it is said, by JOHNSON, J.: "The statute (§ 157) as to everything material, must be strictly followed, and parties will not be permitted to evade it, by qualifications or reservations of any kind."

Verification out of the state.] The act of 1863, ch. 246, § 3, provides that every person who, in foreign countries, is authorized by law to take and certify the acknowledgment and proof of deeds, shall also have power to administer oaths and affirmations to be read in evidence and used in any of the courts of this state or otherwise. This refers to vice-consuls or commercial agents of the United States Government resident in any foreign port or country. (*Ibid.* § 1.)

In the *City Bank v. Lumley*, (28 How. 401,) BRADY, J. says: "The jurat to the affidavit is in the usual form. It states that the deposition was subscribed and sworn to in the presence of the vice-consul, and he so certifies, under his seal of office. It is sufficient; and so far as the act of 1854 (Laws of 1854, p. 475) provides to the contrary, it must be regarded as abrogated."

By the act of 1869, (ch. 133, § 1,) it is provided that in cases where, by law, the affidavit of any person residing in another state, or in any territory of the United States, is required, or may be received in judicial proceedings in this state, the same may be taken and certified by any officer authorized by the laws of such state or territory to administer oaths and take and certify affidavits to be used in the courts of record in such state or territory. (§ 1.) To entitle such oath or affidavit to be read in the courts of this state, there shall be stated, in the body of such affidavit, the name, residence, age and occupation of the deponent or affiant, and there shall be attached to the jurat or affidavit a certificate, under the name and official seal of the clerk, register, prothonotary, or other officer authorized by the laws of such other state to make such certificate of the county in which the officer taking and certifying such oath or affidavit resided, specifying that such officer was, at the time of taking such oath or affidavit, duly authorized to take the same, and that such clerk, register, &c., is well acquainted with the handwriting of such officer, and verily believes that the signature to such jurat or certificate is genuine, and that such oath or affidavit purports to be taken in all respects as required by the laws of the state or territory. And such oath or affidavit, so taken and certified, may be read in any court, or before any officer, in any suit or proceeding in this state, with like force and effect as if such oath or affidavit had been taken before any officer authorized by law to take affidavits in this state, to be read in courts of record. (*Ib.* § 2.)

Verification by all parties not united in interest.] In order that a pleading may be completely verified, where more parties than one join in the prosecution or defence, it should be verified by all parties not united in interest. (*Gray v. Kendall*, 5 Bosw. 666; S. C. 10 Ab. 70.) It seems that where the affidavit is made by one of several parties united in interest, he need not swear that he is acquainted with the facts. (*Southworth v. Curtis*, 6 How. Pr. 273.)

In an action against husband and wife to set aside a deed to her as fraudulent, the answer must be verified (the complaint being sworn to) by both parties. And it seems the wife should verify in all cases where she has a separate interest. (*Youngs v. Seely*, 12 How. Pr. 395; *Harlay v. Ritter*, 18 id. 147; S. C. 9 Ab. 400.) But where the wife is jointly liable, a verification by the husband alone is sufficient. (*Hartley v. James*, 18 Ab. 299.)

Before whom to be made.] The Revised Statutes direct that whenever any oath or affidavit is or may be required or authorized by law, in any cause, matter or proceeding, * * the same may be taken before a judge of any court of record, any justice of the peace in towns, commissioner of deeds, or clerk of any court of record. Affidavits to be read in the supreme court may also be taken by any commissioner appointed for that purpose by the justice of the said court. (3 R. S. 5th ed. 474, § 38.)

It is irregular for a complaint to be sworn to before the plaintiff's attorney; but it cannot be treated as a nullity because so verified. The remedy of the defendant is by motion to set it aside. (*Gilmore v. Hempstead*, 4 How. Pr. 153; *Anonymous*, id. 290.)

A party verifying a pleading must subscribe his name to such pleading, or to the affidavit appended. (*Lambeer v. Allen*, 2 Sandf. 648; S. C. 2 Code R. 15.)

No presumption can arise that an affidavit was made at any particular place, or before any particular person; and where a complaint was verified, but the affidavit did not state a venue, and the commissioner before whom it was taken did not state his

residence, the verification was held to be a nullity. (*Lane v. Morse*, 6 How Pr 394.)

By the Code of *Wisconsin*, every pleading in a court of record must be subscribed by the party or his attorney, and must be filed with the clerk of the court within the time fixed by law for serving the same; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (Rev. Stat. of 1855, p. 723, § 18.)

In *Kentucky*, every pleading must be subscribed by the party or his attorney, and the petition, answer and reply, must each be verified by the affidavit of the party, to the effect that he believes the statements thereof to be true. Such verification shall not make other or greater proof necessary on the side of the adverse party. The verification of any pleading of a corporation may be by any officer or agent on whom the summons in an action against the corporation may be served, or by its attorney in the action. (Code, § 142.) When the party is mentally incapable of taking an oath, or physically unable to attend before an officer to do so, his agent or attorney may make it. (See Amend. to § 611.) Each of several joint plaintiffs or defendants may be required to verify their pleading, upon the opposite party filing an affidavit that he does not believe that those who have not verified can truthfully do so. (Amend. to § 760.) A party whose pleading is verified by an agent or attorney, may be required to verify in person, upon the opposite party filing an affidavit that he does not believe the party whose agent verifies can truthfully verify the pleading himself. (Amend. to § 611.)

The verification by affidavit, mentioned in § 142, shall not be required to the answer of a guardian or committee defending for an infant, or person of unsound mind, or imprisoned; nor in any case where the admission of the truth of the allegations of the petition or answer might subject the party to a criminal or penal prosecution; nor to pleadings affecting injuries to person or character; nor to petitions in actions founded on a note, bond, bill of exchange, mortgage, or other written obligation of the defendant; nor to defences founded on the written obligation, release, or written acknowledgment of the plaintiff, unless the writing on which the action or defence is founded is lost, mutilated or destroyed. (Code, § 143.)

In *Minnesota*, pleadings must be subscribed by the party, or his attorney. (Pub. Stat. of 1859, p. 542, § 75.) The cases in which a verification is necessary, the mode of verification, and by whom to be made, are specified in the same section.

The cases in which a verification of pleadings is necessary in *Kansas*, and by whom, and in what manner it is to be made, are prescribed in sections 116 to 123 of the Code, and are nearly identical with the provisions of the Ohio Code.

In *Ohio*, every pleading in a court of record must be subscribed by the party or his attorney. (Code, § 105.) And every pleading of fact must be verified by the affidavit of the party, his agent or attorney. (Code, § 106.) When a corporation is a party, the verification may be made by an officer thereof, its agent or attorney; and when the state, or any officer thereof, in its behalf, is a party, the verification may be made by any person acquainted with the facts, the attorney prosecuting or defending the action, the prosecuting attorney, or attorney-general. (Ibid.) A pleading verified as herein required shall not be used against a party in any criminal prosecution, or action or proceeding for a penalty or forfeiture, as proof of a fact admitted or alleged in such pleading; and such verification shall not make other or greater proof necessary on the side of the adverse party. (Ibid.)

The verification mentioned in § 106 shall not be required to the answer of a guardian defending for an infant or person of unsound mind, or person imprisoned; nor in any case where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution. (Ib. § 107.)

If there be several persons united in interest and pleading together, the affidavit may be made by any one of such parties. The affidavit shall be sufficient if it state that the affiant believes the facts stated in the pleading to be true. (Ib. §§ 108, 109.)

In all cases where the party pleading is a non-resident of the county in which the action is brought, or if he shall be absent from the county where the pleading is filed, an affidavit made before filing the pleading, stating the substance of the facts afterward inserted in the pleading, shall be a sufficient verification. Such affidavit shall be filed with the pleading and need not be verified thereby. (Ib. § 111.)

The verification of the pleading does not apply to the amount claimed, except in actions founded on contracts, express or implied, for the payment of money only. (Ib. § 112.)

When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney, only: 1. When the facts are within the personal knowledge of the agent or attorney;

2. When the plaintiff is an infant, or of unsound mind, or imprisoned; 3. When the pleading to be verified is founded on a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney; 4. When the party is not a resident of, or is absent from, the county. (Ib. § 113.)

2. *Formal requisites.*] It is recited in the preamble to the Code of Procedure, that "it is expedient that the present forms of actions and pleadings at common law should be abolished; that the distinction between legal and equitable remedies should no longer continue; and that an uniform course of proceeding, in all cases, should be established."

This is the key-note to the design and purpose, and construction of the Code, in respect to the rules of pleading embodied therein.

By section 140 of the Code, "all the forms of pleading heretofore existing are abolished; and hereafter the forms of pleading in civil actions, in courts of record, and the rules by which the sufficiency of pleadings is to be determined," are those prescribed by that act. Section 45 of the Code of *Wisconsin*; section 83 of the Code of *Ohio*; section 61 of the Code of *Minnesota*; section 1 of the Code of *Wisconsin*; section 116 of the Code of *Kentucky*, and section 92 of the Code of *Kansas*, are the same as section 140 of the Code of *New York*.

All pleadings must be in the English language, (except that the proper and known names of process, and technical words, may be expressed in the language commonly used,) and shall be made out on paper or parchment, in a fair, legible character, in words at length, and not abbreviated; but such abbreviations as are commonly used in the English language may be used, and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner. (3 Rev. Stat. 467, § 18.)

Any pleading exceeding two folios in length must be distinctly numbered and marked at each folio, in the margin; and all copies, either for the parties or the court, must be numbered or marked in the margin so as to conform to the original draft, and to each other, and must be indorsed with the title of the cause. All the pleadings, and copies thereof, must be fairly and legibly written; and if not so written and folioed and indorsed as aforesaid, the clerks shall not file the same, nor will the court hear any motion or application founded thereon. (Rule 26, Supreme Court.) The party upon whom a pleading is served will be deemed to have waived this objection unless, within twenty-four hours after the receipt thereof, he returns the pleading to the party serving the same, with a statement of the particular objection to its receipt. (Ibid.)

If a pleading is correct in substance, but not in form, the remedy is by motion; not by demurrer. (*Howell v. Fraser*, 6 How. Pr. 221.)

The general rule of pleading, with respect to the necessity of averring notice, is that when the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the party pleading, than of the adverse party, notice thereof should be averred. (*Cole v. Jessup*, 2 Barb. 309.)

In *Missouri*, the pleadings in equity are in the same form with those at law, but may be different in the contents. (*State v. St. Louis Circuit Court*, 41 Mo. 574.)

In *California*, the Practice Act, (§ 36,) states that "the pleadings are the formal allegations by the parties of their respective claims and defences, for the judgment of the court." This definition, being purely statutory, is not intended to supersede the more general definition of pleadings given by the common law; and yet, as there is but one form of civil action, in that state, the same rules govern in proceedings both at law and in equity. (1 Estee's Pr. 120.) In *Bowen v. Aubrey*, (22 Cal. 569,) it was held that under the Code of Practice there was but one system of rules respecting pleadings, which governs all cases, both at law and in equity. The court say that "although in construing that act, we resort to former adjudications, and the old and well established principles of pleading at common law, yet the former distinctions which existed between common law and equity pleadings no longer exist." (See, also, *Sampson v. Schaeffer*, 3 Cal. 196; *Cordier v. Schloss*, 12 id. 143; *Payne v. Treadwell*, 16 id. 243.) The intention of the legislature was, evidently, to adopt a "uniform and complete system," (*Humiston v. Smith*, 21 Cal. 134,) whereby the old and cumbersome forms of pleading would be dispensed with. Yet the facts constituting the plaintiff's cause of action are required to be stated as fully, under the new practice, as under the old. (1 Estee's Pr. 124; *Miller v. Van Tassel*, 24 Cal. 463.)

By section 115 of the Code of *Ohio*, and section 125 of the Code of *Kansas*, all *fictions*, in pleadings, are abolished.

In *Indiana*, the provisions of the constitution requiring the appointment of commissioners to "revise, simplify and abridge the rules, practice, pleadings and forms of the courts, and to provide for abolishing the distinct forms of actions at law, and for the administration of justice in a uniform mode of pleading, without distinction

between law and equity," and the enactment of a new code of practice, in accordance with the requisition, by which the distinction between actions at law and suits in equity, and the forms of all such actions and suits, theretofore existing are abolished, have not abolished the distinction between law and equity. There is to be no distinction between law and equity as to the *mode of pleading*; but all other subsisting differences between law and equity are not only left undisturbed, but are impliedly recognized by the constitution. (Bick. Civ. Code, 3, 4.)

Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in a pleading. (Code of *Ohio*, § 129; of *Kansas*, § 139; of *Kentucky*, § 144.) This section refers to those presumptions of fact which the law raises upon the ascertainment of other facts. (*Gregory v. McFarland*, 1 Duv. 59.) A statement of a legal conclusion, deduced by the plaintiff from facts alleged in his pleadings, is not a material allegation. (*Steadman v. Guthrie*, 4 Met. 149.)

3. *Mode of stating an account.*] It shall not be necessary for a party to set forth, in a pleading, the items of an account therein alleged; but he must deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. (Code, § 158.) The court, or a judge thereof, or a county judge, may order a further account, when the one delivered is defective; and the court may, in all cases, order a bill of particulars of the claims of either party to be furnished. (Ibid.)

It has been held that in an equitable action, an order for a further account should not require more than the original order, and in so far as it does, it will be modified on appeal. (*Mason v. Ring*, 10 Bosw. 598.) A party claiming on an account stated, who refuses to furnish the items of his demands, pursuant to section 158, should be precluded from giving evidence of such items, further than it may be necessary to prove the settlement of the sum due (*Goings v. Patten*, 1 Daly, 168; S. C. 17 Ab. 339.)

Where a bill of particulars is ordered, or furnished, the several items thereof should be given with all practicable particularity, and the date and amount, and the general character of each item which it is proposed to establish by proof at the trial. (*Kellogg v. Payne*, 8 How. Pr. 329.) It is sufficiently explicit if the opposing party can gather from it, with reasonable certainty the evidence which is to be offered. (*Smith v. Hicks*, 5 Wend. 48.) It is sufficient if it points out the items and particulars embraced in the plaintiff's claim. It need not point out the grounds upon which he claims to recover. (*Seaman v. Low*, 4 Bosw. 338.)

In *Minnesota*, it shall not be necessary for a party to set forth, in a pleading, the items of an account therein alleged, but he shall deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further or more particular bill. (Code, § 74.)

In *Kentucky*, when the action is upon an account, a copy thereof must be filed with the pleading. (Code, § 145.)

In *Ohio*, if the action, counter-claim or set-off be founded on an account, or on a note, bill or other written instrument, as evidence of indebtedness, a copy thereof must be attached to, and filed with the pleading. If not so attached and filed, the reason thereof must be shown in the pleading. (Code, § 117.)

In *Wisconsin*, the method of stating an account, in pleading, is the same as that prescribed by section 158 of the New York Code. (Rev. Stat. of 1853, p. 723, § 20.)

4. *Pleadings to be liberally construed.*] In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties. (Code, § 159.)

If substantial averments, or matters necessary to be pleaded, be omitted, this section does not permit such omission to be disregarded. (*Koenig v. Nott*, 2 Hilt. 324; *Spear v. Downing*, 34 Barb. 522; S. C. 12 Ab. 437; 22 How. Pr. 30.) Where, in a complaint, a specific allegation follows one more general, the specific statement of facts controls the general allegation, and although it is unnecessary, yet if the general allegation is any way qualified by it, it cannot be stricken out, or rejected as surplusage. (*Hatch v. Peet*, 23 Barb. 575.) Where general statements are made use of, in a complaint, which are evidently qualified, and it is the intention of the pleader that they should be qualified by subsequent facts, they must be taken accordingly, with such qualification. (*Page v. Boyd*, 11 How. Pr. 415.)

Where there is, in a pleading, the averment of a legal conclusion against a previously admitted fact, the fact is of the most importance, and must stand, and the

conclusion will be disregarded. (*Jones v. Phoenix Bank*, 8 N. Y. 223; *Robinson v. Stewart*, 10 id. 189.) If a defendant answers upon the merits, and then waits until the trial to make objections to the complaint, much greater liberality will be exercised by the court, in the construction of the pleading, than if the same questions had been presented on demurrer. (*St. John v. Northrup*, 23 Barb. 26; *Cady v. Allen*, 22 id. 394.) So, where the defendant might have availed himself of the objection by motion. (*Wall v. Buffalo Water Works Co.* 18 N. Y. 118.)

Words in a pleading are to be construed in their ordinary and popular sense; and it should be so plain that a person understanding the language can understand it. (*Mann v. Morewood*, 5 Sandf. 557; *Woodbury v. Sackrider*, 2 Ab. 402.) A pleader must say what he means; and the court will not search out a meaning for him. In the construction of a pleading, the court will be governed by what is alleged, and not by what may have been intended to be alleged. (*Gould v. Glass*, 19 Barb. 179; *Ogdensburgh Bank v. Van Rensselaer*, 6 Hill, 240.) If a pleading has been verified, all its facts must, if possible, be harmonized in its construction. (*Ryle v. Harrington*, 4 Ab. 421; S. C. 4 How. Pr. 59.) If a pleading is so worded that it is a matter of doubt whether the pleader will rely upon an action sounding in tort, or for a breach of contract, the court will apply that construction which will be most unfavorable to the party pleading. (*Ridder v. Whitlock*, 12 How. Pr. 208; *Munger v. Hess*, 23 Barb. 75.) This rule, however, does not require such a construction to be given as will make the pleading absurd. (1 Chit. Pl. 237; *Marshall v. Shafter*, 32 Cal. 176; *Lorraine v. Long*, 6 id. 452; *Sheddon v. Patrick*, 28 Eng. L. & Eq. R. 68.) When the facts set forth in the complaint will support either of two actions, and it is doubtful which the pleader intends to bring, it is competent to consult the summons and the demand for judgment, in order to ascertain which action was intended to be brought. (*Rodgers v. Rodgers*, 11 Barb. 595; *Chambers v. Lewis*, 2 Hilton, 591; S. C. 10 Ab. 206; 11 id. 210; *Cornes v. Harris*, 1 N. Y. 223.) Where the statements in a pleading are so indefinite or uncertain that it is not apparent what is the precise nature of the charge, the proper remedy of the other party is to apply to the court, by motion, to have the pleading made more certain and definite. (*Oleott v. Carroll*, 39 N. Y. 436.)

The old common law rule prevails in regard to matters of substance, in a pleading, that the pleading is to be construed most strongly against the pleader. (*Bates v. Rosekrans*, 23 How. Pr. 98; *Ridder v. Whitlock*, 12 id. 208.) Thus where, in an action on contract, the answer is susceptible of being construed to contain two defences, one of payment, and the other requiring an account—one requiring a reply, and the other not—the answer should be construed as setting up only the defence of payment, and not considered as containing a counter-claim requiring a reply. (*Ibid.*) Especially where all the alleged counter-claims are liable to the objection that they are not apparently set up as such, but are set up by way of defence, and do not claim affirmative relief. (*Ibid.*) But the rule above mentioned must be taken with some qualification; for the language of a pleading is to have a reasonable intendment and construction; and when a matter is capable of different meanings, that shall be taken which will support the pleading, and not that which will defeat it. (*Allen v. Patterson*, 7 N. Y. 480.) When place is material to be alleged, and the pleading is ambiguous as to the place, the presumption is against the pleader. (*Beach v. The Bay State Co.* 10 Ab. 71; S. C. 30 Barb. 433.)

The Code makes it the positive duty of the court to disregard all nice distinctions and objections, and to construe pleadings liberally, with a view to substantial justice. (*St. John v. Griffith*, 1 Ab. 39.)

The allegation of the making of a written instrument is equivalent to averring a delivery. (*Prindle v. Caruthers*, 15 N. Y. 426; *Peets v. Bratt*, 6 Barb. 662.) Where a complaint alleged that the bill was duly presented for payment, and payment duly demanded, it was held that material facts were omitted, and that the court would not imply that the bill was presented to the drawer, and payment demanded from him. (*Graham v. Machado*, 6 Duer, 515; *Bank of Lowville v. Edwards*, 11 How. Pr. 216.)

When a pleading states that goods have been sold, a delivery is always implied. (*Clark v. Meigs*, 13 Ab. 467.) So, the statement, in a complaint, that judgment has been recovered, and that it is a lien, embraces the fact of the docketing of the judgment, and its legal effect. (*Cady v. Allen*, 22 Barb. 394.) And where it is averred, in a pleading, that an instrument was "signed," the meaning is that it was "made." (*Price v. McClave*, 6 Duer, 544.) The allegation that a person was sole heir at law, &c., is equivalent to saying that he was the testator's heir, as well as his sole heir. (*St. John v. Northrup*, 23 Barb. 26.) And the word "negligence" is held to include gross, as well as ordinary, negligence. (*Nolton v. Western R. R. Corporation*, 15 N. Y. 444; *Edgerion v. N. Y. & Harlem R. R. Co.* 35 Barb. 389; S. C. 39 N. Y. 227.)

But where a complaint avers that the plaintiff is the "owner" of a note, &c., this will not be construed as signifying that the note was "made or indorsed" by the defendant. (*Bank of Geneva v. Gulick*, 8 How. Pr. 51.)

In an action to recover the possession of real estate, the facts set forth in the complaint must show that the plaintiff has a legal title to the premises in question. The mere averment that he has such a title is insufficient. (*Lawrence v. Wright*, 2 Duer, 673.) Facts constituting a cause of action or a defence, in the sense of the Code, are physical facts, capable of being established by oral or documentary proof, not propositions which are true in law. (*Ibid.*) When a party's title to real estate is shown, and it is alleged that it was in him on a certain day named, it need not be alleged that he continued the owner until the suit was commenced. This is a legal presumption. (*Van Rensselaer v. Bonesteel*, 24 Barb. 365.)

A general allegation, in a complaint, that the grantee procured a deed by false and fraudulent representations, and by undue and improper influence, &c., is not sufficient. What the practices, &c., were, must be stated. (*Butler v. Viele*, 44 Barb. 166.) There is, in substance, no difference between an averment, in a complaint, that by means of certain specified frauds of the defendants, (which are charged to have been practiced with intent to defraud the public generally,) the plaintiff was induced to make, and did make, a particular purchase, and an averment that the defendants, by means of such frauds, induced the plaintiff to make such purchase. (*Cross v. Sackett*, 2 Bosw. 618; S. C. 6 Ab. 247; 16 How. Pr. 62.) The averment, in either form, connects the fraud and damage as cause and effect, with sufficient certainty, to comply with all the essentials of a complaint good in substance. (*Ibid.*) Notwithstanding there is a positive denial of any fraud, in pleadings, if in the same pleadings there are admissions of facts which show that the transaction was fraudulent, such denial will not prevail against the admissions. (*Robinson v. Stewart*, 10 N. Y. 189; *Wright v. Prescott*, 2 Barb. 196; *Dykens v. Woodward*, 7 How. Pr. 313.)

An allegation that on day named A. B. was in the employ of the defendants, as an engineer upon their locomotive, while it was in their use and service, is sufficient to show the relation of master and servant existing between the defendants and A. B. on that day. (*McMillan v. Saratoga & Wash. R. R. Co.* 20 Barb. 449.) An allegation, in a complaint, that certain drafts were accepted by a corporation, by its treasurer, includes an averment of authority to the treasurer to accept the drafts; inasmuch as the company could not accept by him, unless he had such authority. (*Partidge v. Badger*, 25 Barb. 146.)

When a deed is set up, in an answer, it is absolutely essential to allege delivery and acceptance. It will by no means suffice to state that it was "executed in due form of law." (*Whitlock v. Fiske*, 3 Edw. Ch. 131; *Keteltas v. Myers*, 19 N. Y. 232; *La Fayette Ins. Co. of Brooklyn v. Rogers*, 30 Barb. 491.)

Allegations in the present tense, in a verified pleading, must be deemed as relating to the date of verification. (*Prindle v. Caruthers*, 15 N. Y. 426; *Boyd v. Weeks*, 2 Denio, 222; *Fisher v. Ford*, 2 Ad. & El. 654; *Faithful v. Ashley*, 1 Q. B. 183; *Wheeler v. Heermans*, 3 Sandf. Ch. 597; *Rice v. O'Connor*, 10 Ab. Pr. 362; *Martin v. Kanouse*, 2 id. 329; *Dendy v. Powell*, 3 M. & W. 442; *Mollan v. Torrance*, 9 Wheat. 537; *Warwick v. Beswick*, 10 B. & C. 676.)

Where a complaint averred that the defendant made and delivered to the plaintiff his promissory note, setting out a copy, showing it to be for \$204.67, payable Sept. 2, 1858; that there was due and owing to the plaintiff the said sum of \$204.67, with interest from date, and demanded judgment; it was held that all that was necessary to state, additionally, was, that there was due to the plaintiff thereon, from the defendant, the amount of the note; which was done, in equivalent words, about which there could be no mistake or misleading of the party; and that the allegations should have been liberally construed, with a view to substantial justice between the parties. (*Keteltas v. Myers*, 19 N. Y. 231, 233.)

One object in enacting the Code was, to introduce truthfulness into pleadings. (*Walker v. Hewitt*, 11 How. Pr. 395.) The theory of the Code, in reference to pleading, is, that the party pleading knows, or should know, beforehand, what is the truth of his case, and that he should state the truth, and nothing but the truth, in his pleading. It is no longer necessary to state the case in different forms, to guard against a variance between the allegation and the proof. (*Dunning v. Thomas*, 11 How. Pr. 281.)

An averment, in a pleading, that an agent acted by due authority, is sustained by proof of subsequent ratification. (*Hoyt v. Thompson's Ex'r*, 19 N. Y. 208.)

"Substantial justice," as used in the Code, means *substantial legal justice*, to be ascertained and determined by fixed rules and positive statutes. (*Stevens v. Ross*, 1 Cal. 95.) That allegations shall be *liberally* construed, does not mean that the

omission of substantial averments should be disregarded, (*Koenig v. Nott*, 2 Hilt. 325; *Spear v. Downing*, 34 Barb. 523; 12 Ab. Pr. 437.) since the law will not assume anything in favor of a party which he has not averred. (*Cruger v. Hudson River R. R. Co.* 12 N. Y. 201.)

To state, in a pleading, the nature and source of the information upon which the party relies in making an averment on information and belief, does not vitiate the allegation. Nor does prefixing the word "therefore" to an allegation render the allegation any the less an allegation of fact. (*Borrowe v. Millbank*, 5 Ab. 28.)

The averment of a mere conclusion, without any fact to warrant it, is always disregarded. (*Schenck v. Naylor*, 2 Duer. 678. See *Mann v. Morewood*, 5 Sandf. 566; *Garr v. Selden*, 4 N. Y. 91; *Sibley v. Waffle*, 16 N. Y. 180; *Burrall v. Bowen*, 21 How. Pr. 378.)

The *California Practice Act* (§ 70) contains the same rule for construing pleadings, as that laid down in section 159 of the *New York Code*. See also *Code of Nevada*, § 70; of *Idaho*, § 70; of *Arizona*, § 70; of *Kansas*, § 124; of *Ohio*, § 114; of *Wisconsin*, § 21; of *Minnesota*, § 75; of *Kentucky*, § 146. In all these states the rule of construction is the same.

In *Indiana*, it is provided by the Code that the laws and usages of that state, relative to pleadings, not inconsistent with the Code, and as far as the same may operate in aid thereof, and to supply any omitted case, shall be continued in force. (2 R. S. 224, sec. 802; *Bick. Civ. Pr.* 4.)

5. *Striking out irrelevant and redundant matter.*] If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. (Code, § 160.)

Irrelevant matter. Irrelevant matter is superfluous matter incorporated in a pleading otherwise good. (*Nichols v. Jones*, 6 How. Pr. 353.) Matter is irrelevant, when no material issue can be framed upon it. (*Rensselaer & Wash. Plank Road Co. v. Wetsel*, 6 How. Pr. 68, Per WILLARD, J. id. 479.) Any matter in a pleading is irrelevant if it has no bearing on the question in dispute, and does not affect the subject matter of the controversy, and can in no way assist, or affect the decision of the court. (*Fabricotti v. Launitz*, 3 Sand. 743; S. C. 1 Code Rep., N. S. 121; *Lee Bank v. Kitching*, 7 Bosw. 664; S. C. 11 Ab. 435; *Calhill v. Palmer*, 17 id. 196; *Van Rensselaer v. Brice*, 4 Paige, 177; *Perrine v. Farr*, 2 Zabriskie, 356.)

In *Martin v. Kanouse*, (2 Ab. 330,) it is decided that the true rule, in respect to striking out irrelevant allegations in a pleading, is, that if the matter cannot be made the subject of a material issue, or affect the question of an injunction, or costs or other relief to be granted, and will embarrass the opposite party and the court, it should be stricken out.

Yet if the matter in any way affects the question of damages, or costs, it cannot be stricken out as irrelevant. (*Root v. Foster*, 9 How. Pr. 37; *Van Rensselaer v. Brice*, *supra*.) No part of a pleading ought to be struck out which can in any event become material. (*Averill v. Taylor*, 5 How. Pr. 475; S. C. 1 Code Rep., N. S. 213.) The prayers of a defendant, in his answer, cannot prejudice the plaintiff, and will not be struck out, on motion. (*Ibid*.)

Section 160 of the Code was not intended as a substitute for a demurrer. (*Harlow v. Hamilton*, 6 How. Pr. 475.)

The fact that a defence arose after the action was commenced is no reason for striking it out for irrelevancy. (*Carpenter v. Bell*, 1 Rob. 711; S. C. 19 Ab. 258.) Nor can a defence be stricken out as irrelevant because it contains matters which may be proved under the general denial. (*Hollenbeck v. Clow*, 9 How. Pr. 289. But see *Benedict v. Seymour*, 6 id. 298.) In an action to recover securities pledged with the defendants, the latter, in their answer, denied knowledge, &c., sufficient to form a belief whether the securities belonged to the plaintiff; and then averred that the securities were delivered to them by the plaintiff as collateral to debts yet unpaid. *Held*, that the first clause of the answer would, by itself, have formed a good issue; and that it was not rendered irrelevant by the addition of the second. (*Townsend v. Platt*, 3 Ab. 325.)

A judge has no power to strike out pleadings, on the trial. All objections to the pleadings should be decided before the circuit. (*Smith v. Countryman*, 30 N. Y. 655.) It is not a fatal objection to a complaint, on a motion to dismiss the same, that it contains irrelevant matter which might have been stricken out on motion, under section 160. (*Simmons v. Eldridge*, 29 How. Pr. 309, 312; *Meyer v. Van Collem*, 28 Barb. 230, 233.) Upon a motion to strike out matters in an answer, for irrelevancy, which is the only ground stated in the motion papers, the court ought not to consider (except incidentally) any other question, such as whether the matter ought to be stricken out forms the whole or a material part, of a defence or counter-claim.

(*McGregor v. McGregor*, 35 How. 385.) Though sham and irrelevant deferces or matter may be stricken out, on motion, the matter must be *palpably* sham or irrelevant. (*Ibid.*)

In *Edgerton v. Smith*, (3 Duer. 614,) a complaint against an indorser alleged that due notice of dishonor had been given to the defendant. The answer did not deny this allegation, but denied that the defendant had ever received such notice. Held that this part of the answer must be stricken out as irrelevant, and tending to raise an immaterial issue.

In an action upon contract, it is improper to insert in the complaint allegations that the defendant was guilty of fraud in contracting the debt sued for; and all such allegations will be struck out as irrelevant. (*Lee v. Elias*, 3 Duer. 736; *Sellar v. Sage*, 12 How. Pr. 531; 13 id. 230.)

In *Decker v. Mathews*, (12 N. Y. 313,) which was an action for the conversion of a promissory note, the complaint, after alleging the making of the note, the parties to it, and the purpose for which it was made, and stating facts showing that the plaintiff was entitled to the note, added: "whereupon the plaintiff became entitled to the possession of the said note." MARVIN J. said: "It was probably not necessary to state this conclusion upon the facts stated, but it can do no harm." So, in *St. John v. Griffith*, (1 Ab. 40,) ROOSEVELT, J. says: "I see no objection to the plaintiff's stating, in addition to the fact, what he may consider to be its legal effect: such statement may or may not be an unnecessary repetition, according to circumstances.

If a complaint, in addition to the statement of a good cause of action, contains unnecessary and improper matters, the remedy of the defendant is to move to have the improper matter stricken out. (*Meyer v. Van Collem*, 28 Barb. 230.) And see *Lee Bank v. Kitching*, (7 Bosw. 664,) where the questions, what answers, or defences forming parts of an answer, and what matter in an answer, or defence forming part thereof, or of a defence therein, may be treated as irrelevant, are considered by HOFFMAN, J. A complaint must not contain the system of pretence and charge which prevailed in the former chancery pleading. (*Clark v. Harwood*, 8 How. Pr. 470.)

An entire answer or defence, or an entire complaint, cannot be stricken out as irrelevant. (*Fasnacht v. Stehn*, 5 Ab. N. S. 338; S. C. 53 Barb. 650; *Collins v. Coghill*, 7 Rob. 81; *Benedict v. Dake*, 6 How. Pr. 352; *Nichols v. Jones*, id. 352; *Howell v. Knickerbocker Life Ins. Co.* 24 id. 475. See *Blake v. Eldred*, 18 id. 240.) Nor can any portion of a complaint be stricken out, on motion, as irrelevant, when there is no specification of what portion is objectionable. The alleged irrelevant matter should always be clearly pointed out by the moving party. (*Benedict v. Dake*, 6 How. Pr. 352; *Blake v. Eldred*, 18 id. 249; *Bryant v. Bryant*, 2 Rob. 612.)

When every part of an answer is objected to as irrelevant and redundant, although by several exceptions, it must be regarded as an exception to the whole pleading; and an application to strike out, under § 160, cannot be entertained, because it would give to the motion the effect of a demurrer, or a decision under § 152. (*Blake v. Eldred*, 18 How. Pr. 240.) Neither can an entire complaint be struck out, on motion, as irrelevant, because, if leave should be granted to serve a new complaint, it would be giving to the motion the effect of a demurrer. And giving effect to the motion merely, would leave both parties in court without the power of proceeding in the action until special relief should be granted. (*Benedict v. Dake*, 6 How. Pr. 352.) In an action on a foreign judgment, matters of defence alleging fraud in the obtaining of such judgment, even if conceded to be frivolous, cannot be held irrelevant, so as to be stricken out. (*Fasnacht v. Stehn*, *supra*.)

An omission to move to have irrelevant matter in a complaint stricken out, will be taken as an admission that the party is prepared to meet the charges against him. (*Quintard v. Newton*, 5 Rob. 72.)

Motions to strike out parts of a pleading as irrelevant are not to be encouraged, unless it is manifest to the court that it would be to the *prejudice* of the party who has to answer, to suffer the objectionable matter to remain. (*Molony v. Dows*, 15 How. Pr. 261; S. C. 2 Hilt 247.) Nor is a court to be taxed with the labor and trouble of minutely inspecting a pleading upon summary motion, for the purpose of ascertaining whether averments are or are not relevant; unless in cases where it is absolutely incumbent upon the party to get rid of them, to enable him to frame a proper answer. (*Ibid.*; *Blake v. Eldred*, 18 How. Pr. 240.) A party must be *aggrieved* or *prejudiced* by allowing the matter to remain. (*Hynds v. Griswold*, 4 How. Pr. 69; *White v. Kidd*, id. 68; *Brockleman v. Brandt*, 10 Ab. 141.) The irrelevant matter which the Code authorizes to be stricken out, is such as implies that the pleading contains other matter which is material. If the *whole* answer is bad, the proper remedy is to demur, or to move under § 152, to strike it out as an irrelevant defence. (*Harlow v. Hamilton*, 6 How. Pr. 478.)

In *Butler v. Mason* (5 Ab. 40.) an allegation in the complaint, anticipating the defence of the statute of limitations, in these words—"the defendants have not resided, at any time within six years before the commencement of this action, in the state of New York"—was stricken out as irrelevant.

A motion to strike out matter from a pleading as irrelevant must be made, upon notice served within twenty days after service of the pleading. (*New York Ice Co. v. North Western Ins. Co.* 12 Ab. 74; S. C. 21 How. Pr. 234.) The service of an answer, after notice of a motion to strike out irrelevant matter in the complaint, is a waiver of the motion. (*Goch v. Marsh*, 8 How. Pr. 439.) A stipulation extending the time for the defendant to answer, and to make such application as he shall be advised, embraces a motion to strike out portions of the complaint as irrelevant, &c. (*Lackey v. Vanderbilt*, 10 How. Pr. 155.)

In *Arrangoiz v. Fraser*, (2 Hilton 244,) which was an action upon a promissory note, against the first indorser, an allegation in the answer, that one R. was the owner and holder of the note; that the maker had a claim against R. and had notified the defendant of such claim, and forbidding him to pay the note, was stricken out as irrelevant.

Where two or more causes of action, proper to be united, are stated in the same complaint, but not separately, but are blended or intermingled in the statement, the objection should be taken by motion to strike out as irrelevant all matter not applicable to a single cause of action. Either cause may be struck out, and the party moving may elect as to which one. (*Waller v. Raskan*, 12 How. Pr. 23.)

An extension of the time to answer, is a bar to a motion to strike out irrelevant matter, unless expressly given by the court, and is a waiver of all objections to the complaint. (*Bowman v. Sheldon*, 5 Sandf. 657.) Although new matter in an answer may constitute a good cause of action, yet if it is palpably no defence either total or partial, nor a counter-claim, it may be struck out on motion, as irrelevant. (*Kurtz v. McGuire*, 5 Duer. 660.)

Any allegation, in an answer, which does not put in issue any portion of the complaint, and which would not be admitted in evidence at the trial, is irrelevant. (*Brown v. Orvis*, 9 How. Pr. 376.)

Redundant matter. Matter is redundant when the pleading expresses the same meaning, after the matter is expunged, as it did before. (*Harlow v. Hamilton*, 6 How. Pr. 479.) Irrelevant or redundant matter may be contained in a pleading which contains a good cause of action or defence. (*Ibid.*)

Redundant and irrelevant matter is superfluous matter incorporated in a pleading otherwise good. (*Nichols v. Jones*, 6 How. Pr. 353.)

It is said, by DUER, J., in *Bowman v. Sheldon*, (5 Sandf. 660 :) "Matter which is irrelevant, it is true, is also redundant, but the converse is by no means true. A needless repetition of material averments is redundancy, although the facts averred, so far from being irrelevant, may constitute the whole cause of action."

Though sham and irrelevant answers and defences may be stricken out, yet under section 152, neither an entire answer or defence, nor a part of an answer or defence, can be stricken out as *redundant*. (*Fasnacht v. Stehn*, 53 Barb. 650; S. C. 5 Ab., N. S. 333. (*Blake v. Eldred*, 13 How. Pr. 240.) Nor can an entire complaint be stricken out as redundant or irrelevant. (*Benedict v. Dake*, 6 id. 352.) Under section 160 of the Code, irrelevant or redundant matter, in a pleading, may be stricken out; but this section does not authorize an *entire* answer, or an entire defence in an answer, to be stricken out as irrelevant or redundant. By irrelevant or redundant matter in this section, is meant matter impertinently or unnecessarily stated, in setting forth the cause of action in the complaint, or the defence, or a defence, in the answer. (*Ibid.*) The rule is, that if a separate denial or defence, otherwise good, is loaded with unnecessary or redundant matter, a motion should be made, under section 160, to have the matter expunged. (*Blake v. Eldred*, 13 How. Pr. 240; *Nichols v. Jones*, 6 id. 355.)

A complaint should not be *dismissed* because it contains matter which is redundant or irrelevant. The remedy is by motion under section 160 of the Code. (*Simmons v. Eldridge*, 29 How. 309; S. C. 19 Ab. 296.) But all objections to the pleadings should be decided before the circuit. A judge has no power to strike out pleadings on the trial. (*Smith v. Countryman*, 30 N. Y. 655.)

In *Brockleman v. Brandt*, (10 Ab. 141,) which was an action for malicious prosecution, averments of aggravating circumstances were held not to be redundant.

It is no sufficient answer to a motion to strike out redundant or irrelevant matter from a complaint, that such matter was inserted solely for the purpose of enabling the plaintiff to obtain an injunction. (*Putnam v. Putnam*, 2 Code R. 64.)

Where matter, in a complaint, though clearly redundant, is not prolix, and does

not tend seriously to prejudice the defendant, or incumber the record, it will not be stricken out. (*Clark v. Harwood*, 8 How. Pr. 470.) But where the plaintiff, in his complaint, undertook to anticipate matters which might be brought forward in the answer, by way of defence, and then set forth those matters as *pretences*, on the part of the defendant, and attempted to meet and avoid them by alleging, in the form of *charges*, certain other matters; it was held that such allegations were redundant. (*Ibid.*) Facts are required, and nothing else. (*Ibid.*)

Redundant or irrelevant matter, in a pleading, must be such as cannot be reached by demurrer, and also be *prejudicial* to the adverse party, to authorize it to be stricken out. (*White v. Kidd*, 4 How. Pr. 68; *Molony v. Dows*, 15 id. 261; *Hynds v. Griswold*, 4 id. 69.)

A party seeking to have matter expunged, must specify the parts deemed redundant or irrelevant; otherwise the matter will not be expunged. The court cannot be required to examine the whole pleading and select the parts to be removed. (*Blake v. Eldred*, 18 How. Pr. 240; *Molony v. Dows*, 15 id. 261; *Benedict v. Dake*, 6 id. 352; *Bryant v. Bryant*, 2 Rob. 612.) If every part of an answer is objected to as redundant or irrelevant, although by several exceptions, it must be regarded as an exception to the whole pleading; and an application to strike out, under section 160, as to each exception, will not be entertained, because it would give to the motion the effect of a demurrer, or a decision under section 152. (*Ibid.*)

Motions to strike out parts of a pleading as redundant or irrelevant are not to be encouraged, unless it is manifest to the court that it would be to the prejudice of the party who has to answer, to suffer the objectionable matter to remain. (*Molony v. Dows*, 15 How. Pr. 261.) A motion to strike out a few redundant words is often viewed as capitious. (Per WILLARD, J., *Harlow v. Hamilton*, 6 How. Pr. 479.)

The court will not amend a pleading on the ground of redundancy. If it is objectionable on that account, the matter objected to must be clearly pointed out by the party aggrieved, in his notice of motion, in order that the court may at once see what it is. (*Bryant v. Bryant*, 2 Rob. 612.)

Motions to strike out of any pleading matter alleged to be irrelevant or redundant must be noticed before demurring or answering the pleading, and within twenty days from the service thereof. (Rule 28, Supreme Court.)

By noticing a cause for trial, a party waives the right of moving, subsequently, to strike out redundant matter from his adversary's pleading. (*Esmond v. Van Benschoten*, 5 How. Pr. 44.)

An answer drawn in conformity with the usage in chancery pleading, admitting specifically all the statements in the complaint, and stating various legal arguments and propositions in defence, cannot be sustained under the Code; such statements being redundant. (*Gould v. Williams*, 9 How. Pr. 51.)

The true test of the materiality of averments, sought to be struck out, is to inquire whether such averments constitute a cause of action or defence. If they do, they will not be struck out. (*Ingersoll v. Ingersoll*, 1 Code Rep. 102.)

The provision for striking out irrelevant or redundant matter from pleadings, contained in section 160 of the New York Code, is also to be found, in nearly the same words, in the Codes of *Kentucky*, (§ 14.) *Kansas*, (§ 128,) *Ohio*, (§ 118,) *Minnesota*, (§ 80,) *Wisconsin*, (§ 22,) *California*, (Pr. Act § 57;) *Nevada*, (§ 57,) *Idaho*, (§ 57,) *Arizona*, (§ 57,) and *Oregon*, (§ 84.)

Conclusions of law, inserted in a pleading, may be considered as mere surplusage. (*Hallock v. Mixer*, 16 Cal. 574.) So of evidence, when inserted in a pleading. (*Green v. Palmer*, 15 Cal. 414; *Bowen v. Aubry*, 22 id. 566, or hypothetical statements. (*Green v. Palmer*, 15 Cal. 414; *Wise v. Fanning*, 9 How. Pr. 543; *Brown v. Ruckman*, 12 id. 313.)

The following tests will determine whether certain allegations in a pleading are unnecessary. (1 *Van Sant*, 319.) 1st. Can the allegation be stricken from the pleading without leaving it insufficient? (*Whitwell v. Thomas*, 9 Cal. 499.) 2d. Can it be stricken from the pleading without impairing any portion of the plaintiff's cause of action? (*Green v. Palmer*, 15 Cal. 414.) 3d. Can it be stricken from the pleading without an injury to the plaintiff, or a benefit to the defendant, however remote the injury or benefit may be? (1 *Estee's Pr.* 138.)

6. *Requiring a pleading to be made definite and certain.*] When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain, by amendment. (Code, § 160.)

The motion to make a pleading definite and certain, under this section is a substitute for a special demurrer, or demurrer for want of form. (*Kellogg v. Baker*, 15 Ab.

286; *Lee Bank v. Kitching*, 11 id. 435; S. C. 7 Bosw. 664; *Prindle v. Caruthers*, 15 N. Y. 425.)

If a pleading is sought to be made more definite and certain, under this section, the remedy is not by demurrer, but by motion. (*Graham v. Camman*, 5 Duer. 697; S. C. 13 How. Pr. 360; *Harlow v. Hamilton*, 6 How. Pr. 475; *Nichols v. Jones*, id. 355; *Howell v. Fraser*, id. 221; *Seeley v. Engell*, 13 N. Y. 542; *Hewitt v. Mason*, 24 How. 336; *Linden v. Graham*, 1 Duer. 670; S. C. 11 N. Y. Leg. Obs. 185; *Lee Bank v. Kitching*, 11 Ab. 435; S. C. 7 Bosw. 664.)

A motion to make a pleading more definite and certain by setting forth the contents of a written instrument relied on by the pleader, should not prevail where it appears that the instrument is lost, and the pleading apprises the adverse party of the nature and effect of the instrument. (*Kellogg v. Baker*, 15 Ab. 286.) Parties are bound to answer positively, as to the facts within their own knowledge; but they are not presumed to recollect the date or contents of written instruments not in their possession or control. (Ibid.) While a motion to strike out a defence as sham is pending, it is irregular for the plaintiff to make a second motion to strike out the same defence, on the ground that the defendant has not complied with an order requiring it to be made more definite and certain. (Ibid.)

The motion, under this section, should be made before the trial. After the trial has commenced, it is too late to object that the pleadings are indefinite or uncertain. (*Farmers' &c. Bank of Long Island v. Sherman*, 6 Bosw. 181; S. C. 33 N. Y. 69; 29 How. 573; *Martin v. Kanouse*, 2 Ab. 331.) Nor can the motion be made after the moving party has noticed the same for trial, upon the issue raised by the pleading. (*Kellogg v. Baker*, 15 Ab. 286.) After an amended answer has been served, the plaintiff has twenty days in which to move to have it made more definite and certain. (*Walker v. Granite Bank*, 1 Ab., N. S. 406.)

Rule 28 of the Supreme Court provides that motions to correct a pleading on the ground of its being "so indefinite or uncertain that the precise nature of the charge or defence is not apparent," must be noticed before demurring to, or answering the pleading, and within twenty days from the service thereof.

An order requiring a pleading to be made more definite and certain may be appealed from. (*Arrieta v. Morrissey*, 1 Ab., N. S. 439.) The proper mode of suspending the operation of the order, pending the appeal, is by a stay of proceedings; not by an extension of the time for amendment. (*Culver v. Hollister*, 17 Ab. 405.)

If, in an action against the maker of a note, an answer alleging that the note was paid to the plaintiff, by a third person, is deemed defective by reason of its not specifying the facts relied upon to establish payment, the plaintiffs' remedy is by a motion to make it more definite and certain. (*Farmers' &c. Bank of Long Island v. Sherman*, 6 Bosw. 181.)

In a complaint seeking to set off a judgment held by the plaintiff as assignee, against one recovered by the defendant against the plaintiff, the consideration upon which the judgment held by the plaintiff was assigned to him need not be stated. (*Martin v. Kanouse*, 2 Ab. 330.)

The time stated in a pleading is often not material; that is, it may be departed from, in evidence; but allegations in respect to time, like all other allegations, are evidence against the party making them, as his admissions. (*Andrews v. Chadbourne*, 19 Barb. 147.)

Less definiteness and certainty will be required than would otherwise be necessary, when the matters in controversy are better known to the opposite party than to the pleader. (Steph. Pl. 370.) Thus a pleading which, setting forth an agreement respecting a policy of insurance, states the names of the insurers and the insured, that it is an insurance on the furniture in D.'s tavern, in N., and that it was given for \$1,000, describes the same with sufficient accuracy; especially if the policy is not in the plaintiff's possession, but in the hands of the defendant. (*Nellis v. Deforest*, 16 Barb. 61.)

A complaint for money received, which states that at a specified time the defendants received, as agents of the plaintiff, from a party named, certain sums of money, amounting in the aggregate, to a specified sum, and alleges a demand and refusal, is not obnoxious to a motion that it be made more definite and certain. The defendant, if he wishes more, must seek a bill of particulars. (*Sloman v. Schmidt*, 8 Ab. 5.)

Where the plaintiff, in his complaint, stated the circumstances under which the defendant made an assignment for the benefit of creditors, and set forth the whole assignment and then alleged that it was fraudulent and void on its face, it was held

sufficiently definite and certain; and that it was not necessary to allege and state why, and for what reason, the assignment was fraudulent and void on its face. (*Hastings v. Thurston*, 18 How. Pr. 530.) And so, as to an allegation that the assignment was made with intent to hinder, delay and defraud creditors. (*Ibid.*)

An omission to move to have a pleading made definite and certain will be taken as an admission that the party is prepared to meet the charges against him. (*Quintard v. Newton*, 5 Rob. 72.)

In *Prindle v. Caruthers*, (15 N. Y. 425,) the complaint stated that the defendant made his contract in writing, "and set forth a copy thereof, in which the defendant "for value received, promised to pay;" but the complaint did not in direct terms aver any consideration for the contract. It also stated that such contract became the property of the plaintiff, by purchase, without stating when, from whom, or upon what consideration. *Held*, that these defects were not of so substantial a nature as to be available under the ground of demurrer that the complaint did not state facts sufficient to constitute a cause of action; but that the remedy was by motion under § 160, to make the faulty pleading more definite and certain.

An answer alleging that "there is another action now pending between the same parties, for the same identical cause of action mentioned in the complaint in this action," is sufficiently definite and certain. (*Ward v. Dewey*, 12 How. Pr. 193.)

The provision for requiring a pleading to be made definite and certain, contained in section 160 of the Code of New York, (*supra*) has also been re-enacted in other states. (See Codes of *Ohio*, § 118, *Kansas*, § 128, *Minnesota*, § 80, and *Wisconsin*, § 22.)

It has been held, in Ohio, that where the petition, in an action for rent, alleges, as the basis of the amount of rent, an appraisement "duly and legally made," and the answer, instead of stating in what particular the appraisement is illegal, alleges that "the appraisement was not legally and duly made," the answer may be the subject of a motion, under § 118 of the Code, on account of indefiniteness; but if the parties proceed to trial on the issue, the objection is waived. (*Trustees of 16 v. Odlin*, 8 Ohio State Rep. 293.) The sufficiency of pleadings, as to certainty, precision, definiteness and consistency of allegation, which does not amount to such an absolute omission of fact as to constitute no ground of action or defence, must be taken advantage of, or be objected to, by motion under § 118, and can afford no ground for demurrer, or assignment of error. (*Ibid.*) Where a legal deduction or conclusion of law is alleged, and the pleading contains a fact constituting a cause of action or defence, and is indefinite and uncertain, it may be made definite on motion. (*Ibid.*)

When the facts are not really stated with sufficient certainty, the introduction of the words "certain" (*Bennett v. Ex'rs. of Pixley*, 7 John. 249; 13 East. 102, 116; 1 Bos. & P. 98, 102; 2 id. 120, 265; 1 Saund. 298, n. 1,) "duly," "lawfully," "sufficient," will not avail to make the fact certain. (*Van Ness v. Hamilton*, 19 John. 349.)

A person claiming as next of kin should show how he was related to the deceased. An allegation that he is "nearer of kin" to the deceased than any other person residing in the United States, is not sufficient. (*Public Adm'r. v. Watts*, 1 Paige, 348.)

7. *Pleading Judgments.*] In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction. (Code, § 161.)

This section was expressly intended to alter the former rule, (and it is abrogated in terms,) that in pleading a judgment or determination of a court of inferior and limited jurisdiction the facts conferring the jurisdiction must be specially pleaded. (*Wheeler v. Dakin*, 12 How. Pr. 537.) Now, in pleading any determination of a court of limited jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may simply be alleged to have been duly given or made. If that be denied, jurisdiction, and all jurisdictional facts, must be proved. (*Ibid.*)

The statute gives a short and simple form of pleading a judgment; and it is safest, if not indispensable, that the statute language be adopted and used, when the party seeks to avail himself of this provision of the Code, instead of following the common law forms, in such cases. (*Hunt v. Dutcher*, 13 How. Pr. 538.) An allegation that the justice by whom a judgment was averred to have been rendered, had full authority and jurisdiction over both the person of the defendant and the subject matter of the action, to try the same, and that such proceedings were thereupon had, that on, &c., judgment was "entered in said action," by said justice, in favor of the plaintiff,

for. § &c., which judgment remains unsatisfied, is insufficient. (*Ibid.*) It is not equivalent to the words, that such judgment has been, or was, "duly given or made." Although the words "entered," or "perfected" may be equivalent to the words "made," or "given," the word "duly" is most essential, and can hardly be dispensed with and satisfy the terms of the statute. (*Ibid.*) The allegation that the judgment was entered would be proved by simple evidence of the actual rendition of a judgment. But the allegation that the judgment was "duly given or made," could only be proved by establishing, on the trial, the facts conferring jurisdiction upon the justice, and showing that the judgment was in all respects, lawfully and regularly obtained, or rendered. (*Ibid.*)

Under § 161 it is necessary in pleading the determination of an officer of special jurisdiction, to designate the officer. An averment that such determination was *duly* made, is insufficient. (*Carter v. Koezley*, 14 Ab. 147; S. C. 9 Bosw. 583.)

In pleading an insolvent's discharge, it is not necessary, under section 161, to state the facts conferring jurisdiction on the officer who granted it. (*Livingston v. Oaksmith*, 13 Ab. 128.) It is enough if the pleading alleges that the judgment or determination was *duly* given or made. (*Ibid.*)

In an action on a judgment of a *foreign* court of inferior jurisdiction, the complaint must set forth the facts showing that the court had jurisdiction both of the person and of the subject matter. It should aver the fact of the existence of a general jurisdiction in the court, or of a limited jurisdiction which extended to the cause of action for which the judgment was recovered. (*McLaughlin v. Nichols*, 13 Ab. 344.)

A complaint, in such a case, which contains no averment of any facts to give jurisdiction to the court in which the judgment was rendered, either of the persons of the defendants or the cause of action, and does not state what the jurisdiction of the court is, cannot be vindicated by the Code; since it does not conform to the rule given by section 161, "if that applies to foreign judgments, or judgments of another state, which has been doubted." (Id. 245, per EMOTT, J.)

It is said by ALLEN, J., in *Hollister v. Hollister*, (10 How. Pr. 539 :) "It appears to be conceded that § 161 of the Code does not apply to foreign judgments; and it would seem to follow, from this, that a general averment of jurisdiction of a foreign tribunal would not be sufficient." But in *Halstead v. Black*, (17 id. 227,) it was held that in pleading the judgment of a court of record of a sister state, section 161 of the Code applies; and that it is sufficient to allege that the judgment was *duly* recovered, without stating the facts conferring jurisdiction.

In an action for slander, in charging the plaintiff with stealing and carrying away the examination of S. G., taken by. and deposited with, T., a justice of the peace, the complaint did not allege that the examination was taken by the justice upon any complaint, made or pending before him, against S. G. or any other person; nor did the occasion or purpose, or whether it was a civil or criminal proceeding, appear; nor that T. had jurisdiction. Held that the complaint was defective in substance; and that this objection was not obviated by the rule of pleading contained in section 161 of the Code. (*Ayres v. Covill*, 18 Barb. 260. And see *Bement v. Wisner*, 1 Code Rep., N. S. 143.)

In *Kansas*, in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall be sufficient to state that such judgment or determination was *duly* given or made. If such allegation be controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction. (Code, § 130.) Section 120 of the Code of *Ohio*, is in the same words.

In *Kentucky*, in pleading such a judgment or determination, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been *duly* given or made. If such allegation is made in a petition, and is not controverted in the answer, or made in the answer in relation to a counter-claim or set-off, and is not controverted in the reply, it need not be proved on the trial. (Code, § 143.)

Section 81 of the Code of *Minnesota* is the same as section 161 of the Code of New York, (*supra*.) Section 23 of the Code of *Wisconsin* is also the same.

In *California*, in pleading a judgment, and especially of a court of *general* jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been *duly* given or made; and if controverted, the facts conferring jurisdiction must be established on the trial. (Cal. Pr. Act, § 59; *Low v. Burrows*, 12 Cal. 181; *Hanscom v. Tower*, 17 id. 518. See also Codes of *Nevada*, § 59; *Idaho*, § 59; *Arizona*, § 59; *Oregon*, § 85.) But in pleading the judgment of a court of *limited* jurisdiction, it is necessary to set forth the facts which give jurisdiction, (*Smith v. Andrews*, 6 Cal. 652,) as the law presumes nothing in favor of their jurisdiction. (*Swain v. Chase*, 12 Cal. 233; *Rowley v. Howard*, 23 id. 403;

McDonald v. Katz, 31 id. 169; 1 *Estee's Pr* 243.) Where the transcript of the judgment shows the jurisdiction of the court, on its face, it is not necessary to aver jurisdiction. (*Low v. Burrows*, 12 Cal. 181.)

8. *Pleading performance of conditions precedent.*] In pleading the performance of conditions precedent, in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated, generally, that the party duly performed all the conditions on his part. And if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. (Code, § 162.)

A complaint against the maker and indorser of a promissory note, which alleges the making of the note, and its indorsement and transfer by the payee, the indorser, to the plaintiff, and that payment of the note was duly demanded at maturity, and was thereupon duly protested for non-payment, must be regarded as a general statement of the performance of the conditions precedent to the plaintiff's right to recover; and is therefore sufficient. (*Adams v. Sherrill*, 14 How. Pr. 297.) To charge an indorser, it is not necessary to aver a presentment and demand of the maker at the place specified in the note. (*Gay v. Payne*, 5 How. Pr. 107.) An allegation that the note was "duly presented" and "duly demanded," will allow the plaintiff to prove the facts which constitute the performance, though he has not specifically averred them, in his complaint. (*Ibid*; *Woodbury v. Sackrider*, 2 Ab. 402.) If the complaint avers that at maturity the note was duly presented for payment, to the makers, this is a sufficient averment of presentment at the place named. (*Ferner v. Williams*, 14 Ab. 215; S. C. 37 Barb. 9.)

But, in *Graham v. Machado*, (6 Duer, 514,) it was held, by the superior court of the city of New York, that allegations in a complaint that a presentment of a bill of exchange was "duly made" and payment "duly demanded," are not warranted by section 162; and that that section has no application to averments necessary to charge the drawer of a bill, but is applicable only to conditions precedent expressed in a contract, and which, by its terms, are to be performed by a party to the contract, who is also a party to the action, and the performance of each of which conditions by himself, but for this section, he would have been compelled to state in his complaint or answer.

It was also held, in that case, that, in an action against the drawer of a bill of exchange, payable at a certain number of days after sight, an averment, in the complaint, that the drawee accepted the bill, is equivalent to an averment that the bill was presented to him for acceptance and that he had sight thereof when he accepted it.

Where, to entitle a plaintiff to recover, he must show performance of a condition precedent, or a valid excuse for its non-performance, and there has been no performance, the plaintiff, if he intends to rely on an excuse must state the facts relied on as an excuse, and not state that he duly performed; for under an allegation of performance, evidence in excuse for non-performance is not admissible. (*Hosley v. Black*, 28 N. Y. 443; *Oakley v. Morton*, 11 id. 25; *Holmes v. Holmes*, 9 N. Y. 525; *Clark v. Crandall*, 27 Barb. 73; *Garvey v. Fowler*, 4 Sandf. 665.)

When facts are relied on as sufficient, in law, to excuse a personal presentment and demand, they should be set forth in the complaint, to enable the court to judge of the sufficiency of the excuse. (*Graham v. Machado*, 6 Duer, 514; *Newcomb v. Brackett*, 16 Mass. 166; *Baker v. Fuller*, 21 Pick. 318.) When performance is impracticable, such fact may be shown under an excuse for non-performance. (*Wolfe v. Howes*, 24 Barb. 174, 666.) As, from sickness or death, (*Ib.*; *Fahy v. North*, 19 Barb. 341;) or by act of law, (*Jones v. Judd*, 4 N. Y. 411;) or by casualty of fire. (*Lord v. Wheeler*, 1 Gray, 282.) If performance has been prevented, or interrupted, by act of the adverse party; or where a waiver thereof may be inferred, an averment of facts constituting the excuse is sufficient. (1 *Estee's Pr* 232. See *Clarke v. Crandall*, 3 Barb. 612; S. C. 27 id. 73; *Garvey v. Fowler*, 4 Sandf. 665; *Crist v. Armour*, 34 Barb. 378; *Rivara v. Ghio*, 3 E. D. Smith, 264; *Shultz v. Dupuy*, 3 Ab. 252; *Little v. Mercer*, 9 Mo. 216.)

Where the conditions contained in the contract have been modified, or the plaintiff has become excused from them, an averment of performance is not proper. The modification or excuse should be stated. (*Oakley v. Morton*, 11 N. Y. 25.) One who, under a contract requiring his personal services, and providing for partial payment during the employment, and the remainder at the end of the term, performs some services, but is, before the expiration of the stipulated period, disabled, by sickness, from completing his contract, is entitled to recover, as upon a *quantum meruit*, for such services as he rendered, without setting up, in his complaint, the excuse for not fully performing. That is matter of reply to a defence interposing the contract. (*Wolfe v. Howes*, 29 N. Y. 197.)

It seems that the word "party," in the clause of section 162 of the Code, allowing a general statement, in the pleading, "that the party duly performed all the conditions on his part," means the person or persons by whom the conditions were to be performed; and the plaintiff in the suit is not necessarily the person who is the party to the contract. Upon a liberal construction, the statute means, that it may be stated generally that the person or persons by whom the conditions were to be performed, have duly performed, &c. (*Rowland v. Phalen*, 1 Bosw. 44.) Thus, where, in an action on a contract by which the plaintiff had bound himself to do certain acts, and to procure third parties to do certain acts, the complaint alleged that the plaintiff, "and those on whose behalf the agreement was made, have fully and faithfully performed and fulfilled all the covenants and agreements in the said agreement contained, on the part of the said plaintiff and those on whose behalf the said agreement was made and entered into," this was held a sufficient allegation of performance. (*Ibid.*)

A general allegation of performance is confined to cases of contracts on instruments valid on their face, (*Spear v. Downing*, 34 Barb. 543;) since, in all other cases, the facts showing a performance must be specifically alleged. (*Hatch v. Peet*, 23 Barb. 580; *People v. Jackson*, 24 Cal. 632; *Couch v. Ingersoll*, 2 Pick. 292; *Kane v. Hood*, 13 id. 281; *Pomroy v. Gold*, 2 Met. 500.)

Performance must be averred according to the intent of the parties. Thus, a vendor of land, who sues upon an agreement of sale, containing a covenant on his part that he "will make a deed for the property," must aver and prove not merely his readiness to "deliver a deed," but that he had a good title, free of incumbrance, which he was ready and willing to convey by a legal deed. (*Washington v. Ogden*, 1 Black, 450; *Pravett v. Vaughn*, 21 Ark. 417.)

A tender of performance, or a readiness and willingness to perform, is a substitute for the general allegation of performance, in cases where it may be required. It may also be alleged that the plaintiff offered to perform. (1 *Estee's Pr.* 231. See *Williams v. Healy*, 3 Denio, 333; *Crandall v. Clarke*, 7 Barb. 169; *Clarke v. Crandall*, 27 id. 73.) In England, a general averment of readiness and willingness is sufficient. (*Rust v. Nottridge*, 1 Ellis & B. 99; *Bentley v. Daves*, 9 Exch. 666.) So, also, in Ohio. (*Swan on Pl.* 206; *Nathan v. Lewis*, 1 Handy, 242.)

Where performance on the part of the plaintiff depends upon acts previously to have been done on the part of the defendant, an averment of readiness and willingness will be sufficient. (*West v. Emmons*, 5 John. 179.)

Section 149 of the Code of *Kentucky* is substantially the same as section 162 of the Code of New York (*supra*). And it has been held, there that an assignee of a note given for the purchase money of land, in his petition to enforce the vendor's lien, must allege the ability of the vendor to comply with his contract of sale. He must allege how, and to whom, the purchaser was to pay the balance of the purchase money, the amount of such balance, the terms of the agreement between vendor and vendee generally, and the character of title to be conveyed. (*Ready v. Smith*, cited *Myers' Code*, p. 407.) A party seeking to enforce a vendor's lien must allege either that the vendor has complied with his contract, or that he is able to do so. (*Noe v. Dougherty*, *ib.*) Failure to allege that the plaintiff is both willing and able to convey the title, according to the contract of sale, is fatal to the judgment. (*Steers v. Mason*, *ib.*) It is not necessary for an incorporated company to allege, in a petition, that it has a legal existence, and a right to sue in its corporate capacity, by being organized in the mode prescribed by its charter. (*Henderson & Nashville R. R. Co. v. Leavell*, 16 B. Mon. 358; *Henderson R. R. Co. v. Beverly*, cited *Myers' Code*, p. 407.) Where the terms of subscription are prescribed by a charter, it is not necessary to set them out specifically. A general averment that all the terms and conditions necessary to authorize a demand of payment of subscriptions is sufficient. (*Ibid.*) In an action on a contract for the sale and delivery of wood, to recover the price, where the last installment was not to be paid until the delivery of all the wood, it is sufficient to allege, in the petition, that the plaintiff had "performed all the conditions of the contract on his part to be performed," without averring, in terms, the delivery of all the wood. (*Tatten v. Cooke*, 2 Met. 275.)

Section 82 of the Code of *Minnesota*, is in the same words as section 162 of the Code of New York.

Section 24 of the Code of *Wisconsin* is the same.

In *California*, *Nevada*, *Idaho*, *Arizona* and *Oregon*, if the promise depended on the performance by the plaintiff of conditions precedent—as in actions on a promissory note—presentment and demand, and notice of non-payment by the drawer to charge the indorser, which formerly were specifically pleaded, may now be generally averred. (*California Pr. Act*, § 60; Code of *Nevada*, § 60; of *Idaho*, § 60; of *Arizona*, § 60;

of *Oregon*, § 86; *California Steam Nav. Co. v. Wright*, 6 Cal. 258. See *Owens v. Geiger*, 2 Mo. 39.)

Where a statute prescribes conditions precedent to the acquirement of a right, the performance of those conditions must be specifically averred, and the facts showing such performance must be pleaded. (*People v. Jackson*, 24 Cal. 632.)

9. *Action or defence founded on an instrument for the payment of money only.* In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims (Code, § 162.)

In the *Mayor, &c. of New York v. Doody*, (4 Ab. 129,) it is said by BRADY, J., that the above section provides merely that in an action founded on an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party a specified sum, which he claims; but that "it imposes no obligation to set out the bond, and was designed to facilitate the pleader, not his adversary."

It was not the intention of the legislature, by the last clause of § 162, to dispense with a statement of the facts constituting a cause of action, or with any of the requirements of § 142, but only to relieve the party from setting out the written instrument according to its legal effect. (*Bank of Geneva v. Gulick*, 8 How. Pr. 51.) The plaintiff must still state his interest in, or title to, the instrument, and such other facts outside of it as are necessary to enable him to recover upon it. (Ib.) Thus, where the plaintiffs in an action upon a promissory note, alleged that they were the owners of a promissory note "of which the following is a copy, and that there is due to them thereon, from the defendants, the sum of \$500, with interest &c.," "and claim to recover such amount, and for which they demand judgment against the defendants," and then set out a copy of the note; it was held that the complaint was defective in not stating that the defendants made or indorsed the note, and in respect to the indorsers, in not alleging a demand and notice of non-payment. (Ibid.)

If a complaint be insufficient as a common law pleading, on the ground that the plaintiff does not make title to the contract sued on, the defect will be cured by its setting out a copy of the contract under § 162 of the Code. (*Prindle v. Caruthers*, 15 N. Y. 425; *Butchers' & Drovers' Bank v. Jacobson*, 24 How. Pr. 205; S. C. 15 Ab. 220; 9 Bosw. 595; *Roberts v. Morrison*, 11 N. Y. Leg. Obs. 60; *Chappell v. Bissell*, 10 How. Pr. 274; *Griswold v. Laverty*, 12 N. Y. Leg. Obs. 316; S. C. 3 Duer. 690.) But if the complaint, and the copy of the contract set out therein, fail to express or imply a consideration, or a request essential to the defendant's liability the complaint will be defective. (*Spear v. Downing*, 22 How. Pr. 30; S. C. 34 Barb. 523; 12 Ab. 437.)

Where the complaint alleged that the plaintiff, who was the payee of a bill, a copy of which was set out, was the holder and owner of it; that no part of it had been paid, but that the whole amount of it was justly due to the plaintiff from the defendant; and prayed judgment for the amount of it, with interest and costs; held that the complaint stated every thing which § 162 required; and that the Code having enacted such a form of complaint to be good, the court had neither the power nor the inclination to adjudge it to be bad. (*Andrews v. The Astor Bank*, 2 Duer. 629.)

In *Conkling v. Gandall*, (1 Keyes, 223,) it is held that the mere fact of indorsement of negotiable paper gives no right of action against the indorser. His contract is conditional, and depends on facts outside the written instrument. It is conditioned that the holder shall present the note for payment; and that if payment is required, notice shall be given to him at the time and in the manner required by law. It is said, by WRIGHT, J., in that case: "This demand of payment, and notice of dishonor, or facts by which they are excused, must be proved on the trial, to establish his liability; and facts thus necessary to be proved as they constitute in part the cause of action, must be averred in the complaint."

Whether a promissory note, payable, not absolutely, but upon a condition, viz: the sale, by the defendant, of certain property in his hands, is an instrument for the payment of money only, within the meaning of the Code, is said by DUER, J. in *Quin v. Tilton*, (2 Duer. 648,) to be doubtful.

When the terms and conditions of an agreement are set out, in a complaint, and the violation of that agreement is charged against the defendant, if it is such an instrument as the law requires to be in writing, courts will presume it was a lawful written instrument, until the contrary appears. (*Van Dorn v. Tjader*, 1 Nev. 380.)

In *California*, when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuine-

ness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified. (Pr. Act, § 53.)

This section extends only to those parties who are alleged to have "signed" the instrument. (*Heath v. Lent*, 1 Cal. 411.) Therefore, if the action be against an administrator, the genuineness of the signature must be proved. (Ibid.) Where a copy of the note sued on is annexed, and the answer is not verified, the due execution and genuineness of the note is admitted. (*Burnett v. Stearns*, 33 Cal. 468; *Horn v. Volcano Wat. Co.* 13 id. 62; *Kinney v. Osborne*, 14 id. 112.) So as to a bond. (*Corcoran v. Doll*, 32 Cal. 83.) And if the complaint contains a copy of the written instrument sued on, and is not verified, and the answer denies the execution, but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature. (Ibid; *Horn v. Volcano Wat. Co.*, *supra*; *Sacramento County v. Bird*, 13 Cal. 66; *Burnett v. Stearns*, 33 id. 468.) The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction, in their pleadings, these admissions are to be taken as modifications of the instrument, (*Lee v. Evans*, 8 Cal. 424,) as no proof is required of facts admitted or not denied. (*Patterson v. Ely*, 19 Cal. 28; *Landers v. Bolton*, 26 id. 416.)

Under the statutes of California, bonds are on the same footing as undertakings. (*Canfield v. Bates*, 13 Cal. 606.)

The Code of Ohio directs that in an action, counter-claim or set-off, founded upon an account, promissory note, bill of exchange or other instrument for the unconditional payment of money only, it shall be sufficient for a party to give a copy of the account or instrument, with all credits and the indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest. (Code, § 122.) When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state, also, the kind of liability of the several parties, and the facts, as they may be, which fix their liability. (Ibid.)

It has been decided, under this section, that in an action on a promissory note, against the makers, it is not necessary to aver, in the petition, that the defendants made, or that the plaintiffs own, the note. (*Ohio Life Ins. & Trust Co. v. Goodin*, 1 Handy, 31.) It should appear, from the petition, not only that the defendant made a promise, but that he has broken it. (*Villiers v. Lewis*, 1 Handy, 38.) The plaintiff must show something to be due to him, and how much, before the defendant can be required to avoid or deny under oath. (Ibid.) In an action against an indorser of a promissory note, the petition must aver demand of payment of the maker, and due notice of dishonor to the indorser. (*Blackwell v. Bates*, 1 Handy, 40.) A transcript of a record showing the recovery of a judgment, is not "an instrument for the unconditional payment of money only," by § 122 of the Code, authorized to be made a part of the petition by reference. (*Memphis Medical College v. Newton*, 2 Handy, 163.) In an action upon a bill of exchange, against the drawer, a general allegation in the petition, that "the bill was not paid, though duly presented for payment, of which the drawer had due notice," is sufficient, under this section of the Code. (*Wood v. Dillingham*, 1 Handy, 29.)

In Kansas, the same rule of pleading, in cases of actions or defences founded on written instruments, prevails, which is established by section 122 of the Code of Ohio, *supra*. (Code, § 132.)

Section 24 of the Code of Wisconsin is in the same words as section 162 of the New York Code.

10. *Pleading private statutes.*] In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof. (Code of New York, § 163; California Pr. Act, § 61; Code of Idaho, § 61; of Nevada, § 61; of Arizona, § 61; of Oregon, § 87; of Ohio, § 123; of Kansas, § 133; of Minnesota, § 83; of Wisconsin, § 25.)

Whenever a statute gives a cause of action or defence, it is sufficient, in pleading the statute, to follow the words of the act. (*Cole v. Jessup*, 10 N. Y. 103; *Ford v. Babcock*, 2 Sandf. 523; S. C. 7 N. Y. Leg. Obs. 270; *Thomas v. The People*, 19 Wend. 480.)

A public statute need not be recited, or even referred to, in a pleading. It is sufficient if the case is brought within it. (*McHarg v. Eastman*, 7 Rob. 137.) A reference, in a complaint, to one section of a public statute, instead of another, is mere surplusage, and the error will be disregarded; more especially where all question as to the section intended is removed by a subsequent averment in the complaint, that

the defendant has failed to perform a specified duty, as required by "said law," which is one mentioned in the latter section of the statute, only. (Ibid.)

If a statute which is private and local is not set out or referred to in the pleadings, the court will not take judicial notice of it. (*Bretz v. Mayor, &c., of New York*, 6 Rob. 325.) An act of the legislature may be local and private in many of its provisions, and yet contain an enactment which is neither local nor private. (Ibid.) The act of April, 1867, to "enable the Board of Supervisors of the county of New York to raise money by tax for the use of the corporation of the city of New York," which confers upon the supreme court exclusive jurisdiction of all actions against the city corporation, is a *public* statute, and need not be pleaded. (Ibid.)

In pleading a statute which is of such a nature that a three-fifths vote is required, to pass it, it is not necessary to allege that such a vote was had. An averment that the statute was *passed* is sufficient. (*Wolfe v. Supervisors of Richmond*, 11 Ab. 270; S. C. 19 How. Pr. 370.) It is sufficient to aver generally, that a contract sought to be enforced is in violation of some municipal ordinance or enactment, when such ordinance or enactment is founded upon a statute. It is not necessary to plead the statute specifically. (*Beman v. Tuquot*, 5 Sandf. 153.) A contract made in violation of a statute having a merely local or municipal application, is as illegal as if the statute had been one of universal application throughout the state. (Ibid.) Thus in an action to recover the contract price for constructing a roof upon a building, in the city of New York, an answer setting up as a defence that the roof was not fire proof, and was not such as had been approved of by the fire department, and the same was in direct violation of the fire laws of the city, is sufficient. (Ibid.)

Laws passed by the common council of the city of New York are not public acts; they must be specially pleaded. (*People ex rel. Houston v. Mayor, &c., of New York*, 7 How. Pr. 81.)

In a complaint upon a cause of action dependent upon the laws of other states, a general averment that by the laws of the territory of M. in 1835, a certain trust was a valid trust, or power in trust, which courts of equity would enforce, and that it so continued, under the laws of the states of O. and M. in which the lands were, is insufficient. The plaintiff should set out, at least substantially, the statute upon which he relies. (*Throop v. Hatch*, 3 Ab. 23. See *Phinney v. Phinney*, 17 How. Pr. 197.) In the absence of appropriate averments to show the laws of a sister state, the presumption is that the common law as it existed at the time of the separation of this country from England, prevails in each state. There is no presumption that the statutes of New York have been enacted in other states. (Ibid.)

In an action on a contract made in another state, in violation of its laws, the law violated must be pleaded by answer, and not by demurrer. (*Humphreys v. Chamberlain*, 1 Code Rep., N. S. 357.)

In pleading an act of the legislature, the title, being no part of an act, need not be recited. (*Eckert v. Head*, 1 Mo. 593.) But where a party refers to an act merely by the title, he thereby makes the title material, and must recite it correctly. (Ibid.) When the pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts; and those facts which the statute requires, as the foundation of the action, must be stated in the complaint. (*Dye v. Dye*, 11 Cal. 163; *Williams v. Hingham, &c., Bridge*, 4 Pick. 341; *Manning v. Merritt, Clarke*, 98; *Russell v. Mayor, &c., of New York*, 1 Daly, 263; *Walker v. Johnson*, 2 McLean, 92; *Goelet v. Condrey*, 1 Duer, 132; *Yertore v. Wiswall*, 16 How. Pr. 8; *Brown v. Harmon*, 21 Barb. 508; *Drown v. Stimpson*, 2 Mass. 444; *Soper v. Harvard College*, 1 Pick. 178.)

Where the plaintiff relies on the statute laws of another state, he must aver those laws, in his pleadings, in the same manner as other facts. (*Throop v. Hatch*, 3 Ab. 25; *Phinney v. Phinney*, 17 How. Pr. 197; *Thatcher v. Morris*, 11 N. Y. 437; *Monroe v. Douglass*, 5 id. 447; *Hutchinson v. Patrick*, 3 Mo. 65; *Ruse v. Mutual Benefit Ins. Co.* 23 N. Y. 516; *Bean v. Briggs*, 4 Iowa, 464; *Walker v. Maxwell*, 1 Mass. 104.) Thus, in pleading that a contract is void by foreign usury laws, the laws should be stated; and the facts which render the contract void, according to them, should be alleged. (*Curtis v. Masten*, 11 Paige, 15.) The same rule applies to municipal laws and ordinances. (*Harker v. Mayor, &c., of New York*, 17 Wend. 199; *People v. Mayor, &c., of New York*, 7 How. Pr. 81.)

All statutes in Ohio, are printed by authority, and though local or special, are, nevertheless, *public acts*; of which courts of justice *ex officio* take notice. (*Brown v. State*, 11 Ohio R. 338.)

11. *Allegation not denied; when to be deemed true.*] Every material allegation of the complaint, not controverted by the answer, as prescribed in section 149; and every material allegation of new matter in the answer, constituting a counter-claim,

not controverted by the reply, as prescribed in section 153, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require. (Code, § 168.)

Only those allegations, in a complaint, are material, in the sense of the Code, which the plaintiff must prove, upon the trial, in order to maintain his action. (*Fry v. Bennett*, 5 Sandf. 54; S. C. 1 Code Rep., N. S. 245; 9 N. Y. Leg. Obs. 330; *Isam v. Williamson*, 7 N. Y. Leg. Obs. 340; *Harlow v. Hamilton*, 6 How. Pr. 475; *Sands v. St. John*, 23 id. 140; S. C. 36 Barb. 628; *Patterson v. Ely*, 19 Cal. 28; *Seale v. Emerson*, 25 id. 293; *Landers v. Bolton*, 26 id. 293; *Surget v. Byers*, Hempst. 715.) Those allegations, alone, are material, within the meaning of this section, which can be the subject of an issue, and without proof whereof the action could not be maintained. (*Connoss v. Meir*, 2 E. D. Smith, 214.) Section 168 has not altered the former rule, in this respect. (Ibid.)

An allegation, in a complaint, though not denied by the answer, is not to be regarded as material under section 168 of the Code, if the plaintiff may recover the whole amount claimed, not only without proving it, but although it may be disproved, if directly put in issue under the complaint as framed. (*Oechs v. Cook*, 3 Duer, 161.) No allegation of a complaint can be deemed material, under that rule, unless, if put at issue, and not proved or being disproved, the action would be defeated, or the plaintiff would be prevented from obtaining some relief to which he would be entitled, if proof of it was made. (Ibid.) An unanswered allegation which is to preclude a defendant from disproving a fact, intended to be asserted by it, should be direct and positive. One which, at most, merely implies the existence of a fact, should not be so construed, in a case in which he may recover under the positive allegations contained in the complaint, although such fact may be disproved. (Ibid.)

No allegation, in a complaint or answer, can be deemed material, within the meaning of section 168, unless an issue taken upon it, whether of law or fact, will decide the case, so far as relates to the particular cause of action to which it refers. (*Newman v. Otto*, 4 Sandf. 668.) The section must be confined to allegations of fact, and cannot refer to an averment of the legal construction or effect of written instruments. Much less can it be applied to the intention or meaning of parties when they execute a written contract. (*Barton v. Sackett*, 3 How. Pr. 358; S. C. 1 Code Rep. 96.) An allegation, in an answer, of the meaning of a written contract, should be deemed by the court "an immaterial allegation," and disregarded at the trial, as the plaintiff cannot demur. (Ibid.) Nor can such an answer be deemed equivalent to an allegation of mistake or surprise, in the execution of the contract, so as to entitle the defendant to have it modified or avoided on either of those grounds. (Ibid.)

Where a complaint alleged that, on a day named, the parties to the action entered into an agreement, which was signed by the defendant, setting forth its terms, and the answer admitted that the defendant signed and executed the contract, as alleged in the complaint, it was held that no proof of a contract was necessary. (*Spear v. Hart*, 3 Rob. 420.)

An allegation that an undertaking was executed, if not denied, implies that the undertaking was executed and delivered; and such is the extent of the admission. (*Robert v. Good*, 2 Trans. App. 103.)

An admission, in a special plea or answer, upon which issue is taken, cannot be used on the trial as a general admission of a material fact alleged in the complaint, when the whole complaint has been denied by a prior answer. (*Troy & Rutland R. Co. v. Kerr*, 17 Barb. 581.)

When there are co-defendants, and any of them do not answer, those who omit to do so shall not be adjudged as having admitted anything set forth in an answer of the defendants who do plead. (*Woodworth v. Bellows*, 4 How. Pr. 25.)

If an answer sets up facts as a counter-claim, they may be taken as true, if they are neither demurred or replied to, and the defendant will be entitled to relief thereon. (*Laurence v. Bank of the Republic*, 3 Rob. 142.) Where a tortious taking and conversion of personal property are set up as a counter-claim, the omission to reply thereto does not admit that the defendant is entitled to the damages he alleges. A counter-claim is in the nature of a complaint in a cross-action; and in trespass or trover, for taking or converting personal property, it is not necessary for the defendant to deny the averment of value, or the allegation of damage. (*McKenzie v. Farrell*, 4 Bosw. 193; *Stuart v. Binns*, 10 id. 436.) Where an answer contains merely a defence, and not a technical counter-claim, the omission to reply to it will not be deemed an admission of the truth of the allegation. (*Bates v. Rosekrans*, 37 N. Y. 410; S. C. 4 Ab., N. S. 276; 4 Trans. App. 332.)

A reply not being admissible, in justices' courts, the allegation of new matter, in an answer must, in all cases, necessarily be deemed controverted by the plaintiff; and it is competent for him to controvert it by evidence either in direct denial, or of new matter by way of avoidance. Therefore, where, in an action commenced in a justices' court, the defendant puts in an answer setting up the defence of infancy, the plaintiff may, without replying, or amending his complaint, prove the making of a new promise, by the defendant, after he became 21 years old. (*Hodges v. Hunt*, 22 Barb. 150.) The same rule applies where the statute of limitations is set up as a defence. (*Esselstyne v. Weeks*, 2 E. D. Smith, 116,) or usury. (*Cutler v. Wright*, 22 N. Y. 472.)

A defendant who explicitly admits, by his pleading, that which establishes the plaintiff's right, will not be permitted to deny its existence, or to prove any state of facts inconsistent with that admission. (*Paige v. Willet*, 38 N. Y. 28; *Robbins v. Codman*, 4 E. D. Smith, 325; *Tell v. Beyer*, 38 N. Y. 162; S. C. 6 Trans. App. 142.)

When there are several answers, an admission made in one is not available against the others. Each answer must stand by itself as a distinct defence, and the plaintiff must recover on the whole record. (*Swift v. Kingsley*, 24 Barb. 543; *Troy & Rutland R. Co. v. Kerr*, 17 id. 599.) An implied admission, in one of several answers, therefore, will not conclude the defendant, or estop him from showing the matters of defence set up in another answer. (*Ibid.*)

What is a material allegation, in a pleading, is expressly specified in the Codes of several of the states.

Section 154 of the Code of *Kentucky*, declares that a material allegation in a pleading, is one essential to the claim or defence, and which could not be stricken from the pleading without leaving it insufficient. Section 85 of the Code of *Minnesota*; section 135 of the Code of *Kansas*; and section 128 of the Code of *Ohio*, are in the same words, precisely.

In *California*, every material allegation in the complaint, not controverted by the answer thereto, shall, for the purposes of the action, be taken as true. (Cal. Pr. Act, § 65. See, also, Codes of *Nevada*, *Idaho*, *Arizona*; *Patterson v. Ely*, 19 Cal. 28; *Seale v. Emerson*, 25 id. 293; *Landers v. Bolton*, 26 id. 393.) The failure to deny is an admission of the truth of such allegations, and such admission is conclusive. (*Blankman v. Vallejo*, 15 Cal. 638; *Burke v. Table Mt. W. Co.* 12 id. 403; *Whitehall v. Thomas*, 9 id. 499; *Crosby v. Leary*, 6 Bosw. 312.) But immaterial allegations require no denial, and are not admitted by such failure to deny them. (*Cunfield v. Tobias*, 21 Cal. 349.) Nor averments of mere evidence. (*Racovillat v. Rene*, 32 id. 450.) Nor matters in avoidance, which shall, on the trial, be deemed controverted by the adverse party without any specific denial. (Cal. Pr. Act, § 65.) A failure to answer is an admission of every issuable fact stated in the complaint, and of those only. (*Harlan v. Smith*, 6 Cal. 173; *Hentsch v. Porter*, 10 id. 555; *Rowe v. Table Mt. Wat. Co.*, id. 441; *McGregor v. Shaw*, 11 id. 47; *Hunt v. City of San Francisco*, id. 250; *Curtis v. Herrick*, 14 id. 117.) If a complaint is sworn to, a general denial in the answer thereto admits all the material allegations thereof. The denial should be specific. (*Pico v. Colimas*, 32 Cal. 578; *Landers v. Bolton*, 26 id. 393.) And where the admissions in the answer negative its general denials, the latter may be disregarded. (*Fremont v. Seals*, 18 Cal. 433.) A specific denial of one or more allegations is an admission of all others well pleaded. (*De Ro v. Cordes*, 4 Cal. 117.) So, also, a denial of value alleged is an admission of any value less than the amount alleged. (*Towdy v. Ellis*, 22 id. 651.) Literal and conjunctive denials are bad. Where allegations are compound, and are denied as a whole, in the exact language of the complaint, the allegation will be deemed admitted. (*Blood v. Light*, 31 Cal. 115; *Fish v. Reddington*, id. 185; *Reed v. Calderwood*, 32 id. 109; *Fitch v. Bunch*, 30 id. 208; *Woodworth v. Knowlton*, 22 id. 164; *Blankman v. Vallejo*, 15 Cal. 638; *Smith v. Richmond*, id. 501; *Canfield v. Sanders*, 17 id. 569; *Kuhlund v. Sedgwick*, id. 123; *More v. Del Valle*, 28 id. 170.)

If the answer be not verified, the genuineness and due execution of the written instrument, of which the complaint contains a copy, shall be deemed admitted. (Cal. Pr. Act, § 53; *Horn v. Volcano Wat. Co.* 13 Cal. 62; *Kinney v. Osborne*, 14 id. 112.) Or of a bond. (*Sacramento Co. v. Bird*, 31 Cal. 66; *Burnett v. Stearns*, 33 id. 468.) This is confined to those who are alleged to have "signed" the instrument. An administrator need not deny the signature of his intestate, under oath. (*Heath v. Lent*, 1 Cal. 411.)

When the defence to an action is founded on a written instrument embodied in the answer, the genuineness and due execution of the instrument shall be deemed admitted, unless an affidavit be filed denying the same. (Cal. Pr. Act, § 54.) But the due execution of the instrument shall not be deemed admitted, unless the party controverting the same is, upon demand, permitted to inspect the original. (*Ibid.*)

Section 153 of the Code of *Kentucky*, is the same as section 168 of the Code of *New York*. It contains the additional provision that "allegations of value, or of amount of damages, shall not be considered as true, by the failure to controvert them."

It has been held, in that state, that the Code does not authorize the court to take as true allegations of value, or amount of damages laid in the complaint, in ordinary cases though not denied in the answer, and though there be no answer to the complaint. (*Daniel v. Judy*, 14 B. Mon. 394.) Thus, where the plaintiff alleged the taking and converting of a quantity of coal, the property of the plaintiff, of a certain value, and the defendant failed to answer; it was held that proof was necessary to show the value of the coal, to authorize a judgment for the plaintiff. (*Ibid.*) So, in an action against a common carrier for failing to deliver goods of an alleged value, it was held that though the value was not controverted by the answer, it must be proved, to authorize the jury to assess the damages. (*Huston v. Peters*, 1 Met. 558.) And in *Harris v. Ray*, (15 B. Mon. 680,) in a suit *ex contractu*, as for medical services, &c., where the account was exhibited, and damages claimed for the amount, it was held that there being no answer, no proof was necessary; and that it was proper for the court to render judgment for the amount of the account, without the intervention of a jury.

But, although allegations of value are not to be taken as true, yet an allegation of value followed by another, that the article was sold for that price, to the defendant, may be taken as true. (*Pate v. Pate*, cited Myers' Code, p. 414.)

Upon the failure of the plaintiff to controvert any material allegation of new matter in the answer, constituting a set-off or counter-claim, the same must be taken as true. (*Harman v. Baker*; *Dougherty v. Crabb*; *Brannaman v. Palmer*, cited Myers' Code, p. 415.) New matter in an answer, not relating to a counter-claim or set-off, is deemed controverted as upon a direct denial or avoidance, as the case may require. (*Fitzpatrick v. Wood*, *ibid.*) Matters in avoidance, in an answer and cross-petition, not in the nature of a counter-claim or set-off, cannot, for want of a reply, be taken as true. (*Ashby v. Woodfolk*, 3 Met. 540.)

Sections 31 and 32 of the chapter of the Code of *Wisconsin*, relative to pleadings in civil actions, (Rev. St. of 1858, p. 725,) are the same as section 168 of the *New York* Code.

Section 228 of the Code of *Kansas*, as amended in 1862, (Comp. Laws of 1862, p. 236,) is the same, also; with the additional provision that "allegations of value, or of amount of damage, shall not be considered as true by failure to controvert them."

Section 127 of the Code of *Ohio*, is identical with the above section of the Code of *Kansas*, and with section 153 of the Code of *Kentucky*.

It has been held, in *Ohio*, that the presumption of law prescribed by section 127 of the Code, as to the traverse of facts stated in the answer, and the finding of the court or jury upon those facts, applies only to such facts stated in the answer as are inconsistent with the petition. (*Erwin v. Shaffer*, 3 Law Gaz. 281.) A statement that a party "knows nothing" of an allegation, "except what he learns from the counter-claim itself," is neither a general nor specific denial. And the allegation must be considered as not controverted; and must, for the purposes of the action, be taken as true, under section 127. (*Smith v. Woodruff*, 1 Handy, 276.)

By the Code of *Minnesota*, every material allegation of the complaint not specifically controverted by the answer as prescribed, and every material allegation of new matter in the answer not specifically controverted by the reply as prescribed, shall, for the purposes of the action, be taken as true; but the allegation of new matter in a reply, shall not in any respect conclude the defendant, who may, on the trial, controvert it by proofs, either in direct denial, or by way of avoidance. (Pub. Stat. of 1859, p. 543, § 84.)

In *Arkansas*, it has been held that unless a defendant answers, he admits that all the allegations of the complaint are true; but does not admit that they constitute a cause of action. (*Johnson v. Pierce*, 7 English, 599.)

12. *Suing a party by a fictitious name, when allowed.*] When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated, in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly. (Code, § 175.) See also, Code of *Wisconsin*, § 39; of *Minnesota*, § 95.

The law, which supposes every one to be designated and known by two names, (one, of his family, and the other, given to him at his baptism,) allows him to be designated by two fictitious names, in legal proceedings, when either of the real ones are unknown, but does not recognize a single separate letter as part of such designation. (*Frank v. Levi*, 5 Rob. 599.)

The law recognizes but one christian name; and an erroneous initial, inserted be-

tween that and the surname, may be regarded as surplusage. (*Van Voorhis v. Budd*, 39 Barb. 479; *Franklin v. Talmadge*, 5 John. 84; *Milk v. Christie*, 1 Hill, 102; *Roosevelt v. Gardiner*, 2 Cowen, 463; *People v. Cook*, 14 Barb. 261; *Smith v. Ross*, 7 Mo. 463; *Orme v. Shephard*, id. 606; *Garwood v. Hastings*, cited 1 Estee's Pr. 170.)

The addition of "junior," to a name, is mere description of the person, and the omission of it does not invalidate any act or proceeding done by the same person. (*People v. Collins*, 7 John. 549; *Fleet v. Youngs*, 11 Wend. 522; *Padgett v. Lawrence*, 10 Paige, 170.) It seems that the word "junior" is no part of a name. (*People v. Cook*, 14 Barb. 261.) Nor is the word "senior." These are mere unnecessary additions, and should not be inserted in the complaint. (*Neil v. Dillon*, 3 Mo. 59.)

A judgment and execution against *Freeman Hildreth*, will not authorize a sale of the property of *Truman Hildreth*; although the latter may be the individual intended. (*Farnham v. Hildreth*, 32 Barb. 277.)

In an affidavit upon which an order of arrest is founded, it is not necessary that the name of the party to be arrested should be stated, if it be unknown. He may be designated as "the real defendant in this suit, and whose name is not now known to this deponent," but who, on the occasion when the injury complained of occurred, "was in command of the sloop *Hornet*." (*Pindar v. Black*, 4 How. Pr. 95.)

A judgment against an individual, as a defendant, by a name which is not his, in contemplation of law, cannot be enforced against him. Nor will a judgment in an action in which the defendant is denominated, in all the proceedings therein, by a different name from that of a particular existing individual, be of any avail against the latter, even if entered up against him by his real name; although process in such action was served upon him when the name of the defendant, in such process, was not his; because, unless he actually appeared in such action, no jurisdiction over him was obtained therein by the service of such process. (*Moulton v. De ma Carty*, 6 Rob. 470.)

The only way to take advantage of a mere misnomer—as the bringing of an action by a married woman in her maiden name—is by answer. If not set up by answer, advantage cannot be taken of it on the trial. (*Traver v. Eighth Avenue R. R. Co.* 6 Ab., N. S. 46; *S. C.* 3 Keyes, 497; 3 Trans. Ap. 203.) A mere misnomer, in pleading, is a formal error, amendable in the court of original jurisdiction; and will not be noticed in the court of appeals. (*Ibid.*)

It is not allowable to a plaintiff to use a fictitious name for a defendant, at his discretion; but only when he is ignorant of the true name. (*Crandall v. Beach*, 7 How. Pr. 271.) In an action against defendants as co-partners, if the name of one of the partners is not known, and a fictitious name is used, to represent him, it must be shown who the co-partner was, by some description; also that his name was not known to the plaintiff, and that the name used is fictitious. (*Ibid.*) If one of the defendants, only, is served in such a case, who appears and answers, it is not sufficient to entitle the plaintiff to a verdict against both, to prove that the services were rendered for the firm, and that the defendant who has answered was a member of it; but it must also be proved, as against that defendant, that the other defendant was also a member of the firm. (*Ibid.*)

Where a defendant is known as well by one name as another, he may be sued and arrested by either; and it is immaterial by what name he was known to the plaintiffs in the action. (*Eagleston v. Son*, 5 Rob. 640.)

In *Newton v. Milleville Manuf. Co.* (17 Ab. 318, note,) the plaintiff, not knowing the true name of the defendants, but supposing them to be a corporation, sued them by the name in which they transacted their business. Having afterwards ascertained that the name used was not a corporate name, but that used by three persons who were the real defendants, the plaintiff asked leave to substitute their names as defendants, with proper allegations in the complaint. It was held that § 175 of the Code met the case, and the motion was granted.

Where the parents of a child refused to give it a name, it was held that it was proper to describe it as the youngest female child of its parents—naming them. (*Eley v. Broughton*, 2 Sim. & Sta. 188.)

Where a defendant, sued by a wrong name, fails to appear in the action, he does not waive his right to object to the misnomer, after judgment and execution. (*Farnham v. Hildreth*, 32 Barb. 277.)

13. *Disregarding errors or defects not affecting substantial rights.*] The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no

judgment shall be reversed or affected by reason of such error or defect. (Code, § 176.) See also, Code of *Minnesota*, § 96; of *Wisconsin*, § 40.

This section must not be so construed as to make valid a bad pleading in an action brought under the old practice, when the defects are demurred to. (*Vandenburgh v. Van Valkenburgh*, 8 Barb. 218.) The section applies to the court of appeals, equally with the court of original jurisdiction; and the appellate court will not reverse a judgment because of defects in the pleadings which have not affected the substantial rights of the appellant. (*Johnson v. Hathorn*, 3 Keyes, 126; S. C. 2 id. 476; *Bank of Havana v. Magee*, 20 N. Y. 330.)

Where the averment in the complaint was, that goods had been sold and delivered to the defendant, and the proof was that they were delivered to a third person, and for his use, it was held that this was a variance that ought to be disregarded, under section 176. (*Smith v. Leland*, 2 Duer. 497; explained and distinguished in *Rogers v. Verona*, 1 Bosw. 417.) In *Williams v. Sholts*, (4 Sandf. 641,) entitling an answer "supreme court," instead of "superior court," was held to be an error which might and should be disregarded. In *Davison v. Powell*, (13 How. Pr. 257,) the summons stated that the complaint would be filed in the office of the clerk of the city and county of New York. On demand the complaint was served, which did not specify the venue. Held that the complaint might be amended, under § 176. (See also, *Merrill v. Grinnell*, 10 How. Pr. 31.)

Entitling the affidavit for an order of arrest, *in a suit*, (which, under the former practice, was fatal,) may now be disregarded, under § 176 of the Code, as not affecting the substantial rights of the adverse party. (*Pindar v. Black*, 4 How. Pr. 95.)

A judgment will not be reversed for an error that can in no respect injure the appellant. (*Burnett v. Tolles*, cited 3 Estee's Pr. 740; *Kilburn v. Ritchie*, 2 Cal. 145; *Wilkinson v. Parrott*, 32 id. 102; *Garwood v. Wood*, 34 id. 248; *Campbell v. Pratt*, 2 Pet. 354; *The Water Witch*, 1 Black, 494.) Unless it affirmatively appear that injustice has been done. (*Broadus v. Nelson*, 16 Cal. 80; *Robinson v. Smith*, 14 id. 254.) Nor will it be reversed for an error favorable to the appellant. (*Kilburn v. Ritchie*, 2 Cal. 145; *Wilkinson v. Parrott*, 32 id. 102; *Garwood v. Wood*, 34 id. 248.) Or for errors not affecting substantial rights. (*People v. Foss*, 20 Cal. 586.) Or for errors of the court which do not materially affect the merits of the case. (*Clayton v. West*, 2 Cal. 381; *Carpentier v. Gardner*, 29 id. 160.) Or for errors which do not injure the complaining party. (*Page v. O'Neal*, 12 Cal. 483; *Hoag v. Pierce*, 28 Cal. 187; *Tyler v. Green*, id. 406; *Boyce v. California Stage Co.* 25 id. 460.) Or for errors which affect only the rights of parties who have not appealed. (*Speyer v. Imets*, 21 Cal. 280.) If the court refuses to allow a defendant to amend his answer, but no injury results from the refusal, the judgment will not be reversed on that ground. (*Jones v. Block*, 30 Cal. 227.) Nor for defects in the complaint, where it can be gathered therefrom, as a whole, that the plaintiff had a cause of action upon which he was entitled to judgment, however defectively the cause of action may have been stated. (*Hallock v. Jaudin*, 34 Cal. 167.) A party is not injured by an error if the error does not prevent him from making out his case. (*Hebraid v. Jefferson G. & S. M. Co.* 33 Cal. 290. See 3 Estee's Pr. 740.)

The appellate court will not reverse an order or judgment, for immaterial errors, or for such as have not really influenced the result, to the prejudice of the appellant. (*Howland v. Willets*, 9 N. Y. 170; *Onondaga Co. Mu. Ins. Co. v. Minard*, 2 id. 98; *Shorter v. The People*, id. 198.)

As to Amendment of pleadings—See Titles "Amending Bill"—"Amendment"—"Answer"—"Complaint" &c.

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CHAPTER X.

TESTIMONY.

Sect. 1. WHO MAY BE WITNESSES.

I. *General Incompetency.*

II. *Incompetency in the particular suit.*

III. *Incompetency as to particular branches of evidence.*

2. EXAMINATION OF WITNESSES.

1. DE BENE ESSE.

2. BY AN EXAMINER.

3. BY A VICE-CHANCELLOR.

4. BY COMMISSIONERS, UPON A COMMISSION.

5. BY THE COURT, AT THE HEARING.

6. AS TO THE CREDIT OF WITNESSES.

3. PROOFS AT THE HEARING.

As soon as the cause is at issue by the filing of a replication, both parties may proceed to take testimony for the purpose of establishing their respective cases. If no replication is filed, the answer is taken as true, and, therefore, the defendant needs no proof; and the complainant not having replied, cannot offer any.

We do not intend to go into the subject of *evidence*, in this treatise, any further than to show who may be witnesses, and the several methods of taking their testimony in this court.

SECTION I.

WHO MAY BE WITNESSES.

It may be laid down as a general rule, that all persons are competent to be witnesses in equity who are capable of being witnesses in trials at law. And it is a general principle, common to both courts, that all [*255] *persons are competent witnesses who are not expressly excluded by the rules of law. There are three general grounds of disqualification which operate as exceptions to this rule: I. General

incompetency; II. Incompetency in the particular suit; and III. Incompetency as to particular evidence.

I. *General Incompetency.*

The grounds of disqualification under this head are, 1st. Where the witness labors under a defect of religious understanding. This embraces idiots and lunatics, children, &c. 2d. Where the witness refuses to take an oath, or from defect of religious belief does not acknowledge its sanction; 3d. Where his character is infamous, in consequence of a conviction of certain crimes.

The grounds of incompetency we do not propose to enter into, in this place; as the rules of courts of law and of equity respecting them are the same, and those rules are well settled, and familiar to the practitioner.

II. *Incompetency in the particular suit.*

That branch of incompetency which extends only to the particular suit or issue before the court, includes every class of persons disqualified by interest, whether directly as parties, or indirectly as being pecuniarily interested in some future use which may be made of the decree. Yet not only interested witnesses, but parties themselves may sometimes be examined as witnesses. We are therefore to inquire, 1st. When a party to the suit may be examined as a witness; 2d. What persons other than parties may be so examined.

1. *When a party to the suit may be examined as a witness.*] At law, whenever a person tendered as a witness, has no interest in the event of the suit, he will be competent, although he is a party to the record. (a) And the rule in equity is the same; since it only admits the testimony of those parties who are not interested in the event of the suit; or at least of that part of it to which the evidence they are called upon to give, applies. (b) (1)

(a) 1 Phil. Ev. 51.

(b) 2 Dan. 448. McLaren v. Hopkins, 1 Paige, 18.

(1) EXAMINATION OF PARTIES AS WITNESSES.

1. Examination of a party as a witness, on the trial, or conditionally, or upon a commission.
2. Examination before trial.
3. Party, how compelled to attend.
4. Testimony of party examined may be rebutted.
5. Effect of refusal to testify.
6. Testimony of a party, when it may be rebutted by the oath of the party calling him.
7. When the person for whose benefit the action is brought or defended may be examined.
8. Examination of co-plaintiff or co-defendant.

When a complainant may be a witness. A complainant is considered,

It is provided by the Code (§ 389) that no action to obtain a discovery under oath, in aid of the prosecution or defence of another action, shall be allowed; nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by Chapter VI; the provisions of which are as follows:

1. *Examination of a party as a witness, on the trial, or conditionally, or upon a commission.* Section 390 directs that a party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission.

A party to an action, within the meaning of this section, is one who is named plaintiff or defendant, and appears on the record as such. (*Woods v. De Figanerie*, 16 Ab. 1; S. C. 25 How. Pr. 522; 1 Rob. 607.) Thus, where the nominal defendant was the president of an unincorporated joint stock company, and the demand in suit was against the company only, it was held that he was the party defendant, and might be required to submit to examination as such. (*Ibid.*) But where the defendant is a corporation, the plaintiff cannot have an order for the examination of such defendant, as a witness, by its officers. Sections 391 and 392 have reference to the examination of parties, and not to the examination of the agents, officers or servants of parties to a suit. It was not the intention of the legislature to authorize the examination of a corporation as a witness. (*Goodyear v. Phoenix Rubber Company*, 48 Barb. 522.) Nor is the president, or other officer, of a corporation which is a party to an action, bound to produce, on the trial, the books and papers of the corporation, under a subpoena *duces tecum* issued by the adverse party. He has no such property in, or control over, them as gives the right or makes it his duty, to produce them. Their proper place is in the office in which the business to which they relate is transacted. (*La Farge v. La Farge Ins. Co.* 14 How. Pr. 26; S. C. 6 Duer, 680.) A joint stock company is not such a corporation, however, as to entitle its officer to refuse to produce its papers in his custody, when required by subpoena. (*Woods v. De Figanerie*, 16 Ab. 159.)

The testimony of parties who appear as witnesses, on the trial of a cause, must be weighed by the same rules, substantially, which apply to the testimony of other witnesses. (*Burnett v. Harris*, 50 Barb. 379.) There are no exceptional rules which apply to such a case. If there can be any difference, it is only that the testimony of parties in their own favor should be more carefully scrutinized, and cautiously received, by jurors, than that of other witnesses. But this applies to both parties; and in all cases where they are witnesses, and contradict each other, the jury must necessarily decide between them. (*Ibid.*)

The term "any other witness," in the last clause of section 390, must be understood to mean any other witness subject to the same disabilities, or standing in the same relation to the parties or the subject matter. It was not intended to remove existing disqualifications, or to make a person a witness because he is a party, who would otherwise be incompetent. (*Rivenburgh v. Rivenburgh*, 47 Barb. 419.) When a party to a suit is called as a witness, by his adversary, and testifies to an independent matter, in his own behalf, the court and jury are not bound to believe him, and decide according to his testimony. (*Roberts v. Gee*, 15 Barb. 449.) It was the intention of the Code, in authorizing parties to be examined as witnesses, to confer upon the courts a wide discretion, as to the credit to be given to their testimony. (*Ibid.*)

The rule that the execution of an instrument must be proved by the subscribing witness, if there be one living, competent to testify, and within the jurisdiction of the court, is inflexible. The oath of the grantor, mortgagor or obligor cannot be substituted. (*Story v. Lovett*, 1 E. D. Smith, 153; *Jones v. Underwood*, 28 Barb. 481.) The testimony of the party executing the instrument cannot be received as a substitute for that of the subscribing witness. (*Jones v. Underwood*, *supra.*) The change in the law, which allows parties to be witnesses, does not alter the rule, or afford any reason for dispensing with its observance. (*Ibid.*; *King v. Smith*, 21 Barb. 158.) In *Giberton v. Ginochio*, (1 Hilt. 218,) however, it is held that the execution of an instrument, not under seal, may be proved by the admission of the party; although the instrument is attested by a subscribing witness who is not called, or his absence excused.

The statute allowing parties to be witnesses has not abrogated the law admitting books of account as evidence, under the rules formerly settled. (*Tomlinson v. Borst*, 30 Barb. 42; *Stroud v. Tilton*, 3 Keyes, 139.) The objection that the alteration of the law, admitting parties as witnesses, has rendered books of account unnecessary

in every case, an incompetent witness for his co-complainant, both at

as evidence, even if it had that effect in other cases, does not apply where the other party is dead; because in such a case the survivor cannot testify. (*Clarke v. Smith*, 46 Barb. 30.)

By the true construction of section 390 of the Code, a party to an action may, at the instance of the adverse party, be compelled by the process of subpoena *duces tecum*, not only to appear at the trial and submit to a personal examination, but to produce papers and books in his possession, precisely as any other witness may be so compelled. And a witness, when properly subpoenaed, is as much bound to produce books and papers in his possession, as evidence, as to testify orally; and his neglect of either is a contempt of court. (*Bonesteel v. Lynde*, 8 How. Pr. 226, 352; *The People ex rel. Valiente v. Dyckman*, 24 How. 222; *Brett v. Bucknam*, 32 Barb. 655.) If a witness upon whom a subpoena *duces tecum* is served, neglects, without good excuse, to obey the subpoena, by producing upon the trial the books or papers specified in the writ, he is liable to the aggrieved party for all damages sustained in consequence of such neglect; although the witness, in other respects, obeys the writ by personally appearing and giving evidence in the cause. (*Lane v. Cole*, 12 Barb. 680; *Hasbrouck v. Baker*, 10 John. 248; *Heermans v. Williams*, 11 Wend. 636.)

When a party to a suit is made a witness, by his adversary, he is as much entitled to his fees as a witness for attendance, as any other person who attends as a witness. (*Hewlett v. Brown*, 1 Bosw. 655.)

2. *Examination before trial.*] Section 391 of the Code provides that the examination of a party as a witness, instead of being had at the trial, as provided in section 390, may be had at any time *before the trial*, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

It has been held that the right of a party to examine the adverse party as a witness, arises immediately on the commencement of the action, and may be enforced before issue is joined. (*McVickar v. Greendale*, 4 Rob. 657; S. C. 30 How. Pr. 61; 1 Ab., N. S. 452; *Fullerton v. Gaylord*, 7 Rob. 551; *Duffy v. Lynch*, 36 How. Pr. 509.) The cases holding that the examination could be had only after issue joined, were all cases decided prior to the amendment of section 349 of the Code, in 1863. (*Ibid.*) The right to such an examination of a party, before trial or issue joined is absolute, and a refusal thereof is not in the discretion of the court. (*Fullerton v. Gaylord*, *supra*; *Cook v. Bidwell*, 29 How. 483; S. C. 17 Ab. 300.) The pendency of a motion to make the complaint more definite does not, of itself, prevent the plaintiff from proceeding with the examination of the defendant. Consequently, its decision or non-decision, or the non-entry of the order upon the decision, can have no effect on the plaintiff's right to proceed. (*Ib.*)

In all cases where a party desires to examine his adversary as a witness, under section 391, the correct practice is to prepare an affidavit, setting forth that the cause is at issue, and that the party desires to examine his adversary as to matters material to the issue, and upon such an affidavit, procure an order for his examination. A mere notice, served upon the party by his opponent, to attend and be examined as a witness, or an ordinary subpoena, is not sufficient. (*Norton v. Abbott*, 28 How. Pr. 388.)

When an examination of the defendant is sought by the plaintiff before he has served his complaint, he must set forth in his affidavit, with particularity, the facts and circumstances out of which he supposes a cause of action to have arisen, the relief which he supposes he is entitled to, the defences which he anticipates will be interposed, and the subjects in relation to which he desires to interrogate the defendant. (*Duffy v. Lynch*, 36 How. Pr. 509.)

It has been held that section 391 gives to either party to an action an *option* to have an adverse party examined before, instead of at, the trial. It is error to deny, to the party claiming it, the right to have such an examination, on the mere ground that the party sought to be examined prefers to be examined at the trial, and offers to stipulate to then attend. (*Green v. Wood*, 15 How. Pr. 838; S. C. 6 Ab. 277.) The fact that other suits against the party sought to be examined are pending, which are brought by other plaintiffs, and depend upon the same general facts, is not such cause as will justify an order exempting a defendant from examination before trial. (*Ibid.*) The qualification in section 391 applies to the time, place and manner of exercising the right, and not to the right itself. (*Reed v. Brown*, 5 Ab. 418.)

Upon an application under the above provisions of the Code, by a party, for the

law and in equity, by reason of his liability to the costs of the suit, and

examination of the adverse party as a witness in the action, he must present an affidavit stating, 1st. The nature of the action and the plaintiff's demand; 2d. If the application be made by the defendant, then the nature of his defence; and, 3d. The name and residence of the proposed witness. (*Greene v. Herder*, 7 Rob. 455; S. C. 4 id. 655; 30 How. 210.)

The examination of a party as a witness, before trial, under section 391, is in the nature of a cross-examination, and governed by similar rules. The limit of a cross-examination is within the discretion of the judge conducting it. (*Plato v. Kelly*, 16 Ab. 188.) Such examination is to be conducted, in all respects, in the same manner as that of a witness examined conditionally under Art. 2, Title 3, Chap. 7 of Part 3 of the Revised Statutes. (*The People ex rel. Valiente v. Dyckman*, 24 How. 222.)

Where a party, who was summoned to appear for examination, under section 391, sent his attorney, on the return day, to claim that his examination was unauthorized, held that this, if not a waiver of his right to mileage, was, at least, an admission of the sufficiency of the sum which had been paid to him; and threw upon him the burden of showing that proper mileage was not tendered. (*Woods v. De Figanieri*, 1 Rob. 607; S. C. 16 Ab. 1.)

A party, on being subpoenaed and paid his fees as a witness, may be examined, after a notice of five days. A previous order from a judge is not necessary, unless a shorter time than five days be desirable and proper. (*Taggard v. Gardner*, 2 Sandf. 667, 669.)

It has been held that there is no authority in the above provisions of the Code, for an order directing a party to appear before a referee, and submit to be examined before him. (*Draper v. Henningsen*, 1 Bosw. 611.) There is no power, either in the court or a judge, to make an order requiring the witness to attend before a person not a judge, and therein constituting such person a referee, for the purpose of taking such examination. (*Ibid.*) It is not obvious that any order for the conditional examination of a party as a witness can, properly, specify and limit the matters to which he is to be examined. He is to be examined generally, the same as any other witness, and the points to which he is to be examined are to be determined by the officer before whom the examination is had, or at the trial, when the testimony is offered in evidence. (*Ibid.*)

If a party, on his examination as a witness, refuses to answer a legal and pertinent question, it is the duty of the judge to issue his warrant for the commitment of such witness. An order merely adjudging him to be in contempt is unauthorized by law, and for that reason is not appealable. (*People ex rel. Valiente v. Dyckman*, 24 How. 223.)

The fact that a witness, by giving testimony, may thereby render himself liable to a civil suit, will not excuse him from testifying; nor, where the testimony is material, can he refuse to answer, on the ground that his testimony will tend to disgrace him. (*Taylor v. Jennings*, 7 Rob. 581.)

3. *Party, how compelled to attend.*] Section 392 of the Code provides that the party to be examined, as directed in section 391, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and that the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

The Revised Statutes prescribe the mode of taking the examination of a witness conditionally. (3 R. S. 5th ed. 673.) Section 10 (p. 675) requires the service of a summons upon the witness to be examined. Sections 53, 59, 60 prescribe the manner in which obedience to such summons is to be enforced. (*Id.* p. 648.)

To compel the attendance of a party as a witness, a summons must be served upon him; and the notice in writing, prescribed by section 391 of the Code, must be served upon the attorney of such party, before such party can be brought into contempt. Such notice must be served upon every adverse party. The object of such notice is, obviously, to apprise all the adverse parties that the examination is to occur, and to afford them an opportunity to prepare therefor. And the summons is the process which is designed to compel the attendance of the party to be examined. (*Van Rensselaer v. Tubbs*, 31 How. 193; *Draper v. Henningsen*, 1 Bosw. 614; *Gaughe v. Laroche*, 14 How. Pr. 451; *Blecker v. Carroll*, 2 Ab. 82.)

Upon presenting a proper affidavit, the party desiring to examine an adverse party as a witness, may apply for such an order as is mentioned in section 3 of the statute in relation to the conditional examination of witnesses within this state, (2 R. S. 392.) and also for the summons provided for in section 10 of the same statute. (*Greene v. Herder*, 7 Rob. 455.) The order so obtained should be served upon the attorneys of

*therefore cannot be examined; (c) except where he is merely [*256]

(c) *Casey v. Beachfield*, 1 Eq. Ca. Abr. 225. *Benson v. Chester*, Jac. 577. 1 Vern. 230. 1 P. Wins. 595. 2 Dick. 799.

all the parties who have appeared, or, if the time for appearance has not yet expired, then upon the adverse parties, themselves, who have not appeared; and the summons should also be served upon the proposed witness. (*Ibid.*) In case the proposed witness fails to appear, the party who has procured the order and summons may, upon a proper affidavit, obtain a warrant directing the sheriff to apprehend such witness and bring him before the judge; or, at his option, he may, on a proper affidavit and notice, have an order directing the pleading of the recusant witness to be stricken out. (*Ibid.*)

The fees of a party for attending to be examined as a witness must be paid him. (*Taggard v. Gardner*, 2 Sandf. 669; S. C. 2 Code R. 82; *Draper v. Henningsen*, 1 Bosw. 614.)

A party examines an adverse party under the above sections of the Code at his peril; and whatever evidence is taken, whether before or at the trial, without objection, is competent, and may be used, notwithstanding the restriction of section 399. (*Barry v. Galvin*, 37 How. 310.)

If the examination is to be as of a witness examined conditionally, a summons must be issued, by the judge, to compel the attendance of the party to be examined; which must be served in the manner required by the Revised Statutes. (2 R. S. 401, § 54.) An order is only necessary to show the existence of facts giving a right so to examine, and to authenticate the proceedings. The witness does not attend in obedience to the order, but in obedience to the summons. If the examination is had before, instead of at, the trial, no order is necessary. A notice to the party, and that alone, is necessary to give the right to examine; and a summons is necessary to compel attendance, and lay the foundation for ulterior proceedings, in case of non-attendance in obedience to it. (*Draper v. Henningsen*, 1 Bosw. 611.)

4. *Testimony of party examined may be rebutted.*] The examination of the party, taken under sections 390 and 391 may be rebutted by adverse testimony. (Code, § 393.)

When a party to a suit calls an adverse party as a witness, he thereby represents him as deserving of credit, and is precluded from denying it by introducing evidence for the purpose of impeaching him, showing either that his general character for truth is bad, or that he has made previous contradictory statements. (*Pickard v. Collins*, 23 Barb. 414; *Barry v. Galvin*, 37 How. 310.) The party calling such witness may, however, by any pertinent evidence, show a fact to be otherwise than as testified to by such witness. And this may be done by proving admissions of such witness. (*Ibid.*; *Parsons v. Suydam*, 3 E. D. Smith, 276; *Armstrong v. Clark*, 2 Code R. 143; *Bemis v. Kyle*, 5 Ab., N. S. 232; *People v. Skeehan*, 49 Barb. 217.) But when a party makes himself a witness in his own behalf, his credibility is not indorsed by the opposite party, and he may be contradicted or impeached, the same as any other witness. (*Forward v. Harris*, 30 Barb. 338; *Varona v. Socarras*, 8 Ab. 302.)

Where the plaintiff and defendant, who are both men of fair character, and stand alike unimpeached, and are of equal credibility, being examined as witnesses, contradict each other, directly, upon a question of fact, and their testimony is totally irreconcilable, the case, in the absence of other testimony, will stand evenly balanced, and the complaint will be dismissed. (*Loose v. Morey*, 57 Barb. 561. See *Forward v. Harris*, 30 id. 341.) But if the plaintiff is fully and circumstantially corroborated in his statement of the facts, by the written agreement of which a specific performance is sought, duly executed in form, and perfect in all its parts, and by the testimony of the subscribing witness; so that if the evidence of both parties should be stricken out, or disregarded, as equally balanced, the plaintiff's case would still stand well proved; this will justify a decree in favor of the plaintiff, if the facts thus proved be sufficient to warrant the relief asked for. (*Ibid.*)

Where, on a question of fact, the plaintiff swears one way, and the defendant another, the jury have a right to credit the former, and not the latter; and the court ought not to grant a new trial because they have done so. But if the defendant introduces a letter of the plaintiff in evidence, written before the commencement of the action, flatly contradicting his testimony, the jury are bound to disregard his oath. (*Boyd v. Colt*, 20 How. Pr. 384.)

5. *Effect of refusal to testify.*] If a party refuse to attend and testify as provided in sections 390, 391, 392 and 393, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out. (Code, § 394.)

a trustee, and has no beneficial interest in the property, or by con-

This section does not give the court the power to stay the party's proceedings in the action, where he refuses or neglects to attend for examination before trial. (*Appleton v. Appleton*, 50 Barb. 486.)

To authorize the punishment of a party for contempt, in refusing to be examined under the above sections of the Code, it need not appear that the misconduct was calculated to, or did, defeat, impair, impede or prejudice the rights or remedies of any party as required by the Revised Statutes (2 R. S. 538, § 20) in ordinary cases of contempt. (*Woods v. De Figueire*, 1 Rob. 607; S. C. 25 How. 522; 16 Ab. 1.)

When a party to an action is made a witness by his adversary, he is as much entitled to witness' fees, as a condition of duty on his part to attend and be sworn, as any third person. (*Hewlett v. Brown*, 1 Bosw. 655; S. C. 7 Ab. 74.) A six days' notice to him to attend and be examined, and notice that if he fails to do so he will be liable as for contempt, and to have his answer stricken out, are not sufficient to authorize an order (on his failure to appear) striking out his answer, or to punish him for contempt; where it appears that he has been neither summoned nor subpoenaed to attend, and that his fees as a witness have not been paid or tendered. (*Ibid.*) Eight days' notice of a motion to punish the party for a contempt, under this section, or that his answer be stricken out, must be given. (*Ibid.*)

In *Bennett v. Hall*, (10 N. Y. Leg. Obs. 191,) a motion to strike out the answer of a defendant because of his failure to attend and be examined as a witness, was denied, where it appeared that after he was subpoenaed, and before the time fixed for his examination, he, in pursuance of a previous arrangement, sailed for California.

A default for non-attendance and submitting to an examination may be waived by the subsequent acts of the plaintiffs' attorneys, in assigning days for the examination of the defendant, at their office, and postponing such examination from time to time. (*Satterlee v. Du Comeau*, 7 Rob. 661; *Gardiner v. Peterson*, 14 How. Pr. 513.) Where the plaintiffs' attorney agreed, by parol, that if the defendants (against whom a default had been taken) would come to his office and be examined, he would accept such attendance, and waive the default; held, that if the defendants were not in the fault by failing to so attend and be examined, the plaintiffs could not insist on the original default. (*Ibid.*) Where it appeared that on the last occasion when a time was fixed for the examination of the defendants, one of them attended, but the plaintiffs' attorney being unable to go on with the examination, it was postponed as to both defendants, no day being fixed at which it should take place; but the plaintiffs' attorney was to give a reasonable notice when he should require the defendants' attendance; and no such notice was given; it was held that the defendants were not in fault in failing to attend. (*Ibid.*)

It has been already stated that the examination of a party as a witness, under the provisions of the Code, is to be conducted in the same manner as that of a witness examined conditionally under the Revised Statutes. Those statutes provide that if any witness attending before a judge, pursuant to a summons, shall, without reasonable cause, refuse to answer any legal or pertinent question, "the officer issuing such summons shall, by warrant, commit such witness to the common jail of the county;" there to remain until he submits to answer, or until he be discharged according to law. (3 R. S. 5th ed. p. 684, § 61.) It has been held that the power of the judge, under this statute, to compel a witness to answer, and to commit him if he refuses, is ample and free from doubt. (*People ex rel. Valiente v. Dyckman*, 24 How. 222.) If the witness refuses to answer a legal and pertinent question, it is the duty of the judge to issue his warrant for the commitment of the witness. An order merely adjudging the witness to be in contempt is improper and unauthorized by law. (*Ibid.*) And an appeal from such order is, for the same reason, equally unauthorized. (*Ibid.*) Where a party, when examined as a witness, has produced a book of account, and proved the same, and has pointed out and explained the charges in it, called for in evidence, he may be compelled to go further, and to read out of the book the specific items and charges to which he has referred and pointed, to the end that the same may be incorporated in his deposition, and preserved as evidence. If he refuses to thus read from the book, he may be punished for contempt. (*Ibid.*)

6. *Testimony of a party, when it may be rebutted by the oath of the party calling him.*] A party examined by an adverse party, as provided by the Code, may be examined on his own behalf, subject to the same rules of examination as other witnesses. (Code, § 395.) But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf, in respect to such new mat-

ter, subject to the same rules of examination as other witnesses; and shall be so received. (*Ibid.*)

7. *When the person for whose benefit the action is brought or defended may be examined.*] A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party. (Code, § 396.)

It has been held that one who is a mere surety, to enable another to prosecute or defend an action, is not a person for whose benefit the action is prosecuted or defended. (*Jessop v. Miller*, 1 Keyes, 321.)

In an action brought by a corporation, a stockholder is not a party for whose immediate benefit the action is brought, under section 396, and is therefore a competent witness in favor of the corporation. (*Montgomery County Bank v. Marsh*, 11 Barb. 645; S. C. 7 N. Y. 481; *Washington Bank v. Palmer*, 2 Sandf. 686; S. C. 8 N. Y. Leg. Obs. 92; *New York & Erie R. R. Co. v. Cook*, 2 Sandf. 732.)

8. *Examination of co-plaintiff or co-defendant.*] Section 399 of the Code directs that no party to an action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence.

The words "representatives of a deceased person," as used in the above section, mean executors or administrators. (*McCray v. McCray*, 12 Ab. 1; *Spaulding v. Hallenbeck*, 39 Barb. 79; S. C. 31 How. 637, n.; 35 N. Y. 204.) But a party whose interest in lands in suit is that of a guardian in socage, an heir, or a dowress, is not a representative of the decedent through whom she claims, within the meaning of that section. (*McCray v. McCray*, *supra.*) And in *Lee v. Dill*, (39 Barb. 516; S. C. 16 Ab. 92; 41 N. Y. 619, n.,) it is held that there is no reason in the language of section 399, the grounds of the exception therein, or the situation and condition of parties, authorizing a distinction between the different classes of representatives of a deceased person, in construing, applying and carrying into effect the provision of law contained in that section. It was accordingly held, in that case, that upon an issue at law between the heir at law and the devisee of a decedent, as to the due execution of a will by the decedent, and to his competency to execute the same; the question being between those two claimants, which is the best entitled to the property, the one by descent, or the other by purchase; the devisee is not a competent witness to testify to transactions between the testator and himself, tending to establish the will.

In *Penny v. Black*, (6 Bosw. 50,) which was an action brought for the conversion of personal property, purchased from a third person, it was held that the party bringing the action was not the "assignee" of such third person, within the provisions of section 399.

The vendor of a personal chattel is not the assignor, within that section. (*Crosby v. Nichols*, 3 Bosw. 450. See also *Gardner v. Gordon*, id. 369.)

A party to the action is not excluded from testifying as to the particulars of a transaction which took place between the deceased and a third person, in the presence of the witness, by section 399. (*Loddell v. Loddell*, 33 How. 347; S. C. 36 N. Y. 327; 4 Ab., N. S. 56.)

In an action against an executor, the plaintiff cannot be permitted to testify as a witness in his own behalf, to what passed between him and the deceased, in her lifetime; nor to testify that certain conversations did not occur between him and the deceased. It matters not whether the object of the testimony is to prove the affirmative, or a negative. (*Clarke v. Smith*, 46 Barb. 30.)

Where, in an action upon a bond given as a substitute for a note, brought by the administrator of the obligee, the defence of usury was set up, and the defendant testified, in his own behalf, that the only consideration he received for the original note (which was for \$896.) was the sum of \$800 paid him by one R.: it was held that this was in fact testifying to a transaction between the defendant and the plaintiff's intestate; and that the evidence was therefore erroneously admitted. (*Stanley v. Whitney*, 47 Barb. 586.)

Where, upon an application by an administrator, to the surrogate, for leave to

mortgage or sell the real estate of the intestate, a claim of the respondent, against the estate, which was disputed by the administrator, was tried by the surrogate, and after several witnesses had testified to conversations between the intestate and the claimant, which established a "transaction" between them, in relation to the subject matter of the controversy, it was held that the claimant could not be examined as a witness to prove that no such conversation had occurred—that no such transaction had taken place—such testimony being "in respect to a transaction had personally between the deceased person and the witness." (*Dyer v. Dyer*, 48 Barb. 190.)

In an action against a husband, after his wife's death, to recover money deposited in a Savings Bank, and the value of promissory notes, claimed to have been owned by the wife, in her lifetime, and to have been given by her to the plaintiff, in anticipation of death, proof of the declarations of the wife are not competent evidence against the defendant, to show that she was the owner of the demands; where the answer denies that the wife ever was the owner of the property, and claims that it at all times belonged to the defendant in his own right; and where he had the actual control and possession of it, at the time. (*Devey v. Goodenough*, 56 Barb. 54.) Under § 399 of the Code, the plaintiff in such an action cannot be allowed to testify as to all the circumstances of the transaction going to show property in the deceased, and a gift thereof to the plaintiff. The husband is included in the words "next of kin" of his deceased wife, as they are used in that section; he having the right to administer her estate, and to collect the debts due to her; and her personal estate belonging to him, subject only to the payment of her debts. (*Ibid.*)

A legatee is not within the meaning of the words "an assignee or executor or administrator," as used in section 399. Hence an assignor is not excluded from testifying against a "legatee" when suit is brought to recover from such legatee the amount of a judgment against the testator. (*Hight v. Sackett*, 34 N. Y. 447.)

Where promissory notes, payable to a foreign executor, as such, are endorsed by him as executor, to himself in his individual capacity, and he sues thereon in his own name, he is not to be deemed the representative of a deceased person, according to the laws of New York, so as to exclude the defendant from being a witness in his own favor. He cannot sue here, in a representative capacity, and can only be regarded as an indorsee of the notes. (*Buckingham v. Andrews*, 34 Barb. 434; S. C. 12 Ab. 322.)

The amendment of section 399 of the Code making it applicable to surrogates' courts and the proceedings therein, not only applied the provision allowing the examination of a married woman as a witness in her own behalf, on her application to the surrogate for letters of administration upon the estate of her deceased husband, but also the restriction on such examination; so that if she comes within that restriction, she cannot be examined in her own behalf, against administrators, to prove any transaction had with the decedent. (*Angevine v. Angevine*, 48 Barb. 417.)

The Code has not changed the common law rule that prohibits a wife from testifying, after the decease of her husband, to declarations made by him to her when no other person was present. Hence, a wife suing for a dower in the land of her deceased husband, cannot be allowed to testify to what her husband said to her, in his lifetime, while they were alone, tending to show that a deed executed by him, under which the defendant claimed, was not delivered to the grantee until after he, the grantor, was married to the plaintiff. (*Keator v. Dimmick*, 46 Barb. 158.) In such an action it is competent for the defendant to prove the declarations of the grantor, made after his marriage to the plaintiff, to the effect that such deed was delivered before he married the plaintiff. (*Ibid.*)

A payee of a negotiable promissory note, who has transferred the same, by delivery, to another person, is a competent witness for the latter, in an action brought by him upon the note; and the fact of his being examined as a witness for the plaintiff will not warrant the admission of the defendant to testify in his own behalf. (*Calkins v. Packer*, 21 Barb. 275; *Collins v. Knapp*, 18 id. 532; *Hicks v. Wirth*, 10 How. Pr. 555; *Goble v. Kinney*, 11 id. 248; *Bartlett v. Tarbox*, 1 Keyes, 495.) Section 399 of the Code was not intended to allow a party to an action to become a witness in his own behalf, excepting for the purpose of meeting the evidence of one who is not a competent witness, at common law, but is made such by virtue of the same and other sections of the Code. (*Ibid.*)

Where a legatee takes from the executors, as a portion of his legacy, a bond and mortgage owned by the testator, and held in trust by the executors, the mortgagor is a competent witness in his own behalf, in an action to foreclose the mortgage, to prove a payment on the bond and mortgage, to the testator, in his lifetime. (*Wildes v. Whitney*, 25 How. 75; *Schenck v. Warner*, 37 Barb. 258.)

Under section 399, a plaintiff, in an action against an executrix cannot be allowed to testify as to notes made by the deceased to the order of, and endorsed by, the

sent. (d) (2) Upon the same principle a *prochein amy* suing for an infant, is considered as so far interested in the event of the suit, that neither he or his wife can be a witness for the complainant. (e) If their examination is necessary for the purposes of justice, his name must be struck out of the bill, and that of another person substituted; which, upon application to the court, will be permitted, on security being given for the costs already incurred. (f)

The rule which prohibits a complainant from being examined as a witness, on behalf of his co-complainant, operates as long as the complainant's name continues on the record. Therefore, it was held, that a complainant who had become a bankrupt, could not be a witness on be-

(d) *Fereday v. Wightwick*, 4 Russ. 114.

(e) *Head v. Head*, 3 Atk. 511. Mitf. 27. 12 Ves. 493.

(f) *Strange*, 708. *Davenport v. Davenport*, 1 Sim. & Stu. 101. *Helms v. Franciscus*, 2 Bland. 544.

plaintiff, and which were transactions had personally between them. In such a case, the test of the admissibility of the testimony is, does it tend to prove what the transaction was? (*Strong v. Dean*, 55 Barb. 337.)

The plaintiff, in a suit in equity brought to establish a lost or destroyed will, against the administrators and next of kin of the testator, is not a competent witness in his own behalf, to prove conversations had between himself and the deceased, at the time of making the will and before, on the subject of the will. (*Timon v. Claffy*, 45 Barb. 438; S. C. 41 N. Y. 619, n.)

A plaintiff, in an action against executors, is a competent witness to prove the contents of a lost letter. Section 399 of the Code was intended to provide for the case of personal intercourse, conversations or communications had personally with the deceased, and is not applicable to testimony resting in papers or documents of any description. (*Williston v. Williston*, 41 Barb. 635.) Nor was it the design of that section to exclude the testimony of a party to an occurrence at which the deceased (although interested in it,) need not have been present; or a fact which he need not, necessarily, have known. (*Franklin v. Pinkney*, 2 Rob. 429; S. C. 18 Ab. 186.)

In an action against heirs at law and administrators, to compel the specific performance of an alleged agreement by the deceased to convey land to the plaintiff, the plaintiff is entitled to be sworn as a witness on his own behalf, although he is not competent to testify to transactions had with the deceased personally. (*Card v. Card*, 39 N. Y. 317.) *Non constat* that he could not have given testimony to facts other than transactions had with the deceased personally, which, as against the heirs at law, would have tended to prove the existence and binding force of the contract alleged. (*Ibid.*)

Where a defendant makes himself a witness, in his own behalf, under section 399 of the Code, his credibility is not certified by the plaintiff, but is to be weighed in the same manner, and his testimony submitted to the same tests as that of other witnesses. (*Forward v. Harris*, 30 Barb. 338.)

(2) A party may be examined on behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend, in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever, in the case mentioned in sections 390 and 391, one of several plaintiffs or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defence, and shall be so received. (Code, § 397.)

This section of the Code, was substantially abrogated in 1857, when, by an amendment, parties were admitted as witnesses in their own behalf, subject to certain limitations of notice; and it was wholly abrogated when, in 1860, these limitations of notice were removed. Since then it has had no force or application, in any possible case. (*Card v. Card*, 39 N. Y. 321, 322; S. C. 7 Trans. App. 144.)

half of his assignees who had filed a supplemental bill; although he had obtained his certificate, and had released; because he was still liable to the costs of the original bill. (*g*)

If, therefore, a complainant is desirous of having the evidence of his co-complainant at the hearing of the cause, he must (unless the defendant will consent to his being examined,) move for leave to strike out his name as co-complainant, and to make him a defendant, by amendment. This will be permitted, even without the consent of the defendant, upon security being given for the costs already incurred. (*h*)

A complainant, however, cannot obtain leave to examine either a co-complainant or a *prochein amy* as a witness, merely on giving security for costs, without either changing the character in which he appears upon the record, or striking him out altogether. (*i*)

But it seems that a guardian *ad litem* is a competent witness; he being at most liable only for costs, and that not of course, but in the discretion of the court, according to the circumstances. (*k*)

Although a complainant in a cause cannot be a witness for his co-complainant, yet he may, with his own consent, be examined by a defendant as to points in which he is not interested. (*l*) The consent of [*257] the complainant, however, to be examined, is absolutely necessary. (*m*) Yet this rule does not extend to a *prochein amy*; who may be examined by a defendant without his consent. (*n*)

And the rule that a complainant cannot be examined by a defendant without his consent, was, under special circumstances, departed from in *Hougham v. Sandys*, (*o*) where the court gave permission to the defendants to examine one of the complainants as a witness, upon the certificate of the master that the examination would be necessary for the better prosecuting the inquiries. The complainants in that case, however, were mere trustees of a sum of money, and had filed the bill to ascertain the rights of the defendants in the same. And there being no doubt about the liability of the complainants to pay the money, which was admitted, and the costs of the suit being payable out of the fund, the reasons which ordinarily prevent the examination of a complainant as a witness did not exist in that case.

When a defendant may be a witness.] Where a party wishes to examine a defendant as a witness against a co-defendant, or against the

(*g*) *Hewatson v. Tookey*, 2 Dick. 799.

(*h*) *Motteux v. Mackreth*, 1 Ves. jun. 142. 2 Cox, 303. *Lloyd v. Makeam*, 6 Ves. 145.

(*i*) *Benson v. Chester*, Jac. 577.

(*k*) *Lupton v. Lupton*, 2 John. Ch. Rep. 625.

(*l*) *Walker v. Wingfield*, 15 Ves. 178. *Armiter v. Swanton*, 1 Amb. 393. 1 P. Wms. 595.

(*m*) *Hewatson v. Tookey*, 2 Dick. 799.

(*n*) *Bird v. Owen*, Mos. 312.

(*o*) 2 Sim. & Stu. 221.

complainant, he may, at any time within twenty days after he has received or served a notice of the rule to produce witnesses, on filing an affidavit that such defendant is a material witness, and is not interested in the matter to which he is to be examined, have an order of course for the examination of such defendant, as a witness, as to any matter in which he is not interested; subject to all just exceptions. (*p*) And such defendant may thereupon be examined to such matters, in the same manner as other witnesses. But the adverse party may, at the hearing, object to the competency of his testimony. (*q*) And if he is interested in the matters to which he is examined, the objection may be taken at the hearing, although it has not before been made. (*r*)

1. *On the part of the complainant.* A complainant cannot examine a sole defendant as a witness against himself. (*s*)

If a defendant is examined as a witness, by the complainant, no decree can be taken against him personally, except upon matters wholly distinct from those to which he has been examined. (*t*) But this rule does not apply to the case of a mere formal defendant, as an executor or *trustee, against whom no personal decree is sought, and who [*258] has no personal interest in the question as to which he is examined as a witness against his co-defendants, who, by his answer, admits his own liability, or who suffers the bill to be taken as confessed against him. (*u*)

It should be observed, however, there is a material difference between a mere trustee and an executor or administrator. A mere trustee may be a good witness for his *cestui que trust*, but an executor or administrator cannot be a witness to increase the assets, although he has no personal interest in them; because he is answerable for a *devastavit*, and liable to be sued by the creditors and to answer the costs. (*v*) This, however, is not the case with an administrator *durante minore ætate*, after his administration is determined; for as he is not liable to be called to an account by any person but the executor, he may be examined as a witness, on behalf of the executor, against a third person. (*w*)

A defendant also, as to whom a decree cannot be opened, is a competent witness for a co-defendant who applies for leave to file a bill of review. (*x*)

If the complainant examines a defendant who is primarily liable for

(*p*) Rule 73.

(*q*) *Ib.* id.

(*r*) *Mohawk Bank v. Atwater*, 2 Paige, 54.

(*s*) *Palmer v. Van Doren*, 2 Edw. 192.

(*t*) *Bradley v. Root*, 5 Paige, 633. *Lingan v. Henderson*, 1 Bland. 268. 1 Cox. 344. 1 Ves. jun. 416.

(*u*) *Id.* *ib.* *Mann v. Ward*, 2 Atk. 228.

(*v*) *Id.* *ib.* *Croft v. Pyke*, 3 P. Wms. 181. *Mabank v. Metcalf*, 3 Atk. 95. *Id.* 603.

(*w*) *Fotherby v. Pate*, 3 Atk. 603.

(*x*) *Hodges v. Mullikin*, 1 Bland. 507.

the debt or demand, as a witness against a co-defendant, he cannot have a decree against either; unless the defendant thus examined had admitted his own liability, by his answer, or by suffering the bill to be taken as confessed. (y) In other words, if a complainant, by examining a defendant, precludes himself from obtaining a decree against him, he also precludes himself from obtaining relief against the others, if, in order to such relief, a decree against the defendant examined is necessary. Thus it has been held, that where a complainant, by examining as a witness, a defendant who was primarily liable, had precluded himself from obtaining relief against such defendant, he could not have relief against another defendant who was only secondarily liable, i. e. liable in case a decree had been made against the first. (z) And the rule is the same where the defendant examined, is one of several parties all equally liable to account and contribution. (a)

The reason of this rule is that a complainant shall not compel a defendant to assist, and in the same cause act adversely against him. (b) [*259] *It is not for the sake of the defendant himself, however, that the rule has been adopted; as he has protection from giving evidence against himself by demurring to the interrogatory. It is for the sake of the other parties that it has been established, and the objection can only come from the other defendants. (c)

The rule does not apply to cases where the party who has been examined has no beneficial interest in resisting the decree, although he may have the legal estate in him, as a trustee, &c.; or where he submits to a decree. (d) Thus where a deed of trust is impeached as fraudulent, the trustee may be a witness, if he has no interest in the support of the deed, and no participation in the alleged fraud. (e)

The rule of exclusion is confined to those matters in which the defendant is interested either in procuring or in resisting a decree. If he is not interested in the whole of the matters embraced in the suit, he may be examined as to those in which he has no interest, and a decree may be made against him upon the rest. (f)

If the complainant intends to examine a defendant as a witness, he should not reply to his answer. If he does so it will be considered as an intimation that he intends to ask a decree against him; which will prevent his reading the depositions at the hearing. (g)

(y) *Bradley v. Root*, 5 Paige, 632. *Weymouth v. Boyer*, 1 Ves. jun. 417.

(z) *Thompson v. Harrison*, 1 Cox's Cases, 316. *Bernal v. Lord Donegal*, 3 Dow. P. C. 133.

(a) *Hulton v. Sandys*, 1 Younge 602. *Meadbury v. Isdall*, 9 Mod. 433.

(b) *Nightingale v. Dodd*, Amb. 584.

(c) *Id. ib.*

(d) *Carter v. Hawley*, cited Amb. 583.

(e) *Taylor v. Moore*, 2 Rand. 563. *Harvey v. Alexander*, 1 id. 219.

(f) *Nightingale v. Dodd*, Amb. 83. *Mos. 228*, *S. C. Murray v. Shadwell*, 2 Ves. & B. 403.

Palmer v. Van Doren, 2 Edw. 192.

(g) *Winter v. Kent*, 2 Dick. 595.

Yet, if the complainant has replied to the answer of a defendant whom he afterwards thinks it necessary to examine, he may apply to the court to withdraw his replication, or to have it amended by striking out the name of such defendant. (*h*)

If the defendant has put in an answer denying the complainant's case, the complainant will be precluded from using his evidence at the hearing, whether the answer has been replied to or not. Thus, where a bill was filed against two defendants, charging them with fraud, and one of the defendants denied the fraud, and charged it on the other, the court would not allow the depositions of the defendant who had denied the fraud, to be read against the other, notwithstanding the complainant had not replied to the answer; because, although he had not replied at the time of the examination, he might have done so at any time before *publication; so that the defendant, at the [*260] time of his examination, might have been under a bias. (*i*)

If a complainant examines a defendant as a witness, he will be decreed to pay him his costs of the suit. Whether the complainant will be allowed to recover these costs from the other defendants, must depend upon the circumstances of the case. (*k*)

2. *On the part of a co-defendant.* Hitherto we have been speaking of an examination of a defendant or of a co-complainant by a complainant.

The rule of the court, authorizing the examination of a defendant by a co-defendant, has also been given. (*l*)

Previous to the adoption of that rule, however, it was the practice for courts of equity to permit the examination of a defendant by a co-defendant, in all cases where the defendant to be examined was not interested in the result. (*m*) If a defendant is interested in the result, his depositions cannot be read on behalf of a co-defendant, any more than they can, under similar circumstances, be read for a complainant.

Whenever a decree can be made against a defendant upon the subject as to which he is examined, his evidence in favor of a co-defendant will be inadmissible. (*n*)

And it is laid down as a general rule that where a defendant may, by any possibility, be liable to costs, this is always a reason for refusing his evidence. (*o*) Yet it has been held in this state, that a defendant

(*h*) *Hardcastle v. Shafto*, 2 Fowl. Ex. Pr. 85. See ante. p. 253.

(*i*) *Meadbury v. Isdall*, cited *Blunt's Amb.* 817, n 1. 9 Mod. 438, S. C.

(*k*) *Weymouth v. Boyer*, 1 Ves. jun. 416. *Hervey v. Talbutt*, 1 Jac. & W. 197. *Fulton Bank v. New York & Sharon Canal Co.* 4 Paige, 127.

(*l*) Ante. p. 257.

(*m*) *Piddock v. Brown*, 3 P. Wms. 288.

(*n*) *Dixon v. Parker*, 2 Ves. 219.

(*o*) *Barrett v. Gore*, 3 Atk. 402. *Eade v. Lingood*, 1 Atk. 204. *Scroggs v. Scroggs*, *Blunt's Amb.* 815.

charged as combining with others in a fraud against which relief is sought, but against whom no particular relief is prayed, may, though liable for costs, be a witness for his co-defendants. This decision was upon the ground that he comes within the exception to the general rule excluding a witness on account of interest: viz. that where the interest is contingent or uncertain, the witness is nevertheless competent, and the objection is to be confined to his credibility. (*p*)

When it is said that the liability of a defendant to have a decree made against him will prevent his being a witness for another defendant, [*261] ant, *the rule must be understood as being subject to the same limitations as have been already mentioned, relative to the examination of a defendant by a complainant, viz: that the decree to which he is liable must be an adverse decree, or it will not exclude his evidence. Therefore, where a defendant is a mere formal party, such as a bare trustee having the legal estate, he will be a good witness, as well for a co-defendant as for the complainant. (*q*) It is otherwise, however, where the defendant is an executor or administrator. (*r*)

Where the defendant is only partially interested in the matters embraced in the suit, he may be examined as to those in which he has no interest. (*s*) If this were not so, the complainant, by joining persons as defendants in a suit in which he has cause of action against one as to one subject, and against another as to a different subject, but having no cause against them jointly, might, by this sort of mechanism, unless the court permitted one defendant to examine another, deprive one of the benefit of the other's testimony. (*t*)

And the rule excluding the testimony of a defendant in favor of his co-defendant, on the ground of interest, extends only to cases where the defendant examined has been made a party because he has a *direct interest*. Where he is merely made a party as an attorney or trustee, the objection will not go to his competency, but only to his credibility. (*u*)

If a witness is disinterested at the time of his examination, his deposition may be read, although he has become interested since his examination. (*v*) And so where a person has been examined as a witness for the complainant, and is afterwards made a defendant to the suit, his evidence may be read. (*w*) In like manner where a witness who had

(*p*) McDonald v. Neilson, 2 Cowen, 139. Beebe v. Bank of N. Y. 1 John. 556. But see Whipple v. Lansing, 3 John. Ch. Rep. 612.

(*q*) Mau v. Ward, 2 Atk. 228. 2 Dan. Pr. 456.

(*r*) Id. ib. Croft v. Pyke, 3 P. Wms. 181. 3 Atk. 95, 603.

(*s*) Nightingale v. Doild, Amb. 83. Mos. 228, S. C.

(*t*) Murray v. Shadwell, 2 Ves. & B. 405.

(*u*) Bridgman v. Green, 2 Ves. 628.

(*v*) Goss v. Tracey, 1 P. Wms. 288. Haws v. Hand, 2 Atk. 615. 2 Ves. 43.

(*w*) Cope v. Parry, 2 Jac. & W. 538. Bradley v. Root, 5 Paige, 632.

been examined *de bene esse*, afterwards became interested and was made a party, his deposition *de bene esse* was allowed to be read at the hearing. (x)

If both parties examine a witness without an order, neither can afterwards object to the evidence; as each, by examining him, has allowed him to be a good witness. (y)

*When a party is examined as a witness, he is to be cross- [*262] examined, and re-examined, in the same manner as ordinary witnesses. (z) And a cross-examination by the party against whom he is produced, will not amount to a waiver of the objection to his competency. (a)

If a party sought to be examined as a witness is interested, his interest may be divested by a release; but the release must be executed previous to his examination. (b) Where a defendant has been examined as a witness for the complainant, and on the hearing was found to be interested and his testimony rejected, an application for a re-hearing with a view to release the witness and re-examine him, was refused. (c)

A certified copy of the order for the examination of a party as a witness, must be taken, for the purpose of being produced before the examiner, as his authority for taking the examination. (d) (3)

2. *What persons, other than parties, may be witnesses.*] The incompetency of witnesses, from interest in the subject matter of the suit, is not confined to persons who are parties to the record. An individual

(x) *Brown v. Greenly*, 2 Dick. 504.

(y) *Prac. Reg.* 419. *Sharp v. Runk*, Halst. Dig. 173.

(z) *Benson v. Le Roy*, 1 Paige, 122.

(a) *Moorehouse v. De Passow*, 19 Ves. 435. *Coop.* 300, S. C.

(b) *Anon.* 2 Atk. 15.

(c) *Dunham v. Winans*, 2 Paige, 24.

(d) *Hinde's Pr.* 256, 357. *Mulvany v. Dillon*, 1 Ball & B. 409.

(3) Section 399 of the Code directs that no party to an action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence.

It has been held that in an action against a municipal corporation, one of the corporators is not a party, within the meaning of the above section, so as to be excluded as a witness. (*Pack v. The Mayor, &c., of New York*, 3 N. Y. 489.) That section should not be so construed as to include any one who is not, by name, a party to the action. (*Ibid.*) In an action against a city corporation, one of the aldermen is a competent witness for the defendants, both at common law and under the Code. (*Ibid.*)

is equally incompetent to be a witness, if he is interested in the result of the case, whether he be a party or not. (e) (4)

What sort of interest will exclude.] The interest which will exclude a witness from being sworn must be a direct interest in the event of the suit. (f) If the only interest a witness has in the cause in which he is sworn is in the *question*, the objection goes to his *credibility*, and not to his *competency*. (g)

Cases may occur in which a direct interest in the event of the suit may belong to a person who is not a party, and which will disqualify him from giving evidence. Thus a residuary legatee or next of kin is incompetent as a witness in a suit by or against an executor or administrator, where the effect of his evidence would be to increase the fund. And upon the same principle, a bankrupt, or a person who has taken the benefit of the insolvent debtor's act, or a creditor of a bankrupt or insolvent debtor, is an incompetent witness in a suit for his assignees. (h)

So a remainderman is incompetent to prove payment of a legacy charged on the estate. (i) Neither can a co-partner give evidence for

(e) 2 Dan. 447.

(f) McLaren v. Hopkins, 1 Paige, 18.

(g) Id. ib.

(h) 2 Dan. 461. 1 Phil. Ev. 46. Austin v. Bradley, 2 Day, 466. 1 Rose, 387. 2 Ves. & B. 177.

(i) Aldridge v. Lord Walscourt. 1 Ball & Beat. 312.

(4) NO WITNESS TO BE EXCLUDED BY REASON OF INTEREST.

Section 398 of the Code provides that no person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded by reason of his *interest* in the event of the action or proceeding, or because he is a party thereto, except as is provided in section 399. And it is declared that nothing contained in section 8 of the Code shall be held or construed to affect or limit the operation of sections 398 and 399.

By a statute passed in 1869, it is enacted that in the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, and in all proceedings *in the nature of criminal proceedings*, in any and all courts, and before any and all officers and persons acting judicially, the person so charged shall, *at his own request*, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him. (Laws of 1869, ch. 678.)

This, doubtless, embraces proceedings as for *contempts*. It therefore seems proper to refer to the statute, in this place.

In suits by or against an aggregate corporation, the admission of any member thereof, not named on the record as a party to such suit, shall not be received as evidence against such corporation, unless such admission was made concerning some transaction in which such member was the authorized agent of such corporation. (3 R. S. 692, 5th ed. § 112.) Any member of a corporation aggregate, not named on the record as a party to a suit brought by or against such corporation, shall be received as a competent witness to testify to any matter against the interest of such corporation. (Id. § 113.)

A corporation is a living person, within the meaning of section 338 of the Code; and where an action is commenced either by or against a corporation, of any kind, a party may be examined in his own behalf. (*La Farge v. Exchange Fire Ins. Co.* 22 N. Y. 352; S. C. 3 Bosw. 157; *Field v. N. Y. Central R. R. Co.* 29 Barb. 176; S. C. 28 How. 583, n.; *Johnson v. McIntosh*, 31 Barb. 267; *Wallace v. Mayor, &c., of New York*, 2 Hilt. 440; S. C. 9 Ab. 40; 18 How. Pr. 169; *Woods v. De Eganerie*, 1 Rob. 607; S. C. 16 Ab. 1; 25 How. 522.)

a *defendant who is sued alone for a partnership debt. (*k*) It is [*263] not true, as a uniform rule, that a creditor is a competent witness for administrators. He is only so where the assets are sufficient for the payment of debts. When they are not, whether the administrator be complainant or defendant, if the verdict swells the fund to which he must look for the payment of his debts, his incompetency is manifest. He is only competent when the verdict cannot affect his interest. (*l*)

So in an action upon an administration bond, against a surety, the administrator is not a competent witness for the defendant; on account of his liability for costs in case of a recovery against the defendant. (*m*)

And a member of a corporation is not a competent witness to sustain a claim of the corporation; even though he release his interest in the subject matter of the suit; and this is upon the principle that he is a virtual party to the suit, and therefore liable for the costs. (*n*) But the remote and contingent interest of a corporator in a mere municipal corporation, is not sufficient to exclude him as a witness in behalf of the corporation. (*o*) And where the corporators are mere *trustees*, they may be witnesses. That was the case in *Weller v. The Governors of the Foundling Hospital*, (*p*) and Lord Kenyon admitted several of the Governors to prove the badness and insufficiency of the work for which the action had been brought.

And in all cases a mere trustee, without legal interest, may be a witness; (*q*) if he is not responsible for costs. (*r*)

Must be a present interest. The interest to disqualify, must be a *present interest*, and not a mere expectancy or probability. An heir apparent may be a witness concerning the title of land, or charges upon it; for his heirship is only a contingency; but one who has a vested remainder cannot, for he has a present estate in the land. (*s*) So a co-obligor in a bond for due administration is a good witness to prove a tender by the administratrix; though a bail is incompetent, because he would immediately become answerable if a verdict were given against his principal. (*t*)

Ignorance as to interest. The ignorance of a witness with regard to *his interest does not make his evidence admissible, if he is really [*264]

(*k*) *Evans v. Yeatherd*, 2 Bing. 135. And see *Blackett v. Weir*, 5 B. & C. 386.

(*l*) *Owens v. Collinson*, 3 Gill. & John. 25.

(*m*) *Id. ib.*

(*n*) *Doe v. Tooth*, 3 Young & Jer. 19. 1 Vern. 254.

(*o*) *Trustees of Watertown v. Cowen*, 4 Paige, 513.

(*p*) *Peake's Ca.* 153.

(*q*) *Gres. Eq. Ev.* 258.

(*r*) *Chambers v. Chalmers*, 4 Gill. & John. 421.

(*s*) *Aldridge v. Lord Wallscourt*, 1 Ball & Beat. 318. *Smith v. Blackham*, 1 Salk. 287. *Ld Raym.* 724.

(*t*) *Carter v. Pearce*, 1 T. R. 163. See also *Stevenson v. Nevins*, 583. *Owens v. Collinson*, 3 Gill. & John. 25.

interested; a rule of which the prudence is obvious. (*u*) And where a person not really interested, *believes himself to be so*, his testimony cannot be admitted. (*v*)

Honorary obligation. Where, however, the witness merely considered himself under an *obligation in honor* to pay a sum of money according to the event, or to contribute to the expenses of the suit, the evidence has generally been received. Indeed that very feeling of honor may be looked upon as a guarantee that he will speak the truth. (*w*)

Witness testifying against his interest. And a witness who is interested in the event of a suit, may be examined when called by the party to whom his interest is opposed; (*x*) and is at all times competent to give evidence to his own disadvantage. (*y*)

Interest equally balanced. So if the witness has an interest inclining him to each of the parties; so as, upon the whole, to make him indifferent, he will be competent to give evidence for either party. (*z*)

Interest acquired fraudulently. If a witness has acquired an interest in the subject matter, for the mere purpose of depriving a party to the suit of the benefit of his testimony, such interest will not exclude him from giving evidence. (*a*)

Interest acquired after examination. And the evidence of an interested witness given while he was disinterested, will be received. (*b*)

Husband or wife of party. It is a general rule that the husband or wife of a party to the suit cannot be admitted to give evidence either for or against the party; they being both considered, in law, as one person. (*c*) (5) They cannot be witnesses for each other, because their

(*u*) Gres. Eq. Ev. 252.

(*v*) Id. Ib. Richardson's Ex'r v. Hunt, 2 Munf. 148. Stra. 129. 1 H. Black. 307.

(*w*) Id. 253. Poderson v. Stuffles, 1 Camp. 144. 1 Phil. Ev. 54. Parker v. Whitby, 1 Turr. & Russ. 372.

(*x*) Kennedy v. Barnett. 1 Bibb, 154.

(*y*) Gilb. on Ev. 139. Gres. Eq. Ev. 219.

(*z*) 1 Phil. Ev. 52, 66. Cowen & Hill's Notes, p. 126. 7 T. R. 480, 1.

(*a*) Id. 137, 8. Cowen & Hill's Notes, p. 272. Bull. N. P. 290.

(*b*) Holcroft v. Smith, 1 Eq. Ca. Abr. 224. Gosse v. Tracy, 2 Vern. 698. 1 P. Wms. 287. 1 Salk. 286. 2 Ves. 42.

(*c*) 1 Phil. Ev. 76. Co. Litt. 6, b. City Bank v. Bangs, 3 Paige, 36.

(5) By an act of the legislature, passed in 1867, it is enacted that in any trial, or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action or proceeding. (Laws of 1867, ch. 887, § 1.) Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding, (except to prove the fact of marriage in case of bigamy,) or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery, (except to prove the fact of marriage,) or in any action or proceeding for or on account of criminal conversation. (Id. § 2.)

interests are absolutely the same; nor against each other, because this is inconsistent with the relation of marriage. (*d*) It is looked upon as a matter of public policy; (*e*) which cannot be waived by the consent of the parties interested; (*f*) a policy which, even after a divorce, protects the *confidence which subsists during coverture. (*g*) [*265] But it does not extend to persons who have not been legally married. (*h*) For these reasons a witness was precluded from proving that a woman who was bringing an action as a feme sole was his wife. (*i*) The rule holds good where the wife is suing as an executrix. (*k*)

And though the interest has ceased, the rule continues. Thus a wife was not allowed, after her husband's bankruptcy, to prove that certain effects had been his property. (*l*)

Interested witnesses, when admitted. Interested witnesses are sometimes admitted from necessity, where no other evidence is reasonably to be expected; whether because knowledge of the fact is confined to few, or because the interest is extended to many. (*m*) For the first reason, a porter or servant is allowed to prove a delivery of goods. (*n*) So, where a son having a general authority to receive money for his father, had received a sum and given it to the defendant, his evidence to that effect was admitted for his father in an action of trover for the money. (*o*) So in trover against a pawnbroker, the servant embezzling

(*d*) Id. 77.

(*e*) Bull. N. P. 286. *Davis v. Dinwoody*, 4 T. R. 678.

(*f*) Per Lord Hardwicke, Rep. Temp. Hardw. 264.

(*g*) *Aveson v. Lord Kinnaird*, 6 East, 192.

(*h*) *Gres. Eq. Ev.* 245.

(*i*) *Bently v. Cook*, 2 T. R. 265.

(*k*) *Alban v. Pritchett*, 6 T. R. 680.

(*l*) *Anon. Barlow*, 47. *Ex parte James*, 1 P. Wms. 611.

(*m*) *Gres. Eq. Ev.* 268.

(*n*) *Matthews v. Haydon*, 2 Esp. Rep. 509.

(*o*) *Anon. Salk.* 289.

No husband or wife shall be compellable to disclose any confidential communication made by the one to the other during their marriage. (Id. § 3.)

When husband and wife are parties to an action, and witnesses in their own behalf, or in behalf of any other party, they are subject to the same rules of examination as other witnesses (except as provided by statute). (*Wehrcamp v. Willett*, 1 Keyes, 250.)

Where a married man is examined as a witness, the fact that his answer may subject him to a civil action for a divorce, will not excuse him from answering. (*Taylor v. Jennings*, 7 Rob. 581.)

Whether, when, in an action against husband and wife, the complaint states, as a cause of action, facts which, if proved, will entitle the plaintiff to a judgment against the husband personally, and he has not been served with the summons, nor appeared in the action, and the means provided by law for compelling his appearance have not been exhausted, the wife can be compelled to be examined at all to establish the allegations in the complaint, when proof of part of the allegations requisite to be proved to charge her separate estate, if she have any, will subject the husband to a judgment for the amount sought to be collected from her property? *Quære.* (*Draper v. Henningsen*, 1 Bosw 611.)

In an action by a husband against his wife, for a divorce on the ground of adultery, the wife is not a competent witness on her own behalf. (*Rivenburgh v. Rivenburgh*, 47 Barb. 419.)

his master's goods and pawning them, will be admitted to prove the fact. (*p*)

For the second reason, viz.: because the interest is extended to many, no person is incompetent to prove a public right, as for example, a right of way—every citizen being interested in it. So, in an action for a toll claimed in a public road, persons who have refused to pay the demand, are, from necessity, competent to give evidence, notwithstanding their interest in the result of the cause. (*q*) Sometimes the interest is made general by the statute which creates it. (*r*) It is necessary to show, in every case, that, under the circumstances, the necessity actually exists. (*s*)

Amount of interest. The magnitude of the interest which a witness has, is not a point to be considered. If he has an interest in the event of the suit, however small it may be, the line of exclusion is strict. (*t*) In the strong language of Mr. Phillips, "a person who loses or gains the smallest sum by the event of the suit, whatever may be his rank, [*266] *fortune or character, is as incompetent to give evidence as one who may be interested to the amount of thousands." (*u*)

Objections to competency of witness. Objections to the testimony of witnesses for incompetency must be made before the examiner, (*v*) and no objections to the testimony of a witness not a party to the suit, shall be made at the hearing, unless such objections were made before his testimony was closed. (*w*) Therefore, where the interest of a witness is of such a nature that it may be released, if the adverse party suffers him to be examined without objection, and waits until the proofs are closed, it will be too late to object to the competency of the witness at the hearing. (*x*)

But where the objection to the competency of a witness is made as soon as his interest is discovered, if the party calling the witness insists upon proceeding, or the examiner overrules the objection, the adverse party is not, by cross-examining the witness, precluded from moving to suppress the deposition, or from objecting to the testimony at the hearing. (*y*)

And where the interest of the witness does not appear upon the pleadings, or upon previous testimony, the objection may be raised

(*p*) Anon. Bull. N. P. 290. See also Bent v. Baker, 3 T. R. 31.

(*q*) Lancum v. Lovell. 9 Bing. 465.

(*r*) Gilb. Ev. 131. Rex v. Luckup. Willes. 425, note.

(*s*) See Green v. New River Co. 4 T. R. 589.

(*t*) Gres. Eq. Ev. 256. Hovill v. Stevenson, 5 Bing. 497.

(*u*) 1 Phil. Ev. 66.

(*v*) Rule 85.

(*w*) Idem.

(*x*) Town of Needham, 3 Paige, 545. Mohawk Bank v. Atwater, 2 id. 54.

(*y*) Rogers v. Dibble, 3 Paige. 238.

whenever the facts on which it is founded are disclosed. (z) The party may also, at the time of the examination, raise the objection that the witness is interested—stating in what that interest consists—and it will then be sufficient if the party making the objection, proves the facts stated as the grounds thereof, at any time before the proofs in the cause are closed (a)

The principle of the rule requiring the objection to be made in due season is, that the party may have an opportunity to remove the interest of the witness, by release or otherwise. (b)

But where a *party* is examined as a witness, he is always examined subject to all just exceptions; and if he is interested the objection may be taken at the hearing, although it has not been previously made. (c)

Competency how restored. The objection on the score of interest may be waived, either expressly or by implication. It is frequently done in open court, at law. (d) And where a party to a deed, though knowing that a person was interested, had nevertheless requested him to attest it, *he was held to have expressly waived the incom- [*267] petency of that attesting witness. (e)

The objection on the score of interest is waived by implication when a party adopts the interested person as a witness by examining him. (f)

But a cross-examination of the witness by the other party, will not, as we have before stated, be a waiver of the objection, to his competency. (g)

A person who is bail for one of the parties, may be relieved from his disability by setting him free from his obligations, which is done by justifying and substituting another bail. (h)

But, by far the most common mode for restoring competency is by a *release*; that is, if the interest be against the witness, by releasing to him every claim; if in his favor, by inducing him to release all claims which he may have. Therefore, where a person has a legacy given to him by will, if he releases his claim to the legacy, he is a good witness to prove the will. (i) And the rule is the same as to a release by a devisee. (k)

It is usual to release specially, the particular interest which causes

(z) Id. ib.

(a) Ib. id. Gregory v. Dodge, 4 Paige, 557.

(b) Id. 241. 2 Paige, 60.

(c) Mohawk Bank v. Atwater. 2 id. 54.

(d) Norden v. Williamson, 1 Tannt. 378.

(e) Honeywood v. Peacock, 3 Camp. 196.

(f) Vaughan v. Worrall, 2 Swanst. 400. Tenton v. Hughes, 7 Ves. 290.

(g) Rogers v. Dibble. 3 Paige, 241. Moorhouse v. De Passow, 19 Ves. 435. Coop. Ch. Rep. 300, S. C. 1 Russ. & My. 428.

(h) Tidd's Pr. 282. 7th ed.

(i) 1 Phil. Ev. 133.

(k) Cook v. Grant, 16 Serg. & Rawle, 198.

the disqualification, whether a *bona fide* satisfaction is actually made at the time or not; but a general release will always answer the purpose. (*l*)

But the operation of this mode of restoring competency is not universal, and many persons against whom the objection of interest would most strongly and most justly lie, are not permitted to be qualified by a release. Thus, neither a party on the record, nor a person who is virtually, though not nominally a party, can be restored to competency by a release. (*m*)

An offer of a release to a witness equally restores his competency; because the parties have a right to his testimony, and he cannot be permitted to deprive them of it by refusing to accept a full discharge. (*n*)

The release must be regularly produced and proved, as any other deed. (*o*) Payment, or the offer of payment, or the offer of a release, are to be proved, according to the circumstances, in any of the usual ways.

[*268] *III. *Incompetency as to particular branches of Evidence.*

An interested witness is in general incompetent to prove even the most trifling matters—such as the custody of a document. (*p*) But the courts frequently allow a witness who is interested on one particular point, to give evidence on all topics which do not bear precisely upon that. For instance, a bankrupt may be made a witness to prove matters which do not impugn the validity of the bankruptcy. (*q*)

And this is of the more frequent occurrence in equity, because many issues may be combined in one suit. And there is a tendency in cases where it is not certain which of several courses they may take at the hearing, to allow a witness whose interest may possibly be affected in the event of the cause taking a particular turn, to give his evidence, subject to its being suppressed on the happening of that contingency. (*r*)

Attorneys, &c. Attorneys, solicitors, counsel, &c., are not permitted to disclose any information which they have obtained in the character of professional advisers. (*s*) (6) They are considered as the same per-

(*l*) Gres. Eq. Ev. 275. Scott v. Lifford, 1 Camp. 250.

(*m*) Id. 273.

(*n*) Fowler v. Welford, 1 Dong. 141. And see Bent v. Baker, 3 T. R. 27.

(*o*) Cocking v. Jarrard, 1 Camp. 37.

(*p*) Carrington v. Jones, 2 Sim. 135.

(*q*) Morgan v. Prior, 2 Barn. & Cress. 15. Hen. Bank. Law, 363.

(*r*) Gres. Eq. Ev. 276.

(*s*) Id. 278.

(6) An attorney or counsel cannot testify as to communications made by a client whilst the relation of attorney or counsel and client subsists. But if, after that relation has ceased, the former client repeat to his attorney, voluntarily, and without any artifice being used by the latter, communications previously made, the attorney is a

son with their clients, and are entrusted with their secrets. (t) Nor is it necessary that the witness should still be the attorney or counsel of the party, or that his name should appear on the record of the pending suit. (u) Neither is the restriction confined to facts disclosed in rela-

(t) Gilb. Ev. 138. Parkhurst v. Lowten, 2 Swanst. 194.

(u) Petrie's case, cited in 4 T. R. 756.

competent witness, as to such subsequent communications. (*Yordan v. Hess*, 13 John. 492. See 3 John. Cas. 193; 1 Caines, 157, 258; 14 John. 391; 17 id. 335; 18 id. 330; 19 id. 134; 2 Cowen, 195.)

A communication to an attorney in reference to his client's personal estate, made upon retaining him to draw an affidavit for the purpose of procuring a reduction of the assessment of such estate, is privileged. (*Williams v. Fitch*, 18 N. Y. 546.)

The true principle, in reference to privileged communications between attorney and client, is that where the attorney is professionally employed, any communication made to him, by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication. (*The Bank of Utica v. Mersereau*, 3 Barb. Ch. 528.) This seal of professional confidence is not the seal of the attorney, but of his client, which the attorney is, by law, as well as by professional honor, bound to keep intact; and it cannot be removed, except by the consent of the client. (Ibid.) The seal which the law fixes upon such communications remains forever, unless removed by the party himself in whose favor it was there placed. (Ibid.) And where the privilege belongs to several clients, it seems that neither one of them, nor even a majority, contrary to the expressed will of the others, can waive the privilege so as legally to justify the attorney in giving testimony in relation to such privileged communications; especially in a case where the testimony of the attorney equally affects the moral characters of all his clients, by showing that they employed him professionally to assist them in giving a fictitious judgment for the purpose of defrauding their creditors. (Ibid; *Whiting v. Barney*, 38 Barb. 393; S. C. 30 N. Y. 330.) Nor will the fact that the client, whose assent to the removal of the seal of professional confidence from privileged communications has not been obtained, is not a party to the suit in which his attorney is called upon to testify, alter the case. (Ibid.) But an attorney who is professionally employed to prepare a deed for his client, and who afterwards witnesses its execution, may be compelled not only to prove the execution of such deed, but also to testify whether it was ante-dated; whether it was in the same form in which it now appears, at the time of its execution, or has been altered; and whether it was actually delivered at the time he subscribed his name thereto as a witness. (Ibid.) And if the deed has been lost, or is in the hands of the adverse party, who refuses to produce it, on the trial, or for the purposes of the suit, the attorney who witnessed the deed may be compelled to testify as to the contents thereof, although in the preparation thereof, he was professionally employed. (Ibid.) The fact that an attorney was employed by his clients to assist them in a transaction which, from what was said in his presence, he must have known to be a fraud upon their creditors, will not deprive their communications of the seal of professional confidence. (Ibid.)

The rule of protection does not extend to an attorney acting under a general retainer as attorney, and a general employment as agent or factor, in relation to the debts and other property of the client in a certain locality; where the facts disclosed consist mainly of the instructions received from time to time, as to the management of the business (*The Rochester City Bank v. Suydam*, 5 How. Pr. 254.) A communication, to be brought within the protection of the rule, if it does not relate to any suit or legal proceeding, commenced or contemplated, should at least be made under cover of an employment strictly professional, and should be such as the business to be done required to be made. It should also be of a confidential nature, and so considered at the time, and it should be shown to have been made with direct reference to the professional business upon which it may be supposed to bear. (Ibid.) Where an attorney or counsel has an interest in the facts communicated to him, and when a disclosure becomes necessary to protect his own personal rights, he must of necessity be exempted from the obligation of secrecy. (Ibid.)

Where there is a dispute, and one of the parties consults an attorney or counsellor on the subject, the communications between such party and his legal adviser are sacred, and the courts will not permit them to be divulged without the client's con-

tion to suits actually pending, but extends to all cases in which the counsel or attorney is applied to in the line of his profession; whether such facts were communicated with an injunction of secrecy, or for the purpose of asking advice, or otherwise. Thus a counsel or attorney

sent. (*March v. Ludlum*, 3 Sandf. Ch. 35; S. C. 4 N. Y. Leg. Obs. 216.) The privilege is not affected by the circumstance that the client offered no compensation, and the legal adviser did not make, or expect to make, any charge for his opinion. (*Ibid.*)

The privilege of an attorney or counsellor extends to information derived from his client as such; either by oral communications, or from books or papers shown to him by his client, or placed in his hands in his character of attorney or counsel, by such client. But the privilege does not extend to information derived from other persons, or other sources, although the information is derived or obtained while acting as such attorney or counsel. (*Crosby v. Berger*, 11 Paige, 377; S. C. 4 Edw. Ch. 210; 3 id. 538; *Bogert v. Bogert*, 2 Edw. 399.)

When professional communications are made by two or more clients jointly, to their mutual legal adviser, the seal of confidence can only be removed by *all* of them. The consent of even a majority is not sufficient; and one or more of them cannot require a disclosure of the communication, as evidence against the others, without their consent. (*Whiting v. Barney*, 38 Barb. 393; S. C. 27 How. 600, n.; 30 N. Y. 330.) Nor will the fact that one of the parties, who has since died, might, were he living, be called upon to prove the facts which were stated by him to the attorney, entitle the other party to the testimony of the attorney. (*Ibid.*) Communications made by a lender, to his attorney, respecting a loan, after the making thereof, when no one else was present, and which were drawn out in consequence of the confidential relations existing between the lender and the attorney, are also privileged. (*Ibid.*)

A communication made to a clerk of the plaintiff's attorney, for the purpose of enabling such clerk to draw a complaint in an action pending, in favor of the person making such communication, is privileged. (*Sibley v. Waffle*, 16 N. Y. 180, 183.)

A combination between a party and his attorney, to prevent the court from compelling the production of important papers required as evidence, on a trial, by transferring such papers from one to the other, is, it seems, entirely distinct from a case where the confidential communications of a client are sought to be disclosed. (*The People ex rel. Mitchell, v. The Sheriff of New York*, 29 Barb. 622; S. C. 7 Ab. 96.) In no instance should such communications be disclosed, by an attorney and counsel; and the courts should carefully guard against any attempt to compel a counsel thus to betray the confidence of his client. But when the party and his counsel thus combine together to defeat the proper administration of justice, and seek to use this privilege as a cloak for that purpose, the act is not entitled to the protection of the court. (*Ibid.*) Where the papers sought for are required in evidence, and are needed for the purpose of identification, the counsel is, to that extent, bound to produce them; even if he can be protected from disclosing their contents. (*Ibid.*) The party himself may be required to produce the papers, when they are in court, and in the possession of his agent or attorney. (*Ibid.*)

The production of documents in the hands of counsel can be resisted only when a controversy exists, or is anticipated, between parties, in relation to the subject on which communications were made to counsel, or the documents entrusted to him (*Peck v. Williams*, 13 Ab. 68.)

Papers entrusted to an attorney in professional confidence are not necessarily to be deemed confidential communications; and if he swears that he is ignorant of their contents, they are not to be so deemed. (*Mitchell's case*, 12 Ab. 249.) It is not the right of a witness, except where the answer might criminate him, whether the matter inquired of is privileged or not. If the production of a document be called for, and the witness declines to produce it upon the ground that the reading of it in evidence would be prejudicial to his interests, or the interests of a person to whom he stood in a confidential relation respecting the instrument, the witness may be required to submit the document to the inspection of the court. (*Ibid.*) The refusal of a witness to produce papers acknowledged to be in his possession, for the reason that it would be a breach of his privilege as attorney, is assuming the right of determining for himself the question of privilege, which is not his province, but that of the court; and his refusal to produce the papers is a contempt. (*Ibid.*)

In *Mitchell's case*, (12 Ab. 249, 262,) it is decided, by the New York court of

employed to draw a deed is considered as acting in the line of his profession, and bound to conceal the facts disclosed by the person who employs him. (*v*)

Conveyancers, interpreters, and clerks. Communications respecting the preparing of deeds are privileged. (*w*) The rule includes an interpreter, so far at least as he is merely the organ of the professional adviser; (*x*) also the clerk of the counsel or solicitor consulted. (*y*)

Confidential communications not of a legal nature. The statute declares that no minister of the gospel, or priest of any denomination, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination. (*z*)(7) Nor shall any physician or surgeon be allowed to disclose any information acquired by him in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. (*a*)(8)

(*v*) *Parker v. Carter*, 4 Munf. 273.

(*w*) *Anon.*, Skin. 404. 2 Brod. & B. 5. 6 Mad. 47. *Parker v. Carter*, *supra*.

(*x*) *Du Barre v. Livette*, Peake's Ca. 77, n. 4 Munf. 273, 286.

(*y*) *Taylor v. Forster*, 2 Car. & P. 295. *Foot v. Haynes*, 1 Ky. & Moo. 165.

(*z*) 2 K. S. 406, § 92, (orig. § 73.) 3 id. 5th ed. 690, § 104.

(*a*) Id. § 93, (orig. § 73.)

common pleas, that the provision of the Code of Procedure, declaring that "a party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose *may be compelled to testify, in the same manner*, and subject to the same rules of examination, as any other witness," (Code, § 390,) sweeps away the rule of the common law, that parties to actions should not be compelled to give evidence against themselves; and that every privilege, either of the party, or of his attorney, that was founded upon it, is gone. But that the protection that was extended to *confidential communications* between attorney and client remains unaffected, as the reasons upon which that rule was founded is as applicable now as it was before; but with this exception, a party to an action, or his attorney, are no longer privileged to withhold testimony.

(7) This statute does not protect communications or admissions made to a clergyman or priest, unless they are made in the due course of discipline of his church. This is the rule even when they relate to a criminal offence. (*The People v. Gates*, 13 Wend. 312.)

(8) This section of the Revised Statutes does not prevent a physician, in an action by him, for his services, from testifying as to the nature of the disease, and the general character of the treatment used by him. (*Kendall v. Grey*, 2 Hilton, 300.) Nor are the provisions of the statute applicable to the physician of a deceased person, in a testamentary case, concerning the probate of a will made by such deceased person. (*Allen v. Public Adm'r*, 1 Bradf. 221.)

Whether the protection from disclosure in such a case is the privilege of the witness, or of the party; and whether testimony thus given by a physician can be rejected by the court, unless objected to by the party? *Quere.* (*Johnson v. Johnson*, 14 Wend. 637.)

A physician consulted by the defendant, as to the means of producing an abortion, is not privileged from testifying, in an action for seduction. (*Hewit v. Prime*, 21 Wend. 79.)

The common law did not render such communications privileged. The "information" spoken of by the statute, clearly has reference to, and forbids the disclosure of all facts which come within the physician's knowledge in a professional case. It is not confined to communications made to the physician. The patient, and not the physician, is to be protected. (*The People v. Stout*, 3 Park. Cr. R. 670.) It is not necessary that the technical relation of patient and physician should exist. If the

Parents to bastardize issue.] There is a rule founded, to use the expression of Lord Mansfield, "in decency, morality, and policy, that parents shall not be permitted to say, after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party." "The law of England," he says in another place, "is clear, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage." (b) This must not, however, be understood to mean that they may not give evidence against the validity of their own marriage; though then it is said they come forward under a cloud of suspicions. (c)

SECTION II.

EXAMINATION OF WITNESSES.

In this state, witnesses are examined either by an examiner, by a vice-chancellor, by commissioners, under a commission issued for that purpose, or by the court itself, at the hearing of the cause. (9)

Commissions to take testimony may be executed either within this state, or in some foreign state or country.

And exhibits may be proved, *viva voce* at the hearing, in certain cases.

Usually, testimony is not taken in this court until after the cause is at issue; but in certain cases witnesses may be examined *de bene esse*, before the defendant has put in his answer.

(b) *Stevens v. Moss*, Cowp. 591.

(c) *Standen v. Edwards*, 1 Ves. 134. Bull. N. P. 112.

visit was regarded and acted upon as professional, by the person attended, it is sufficient to bring the case within the statute. (Ibid.)

In *Hanford v. Hanford*, (3 Edw. Ch. 465,) it was decided that a divorce for adultery would not be granted upon the testimony of a physician disclosing information which he had acquired in the course of his professional employment; such testimony being prohibited by statute.

After a physician has proved an employment professionally, the entries in his book, of the visits, may be received, to show the number of visits. (*Clarke v. Smith*, 46 Barb. 30.) Such book is evidence of nothing else; and for this purpose it is not necessary, as in other cases where books are admitted in evidence, to prove that the plaintiff keeps correct books, or that others have settled by them. (Ibid.)

(9) The Constitution of 1846, in abolishing the court of chancery, also abolished the office of examiner, and the entire practice of taking testimony out of court, except in cases where testimony is taken *de bene esse* (or conditionally;) or in order that it may be perpetuated; or where witnesses out of the state are examined under a commission issued for that purpose, as in suits at law. When an equity action is at issue, it is now brought to trial, before the court, or a referee, in the same manner as a common law issue in a case where a jury is waived; witnesses are examined in the presence of the court or referee; and the proceedings down to, and including the entry of judgment, are in all respects similar. (See Van Sant. Eq. Pr. 20.)

The subjects to be noticed in the present section, are, I. Examination of witnesses *de bene esse*; II. By an examiner; III. By a vice-chancellor; IV. By commissioners, under a commission; V. [*270] By the court, at the hearing; VI. As to credit of witnesses.

I. EXAMINATION DE BENE ESSE.

Different methods of examination.] There are two methods of taking the examination of witnesses *de bene esse* in this court: 1. Under an order of the court, upon a special application therefor; and 2. By summary proceedings under the statute.

1. *Under an order of the court.*] This was the ancient mode of proceeding to take the examination of witnesses *de bene esse*; and although the revised statutes authorize an examination in a more summary manner, before certain officers out of court, without any application being made to the chancellor or vice-chancellor, for leave to do so, the former method does not appear to have been abolished. It will therefore be necessary to consider it.

In what cases resorted to.](10) The examination of a witness *de bene*

(10) EXAMINATION OF WITNESSES DE BENE ESSE.

The statute now governing the examination of witnesses *de bene esse* directs that whenever any action pending in any court of law, being a court of record, shall have been commenced by the actual service of process, or where the defendant shall have appeared in the action, either party may have the testimony of any witness taken conditionally, to be used in the cases and under the circumstances thereafter prescribed. (3 Rev. Stat. 5th ed. p. 673, § 1.)

The party desiring the examination of a witness, may apply to any judge of the court, upon an affidavit which shall state: 1. The nature of the action and the plaintiff's demand; 2. If the application be made by the defendant, the nature of his defence; 3. The name and residence of the witness; 4. That the testimony of such witness is material and necessary for the party making such application, in the prosecution or defence of such suit, as the case may be; and 5. That such witness is about to depart from this state, or that he is so sick or infirm as to afford reasonable grounds for apprehension that he will not be able to attend the trial of such suit. (Ibid. § 2.)

The officer to whom application is made, may thereupon make an order requiring the adverse party to appear before him, and attend the examination of the witness, at a specified time and place, which time shall not exceed twenty days from the date of the order, and shall be as much shorter as the exigency of the case may require, and the residence of the adverse party or his attorney will allow. Or the officer may make an order requiring the adverse party to show cause, on a day to be named in the order, why such examination should not be taken by a referee to be appointed by him; and on the return day thereof he may appoint such referee, &c. (Id. § 3.)

Sections 4, 5 and 6 provide for showing cause against the granting of the order; for the examination of the witness, and taking his deposition; and for certifying and filing such deposition.

Section 7 directs in what cases such deposition shall be read in evidence; and section 8. what proof will prevent the reading thereof.

Section 9 directs that such deposition shall have the same effect, and no other, as the oral testimony of the witness would have if given on the trial or assessment of damages; and that every objection to the competency or credibility of such witness, and to the competency or relevancy of any question put to him, or of any answer given by him, may be made, in the same manner as if such witness were personally examined on such trial or assessment.

Section 10 authorizes the officer to compel the attendance of the witness to be ex-

esse, takes place where there is danger of losing the testimony of an important witness from death, by reason of old age, (as where the witness is seventy years old and upwards; (d) or dangerous illness; (e) or where he is the only witness to an important fact. (f) In such cases,

(d) *Rowe v. —*, 13 Ves. 261. (e) *Bellamy v. Jones*, 8 Ves. 31.
(f) *Shirley v. Earl Ferrers*, 3 P. Wms. 77. *Pearson v. Ward*, 2 Dick. 648. 1 Cox, 423. 6 Mad. 315.

amined, by issuing a summons for that purpose and enforcing the same in the manner prescribed by statute. (3 R. S. 5th ed. p. 684, § 60.)

By the act of April 16, 1852, (Laws of 1852, Chap. 324,) it is provided that whenever an action pending in either of the district courts in the city of New York shall have been commenced by the actual service of process, or where the defendant shall have appeared in the action, either party may have the testimony of any witness who is about to leave the city and county of New York, and will probably continue absent when the testimony is required, taken conditionally, to be used on the trial of such action, in the same manner and with the like effect, as provided in the above sections of the Revised Statutes.

Although the Revised Statutes require the judge to take the deposition, yet it is not necessary for him to write down the examination of the witness. It is sufficient that he administers the proper oath, and then, after the witness has been examined in his presence, and the examination has been written down by counsel, that he reads it over to the witness, before signing and certifying it. (*Mc Donald v. Garrison*, 9 Ab. 34,) and though the statute provides that the deposition shall be filed in the office of the clerk of the county, within ten days from its date, it has been held that this provision is directory, only, and in cases calling for that indulgence, may be dispensed with, and the deposition allowed to be filed *nunc pro tunc*. (*Burdell v. Burdell*, 1 Duer, 625; S. C. 11 N. Y. Leg. Obs. 189. See also *Bank of Silver Creek v. Browning*, 16 Ab. 262.)

The deposition of a foreign witness may be read, although it appear that he came to this state on the request of the party, for the purpose of being examined, and that he resides in a foreign country, and might have been examined on a commission; and even though a commission may have been obtained, for the purpose of examining him at his foreign residence. (*Jackson v. Kent*, 7 Cowen, 59; *Wait v. Whitney*, id. 69.) These decisions were prior to the Revised Statutes.

The party cannot object that the notice of the examination of the witness was too short, where he appears before the officer and omits to object for that reason, there, but puts his objection on other grounds. (*Jackson v. Kent*, 7 Cow. 59.)

The deposition of a witness, taken on a former trial between the same parties, who is still living, though in another state, cannot be read in evidence. (*Weeks v. Louerre*, 8 Barb. 530.)

It seems that the requirement of the statute, that the officer before whom a deposition is taken shall insert every answer of the witness which either party shall request, is sufficiently complied with if the officer excludes the answers to questions which are, in his opinion, illegal and irrelevant. (*Gibson v. Pearsall*, 1 E. D. Smith, 90.)

In *Ward v. Whitney*, (3 Sandf. 399; S. C. 8 N. Y. 445,) where the evidence of a party was taken conditionally, and the execution of an instrument was then proved without objection, it was held that none could be raised at the trial.

In *Guyon v. Lewis*, (7 Wend. 26,) where the witness was a transient person, without any fixed habitation—a journeyman carpenter seeking employment—and said, at the time of his examination, that he was about leaving the state, and departed, and was not seen afterwards, by one who had before seen him frequently, the deposition was, upon proof of these facts, held admissible.

In all cases of absence from the state, where a deposition taken *de bene esse* is offered in evidence, the party offering it must prove that he has used due diligence to procure the attendance of the witness; and particularly that he has made inquiries at the last place of abode of the witness, in order to have him served with a *sub-pœna*. (1 Monell's Pr. 612.)

A party is not required, on the demand of his opponent, to produce documents, the execution of which he has proved upon the examination of a witness *de bene esse*. They remain under his control until read in evidence, and he may read a portion of them and refrain from using the others, at his election. The opposite party must procure a discovery of them before the trial, or be prepared with parol evidence.

the court, to prevent the party from being deprived of the benefit of his evidence, will permit his depositions to be taken before the cause is at issue; in order that if the witness die, or be not forthcoming to be examined after issue joined, the depositions so taken may be used at the hearing. (g)

The examination of a witness *de bene esse* is incidental to every suit brought in this court. It may even be incidental to a suit to perpetuate testimony, where there is danger that the evidence of the witnesses whose testimony is intended to be perpetuated, will be lost before the suit for perpetuating is ripe for a regular examination. (h)

(g) Hinde's Ch. 368.

(h) Frero v. Green, 19 Ves. 319.

the contents, on a refusal to produce them. (*Edmonstone v. Hartshorn*, 19 N. Y. 9.) Where the adverse party had notice of the examination of a witness *de bene esse*, and appeared and cross-examined him, merely objecting that the power of the officer to take the examination was exhausted by a previous notice of examination, and a failure of the moving party to proceed with the examination, it was held that the examination thus taken became effectual proof in the cause. (*Kushmore v. Hall*, 12 Ab. 420.)

Testimony taken conditionally is admissible upon the trial, notwithstanding that one of the original plaintiffs has died, and the suit is continued by the survivor. (*Markoe v. Aldrich*, 1 Ab. 55.) It is also admissible notwithstanding the witness may have returned to the state, since his examination, if he is not within the state at the time of the trial. (*Ibid.*)

A witness may go and come, but if it is shown he is not here at the time of trial, the end of the statute is answered. The salutary rule of the common law requiring in all practicable cases, the presence of the witness at the trial, is sufficiently favored and conserved by excluding testimony taken conditionally, when it is not shown that the witness is absent at the time of trial. (*Ibid.*) If the deposition be offered on the ground that the witness is unable to attend, by reason of insanity, sickness, or settled infirmity, this must be shown to the satisfaction of the court. Mere old age is not of itself, sufficient; but the party must also prove that the witness is too infirm to attend. (*Van Sant. Eq. Pr.* 279, 283; *Jackson v. Rice*, 3 Wend. 180.) That the witness is ill, from being far advanced in pregnancy, is a sufficient inability from "sickness," to make her deposition admissible. (*Clarke v. Dibble*, 16 Wend. 601.)

The uncorroborated testimony of an interested witness, that shortly before the trial he saw, in this state, a person proved by other testimony to be a resident of another state, is not sufficient to authorize the exclusion of a deposition of such person taken *de bene esse*. (*Nixon v. Palmer*, 10 Barb. 175; S. C. 8 N. Y. 398.)

To entitle the deposition of a witness examined *de bene esse* to be read at the trial, on the ground of his absence from the state, it must be proved, by competent evidence, to the satisfaction of the court, that he has continued out of the state, so that his attendance at such trial could not be compelled by the ordinary process of law. The mere declaration of his wife, out of court, that he is absent, without other evidence, does not constitute such proof, she being competent to prove the fact, if it exists. (*Fry v. Bennett*, 4 Duer, 247; S. C. 1 Ab. 289.) The spirit of the decisions requires legal proof, as contradistinguished from mere hearsay evidence or belief, especially when it is apparent that it is as easily attainable as the inferior proof which may be offered. (*Ibid.*)

Proof that a person who has been examined *de bene esse* resides in another state; that he has been seen there since he was examined; and that the witness is informed that he is there at the time of the trial, is sufficient, *prima facie*, when the competency of the evidence to establish his absence is not questioned, to entitle the deposition to be read. (*Donnell v. Walsh*, 6 Bosw. 621; S. C. 29 How. 573; 33 N. Y. 43.) Where it appears, when depositions are offered in evidence, that every reasonable effort has been made, to find the witnesses, to subject them to the process of subpoena, and there is every reason to suppose that they are out of the state, this is sufficient to authorize the reading of the depositions. (*Roberts v. Carter*, 28 Barb. 462; S. C. 17 How. Pr. 524.)

Wherever the testimony of a witness is required to be used either in support of, or in defence to, an action at law, a bill must first be filed in this court, with the proper affidavit annexed to it, praying specifically that the witness may be examined *de bene esse*. (*i*) But an order of this nature, in aid of a proceeding at law, cannot be obtained upon a bill filed for any other purpose. (*k*)

[*271] *The court will grant an order for the examination of witnesses *de bene esse*, not only in the cases above enumerated, but wherever the justice of the case appears to require it. Thus, where an application was made to examine the surviving witness to a will, *de bene esse*, on the ground that the parties concerned all lived in a foreign country, and that the surviving witness was greatly afflicted with the gout, the order was made, although the witness was only stated to be "upwards of sixty years old." (*l*) So also, where the age of the witness was not stated, but the affidavit upon which the application was made, alleged only that the witness was subject to violent attacks of the gout, and from these attacks was under the apprehension of dying, and that he was a material witness; his testimony being required to prove the draft of a bond which he had prepared, but which was lost; the court of exchequer made an order for his examination *de bene esse*. (*m*)

In like manner, where a witness is about to go abroad, the court will make an order for his examination *de bene esse*. (*n*) But not if it is in the power of the complainant to detain him. (*o*)

It seems also that in a question of pedigree, where the case depends upon a chain of distinct circumstances in the knowledge of different individuals, the death of one of whom would destroy the whole chain, the court will permit the examination of such individuals *de bene esse*; although none of them come within the description of witnesses whose testimony is in danger of being lost either from age or serious illness. (*p*)

But the rule that the examination of a witness *de bene esse* will be permitted where the person proposed to be examined is the only witness, will not be extended to cases where there is more than one witness

(*i*) Phillips v. Carew, 1 P. Wms. 117. Andrews v. Palmer, 1 Ves. & B. 21.

(*k*) Atkins v. Palmer, 5 Mad. 19.

(*l*) Fitzhugh v. Lee, 1 Amb. 65.

(*m*) Jepson v. Greenaway, 2 Fowl. Ex. Pr. 103.

(*n*) Botts v. Verelst, 2 Dick. 454. Byrne v. Byrne, 2 Moll. 440.

(*o*) The East India Company v. Naish, Bunb. 320.

(*p*) Shelley v. —, 13 Ves. 56. Shirley v. Earl Ferrers, 3 P. Wms. 77.

A witness whose testimony has been taken *de bene esse* cannot be impeached on the trial by proving that, subsequent to his examination, he made statements inconsistent with his testimony, or said that what he had sworn to was false. Before such statements can be given in evidence to impeach a witness, he must be interrogated as to the same. (*Stacy v. Graham*, 14 N. Y. 492.)

to the same fact; unless upon the ground of the age or infirmity of the witness. Thus where an application was made for leave to examine *de bene esse* one of two surviving witnesses to a will, who was neither of the age of seventy nor in a state of dangerous illness, on the ground that he was in prison charged with a capital felony, no order was made. (q)

Within what time to be had.] The court will grant an order allowing the complainant to examine a witness *de bene esse*, before an answer has *been put in; provided the necessity for taking his deposition [*272] is satisfactorily shown by affidavit. (r)

It will also be granted before appearance, on the ground of the witness being seventy years of age, or dangerously ill, or the only witness, if the defendant has been served with a subpoena; immediately after the filing of the bill, and without waiting either for the defendant's appearance or for his being in contempt for non-appearance. (s) And it seems clear that the contempt of a defendant in not appearing would, at any time, be a reason for giving permission to a complainant to examine his witnesses *de bene esse*, where a proper ground is laid for it; even where the case does not come within any of the three instances just mentioned. (t) It is also said that a reference of the complainant's bill for impertinence is no reason for refusing the order. (u)

But where the defendant has not appeared, he must have *notice of the examination* of the witness, in order that he may have an opportunity to cross-examine him. (v)

A *defendant* cannot have an order to examine a witness *de bene esse* before he has put in his answer. (w)

Notice of application when necessary.] By the English practice, an order for leave to examine a witness *de bene esse*, on the ground of the witness being seventy years of age, or dangerously ill, or of his being the only witness to a material fact, may be obtained without notice. (x) And the application may, as we have already stated, be made before answer, or even before appearance; provided the defendant has been served with a subpoena. (y)

Here it seems, in cases above enumerated, wherever there is an ap-

(q) Anon. 19 Ves. 321.
(r) Fort v. Ragusin. 2 John. Ch. Rep. 146. Byrne v. Byrne, 2 Moll. 440. Brown v. Greenley, 2 Dick. 504.

(s) Wilson v. Wilson, cited 1 Newl. Ch. P. 237. Dew v. Clarke, 1 Sim. & Stu. 103. 2 Dan. 545.
(t) Coveny v. Athill, 1 Dick. 355. Pritchard v. Gee. 5 Mad. 364.

(u) 2 Dan. 545.
(v) Tompkins v. Harrison, 6 Mad. 315. 13 Ves. 261. Loveden v. Lord Milford, 4 Bro. C. C. 540.

(w) Williams v. Williams, Dick. 92. Woodmas v. Warner, 2 Fowl. Ex. Pr. 131. But see Brown v. Child, 3 Sim. 457.

(x) Bellamy v. Jones, 3 Ves. 31. Tompkins v. Harrison, Mad. & Geld. 315. 2 Dan. Pr. 545.
(y) Ante, p. 271, et supra.

pearance, notice of the application must be given; though, under special circumstances, it has been dispensed with. (z)

But where the application is not made on the ground of the age or dangerous illness of the witness, or because he is the only witness, the court will not make an order for his examination *de bene esse* as of [*273] *course. Therefore, if a party wishes to examine a witness *de bene esse*, upon a ground different from those above mentioned, he must apply to the court for an order to that effect, on notice to the other party. (a)

It seems, however, that where a defendant is in contempt for non-appearance, such an order may be obtained without notice; and this even where the defendants are infants. Thus, in a case where the defendants were infants, and in contempt by the messenger's return that they had absconded and were not to be found, the court, upon the usual affidavit, of the materiality of the evidence of the witnesses, &c., and the complainants undertaking to proceed with all due diligence, and with as much expedition as the course and practice of the court, and the contempt of the defendants would admit, to bring the cause to an issue and examine their witnesses in chief, made an order that the complainants should be at liberty to examine them *de bene esse*. But it was provided by the order that, before the publication of the depositions of such witnesses should be allowed to pass, proper evidence should be produced to satisfy the court that the complainants had complied with the above undertaking. (b)

Affidavit in support of motion.] The application for leave to examine a witness *de bene esse* must, in every instance, whether made upon notice or without, be supported by an affidavit of the facts which form the ground of the application; such as the age of the witness, &c., and that he is a material witness for the party making the application. Where an application is made for an order to examine a witness on the ground that he is the only person who knows the fact, the affidavit should state the particular points to which his evidence is meant to apply. (c) And it should be shown, not only that the witness is a person who knows the fact, but that he is the *only person* who knows it. And the affidavit should also show the ground which the person making it has for believing that the witness is the only person. (d) Therefore, where an order was applied for to examine several witnesses *de bene esse*, one upon the usual affidavit that he was above seventy years of age, and

(z) *Rockwell v. Folsom*, 4 John. Ch. Rep. 115. 1 Hoff. Ch. Pr. 455.

(a) *Bellamy v. Jones*, 8 Ves. 31.

(b) *Frere v. Green*, 19 Ves. 319.

(c) *Pearson v. Ward*, 1 Cox. 177. 2 Dick. 648, S. C.

(d) *Rowe v. —*, 13 Ves. 261. Newl. Pr. 278.

the other upon the affidavit of the agent, who stated he was informed by the witness that he could prove the particular fact, and that he, (the agent,) believed that he was the only person who could do so, the court, although it granted the application as to the witness who was above seventy, denied it as to the other. (*e*)

*The affidavit must also state the place of residence and description of the witness sought to be examined. (*f*)

In *Fort v. Ragusin*, (*g*) an order was made for the examination of a witness *de bene esse* on his own affidavit that he was a mariner and about to return to the Havana; that the complainant was absent from the state, and that he was advised by the complainant's counsel that his testimony would be material.

Order for.] The order to examine witnesses *de bene esse* gives the party liberty to examine such and such witnesses, naming them, and will only authorize the examination of the persons named therein. It must be served upon the opposite party, in order to afford him an opportunity to cross-examine the witnesses. (*h*)

Where applied for by the defendant.] A defendant, although he may equally with the complainant, examine a witness *de bene esse*, cannot obtain an order for that purpose before he has put in his answer. (*i*) But where a complainant has obtained an order for a commission to examine witnesses *de bene esse*, the defendant, if he has any witnesses to examine *de bene esse*, may, to save the expense of another commission, obtain an order for leave to examine his own witnesses, (naming them,) under the complainant's commission. Without such an order he cannot examine his witnesses under that commission, but must obtain one for himself. (*k*)

By whom witnesses are to be examined de bene esse.] Witnesses may be examined *de bene esse*, either by an examiner, or in a proper case for it, by a commissioner, under a commission issued in the same manner as a commission to take the examination of a witness in chief. (*l*) The cases in which a commission to take testimony will be issued, will be stated in another part of the present chapter.

Under a commission.] The form of the commission to take the examination of witnesses *de bene esse*, is nearly the same as that of the ordinary commission; the principal variation being that it specifies the

(*e*) *Id. ib.* 2 Dan. Pr. 547.

(*f*) *O'Farrell v. O'Farrell*, 2 Moll. 364.

(*g*) 2 John Ch. Rep. 146.

(*h*) 1 Smith's Ch. Pr. 508. *Tomkins v. Harrison*, Mad. & Geld. 315.

(*i*) *Williams v. Williams*, 1 Dick. 92. *Sheward v. Sheward*, 2 Ves. & B. 116. 2 Fow. Ex. Pr. 131

(*k*) *Hinde's Pr.* 312.

(*l*) *Lingan v. Henderson*, 1 Bland, 238.

particular witnesses to be examined, and does not authorize the examination of witnesses generally. (*n*)

Mode of taking the examination of witnesses de bene esse.] Whether witnesses are examined by an examiner or by a commissioner under a [* 275] *commission, their examination is taken in the same manner as the examination of a witness in chief. In either case, all the formalities which are required in the examination of witnesses in chief must be observed, at least as far as the circumstances of the case will admit of their being so. (*o*)

Notice of examination.] In all cases, notice of the examination of a witness *de bene esse*, either by an examiner, or upon the execution of a commission for that purpose, must be given to the opposite party, in order that he may have an opportunity for cross-examination. (*p*)

After examination de bene esse, examination in chief to be had.] The party examining witnesses *de bene esse*, is bound to take the earliest opportunity to examine them afterwards in the ordinary method; and if he is guilty of any laches in so doing, he will lose the benefit of the examination *de bene esse*. (*q*) If the witness is alive, or in the country, he must be examined in chief. And to entitle the party to read the depositions taken *de bene esse*, at the hearing, he must show by affidavit, the death of the witness, or his absence, when the proofs in chief were taken. (*r*) But whenever it can be established to the satisfaction of the court that there is a moral impossibility against the examination of a witness in chief, it will order depositions taken *de bene esse* to be published. (*s*) So also, the court has permitted depositions of this nature to be read, although there has been no strict proof of the death of the witnesses; because the length of time which has elapsed since the depositions were taken, has afforded a just ground for presuming them to be dead. (*t*)

And sometimes, where the evidence is required upon a trial at law, the court will order depositions taken *de bene esse* to be published, on the ground that the witness, though alive, will be unable, from age or sickness, or other infirmity, to attend at the trial. (*u*) But the more usual course, in such cases, is to make an order that the officer in whose possession the original deposition is, shall attend with it at the trial, in order that if it should be proved to the satisfaction of the court of law

(*n*) Hinde's Pr. 313.

(*o*) Hinde's Pr. 313.

(*p*) Loveden v. Lord Milford, 4 Bro. C. C. 540.

(*q*) 2 Dan. 549.

(*r*) Cann v. Cann, 1 P. Wms. 567. Hinde's Prac. 368. 387. Dick. 182. For. Rom. 140.

(*s*) Gason v. Wordsworth, 2 Ves. 325, 336. Amb. 108, S. C.

(*t*) Anon. 2 Ves. 496. Marsden v. Bound. 1 Vern. 331.

(*u*) Bradley v. Crackenthorpe, 1 Dick. 153.

that the witness is unable to attend, then the depositions should be tendered *and read; (v) it being the province of the judge who [* 276] tries the cause at law, and not of this court, to decide on the admissibility of the evidence, upon the facts as they appear before him. (w) Upon this ground, the court has frequently refused to make an order that the depositions taken *de bene esse*, of a witness who was alive, though sworn by affidavit to be unable to attend at the trial of an issue at law, should be read at the trial. (x)

It should be observed that depositions taken *de bene esse* can never be used except for the purpose of supplying the want of an examination in chief. Applications to this effect have been made where many circumstances have concurred to induce a belief that the examination *de bene esse*, and the examinations in chief, were contradictory, but they have been refused. (y)

Such is the English practice. Whether in this state a re-examination of a witness in chief, who has been examined *de bene esse*, will be required in any case, has not been settled by any decision of the court.

2. *By summary proceedings under the statute.*] It is provided by the revised statutes that any person who is a party to a suit pending in any court of this state, or who expects to be a party in any suit about to be commenced, may cause the testimony of any witness material to him in the prosecution or defence of such suit, to be taken conditionally, and to be perpetuated. (z)

Upon producing to any Justice of the Supreme Court, or to any officer authorized to perform the duties of such Justice at Chambers, or to the County Judge of any county, due proof by affidavit that the applicant is a party to a suit actually pending in some court of record in this state, or that he has good reason to expect to be made a party to such a suit; and that the testimony of any witness within this state is material and necessary to the prosecution or defence of such suit; and if the suit is not actually commenced, that the party expected to be adverse to the applicant resides within this state and is of full age, such officer is authorized to appoint a place within the county where such witness resides, and a time not less than fourteen days from the date of such order, for the examination of such witness, and to issue a summons to the witness to appear and testify at the time and place appointed. (a)

(v) *Andrews v. Palmer*, 1 Ves. & B. 21. Id. 335. 15 Ves. 176.

(w) *Jones v. Jones*, 1 Cox, 184.

(x) *Hinde's Ch.* 390.

(y) *Cann v. Cann*, 1 P. Wms. 567.

(z) 2 R. S. 398, § 45, (orig. § 33.) Id. 5th ed. vol. 3 p. 681, § 46.

(a) Id. ib. §§ 46, 47. (orig. §§ 34, 35.) Id. 5th ed. vol. 3, p. 681, §§ 47, 48.

The subsequent sections of the statute specify the manner in which [*277] *the testimony of the witness is to be taken, the cases in which his deposition may be given in evidence, the effect thereof, &c. (b)

Under the former act, which was similar in its provisions to the article of the revised statutes above referred to, it has been decided that a witness upon his examination *de bene esse* is bound to give evidence in the same cases and to the same extent that he would be, were he called as a witness upon the trial of the cause; and that he is not bound to answer a question which would either criminate himself, render him *infamous, or subject him to a penalty or forfeiture. (c) The act does not authorize the examination of a witness who could not be compelled to testify upon the trial. (d) (11)

(b) Id. 399, §§ 48 to 53. Id. 5th ed. vol. 3, p. 682, §§ 49 to 55.

(c) Matter of Kip, 1 Paige, 601.

(d) Ib. id.

(11) PROCEEDINGS TO PERPETUATE TESTIMONY.

It has been held that it is not necessary to state, in the affidavit on which an order for the examination of a witness is founded, the probable inability of the witness to attend the trial. (*Jackson v. Perkins*, 2 Wend. 308.) But to authorize the reading of a deposition thus taken, on the trial, the party must produce *proof* of the inability of the witness to attend at the trial, and not rely on the *presumption* of such inability arising from the advanced age of the witness. (*Jackson v. Rice*, 3 Wend. 180.) Proof, however, that a witness is 74 years of age, and the belief of another, from his knowledge of the situation and infirmities of the witness that she could not endure the fatigue of a journey to the place of trial without serious hazard to her health, has been held sufficient to authorize the admission of the deposition in evidence. No witness is bound to endanger his life by his attendance at court. (*Jackson v. Perkins*, 2 Wend. 308.)

On the 18th of March, 1853, on a trial in the city of New York, the deposition of a witness residing in Buffalo, was offered in evidence by the plaintiff. The evidence of the inability of the witness to attend was the testimony of his son, to the effect that "he was in the city in April, 1852, to be a witness in this case; that he was then in feeble health and was detained at Utica by sickness, on his journey home, and that he was here again in September, 1852, in the hope that it would benefit his health; that he returned home much weaker, and, since, has been unable to make a journey; that his complaint is consumption; that a week prior to said 18th of March, when the son left Buffalo, the witness was very feeble, unable to get out of his house or to sit up all day, and that the family scarcely expected him to live from week to week." Held, that the evidence of the witness's inability to attend was sufficient to entitle the deposition to be read on the said 13th of March, and that it proved sufficiently, from the nature, extent and duration of the illness of the witness his inability to attend on an adjourned day (May 10,) when it was finally offered and received. (*Sheldon v. Wood*, 2 Bosw. 267; S. C. 24 N. Y. 607.)

Under the statute relative to "proceedings to perpetuate testimony," a judge of the supreme court may order a deposition to be taken before the county judge of Erie county, in an action pending in the superior court of the city of New York, the witness then residing in that county. But such county judge could have made the order on an application to him therefor. (*Sheldon v. Wood*, 2 Bosw. 267; S. C. 24 N. Y. 607.) The fact that the affidavit on which the order was made, is entitled in the supreme court, does not make the order, and the deposition taken under it, nullities, if the affidavit correctly describes the court in which the action was pending, in which it was designed to be read, and is sufficient in other respects. (*Ibid.*) This part of the title, and similar matter in the title of the deposition, may be rejected as surplusage, being unnecessary and immaterial. (*Ibid.*) The objection that portions of a deposition are hearsay evidence, cannot be raised on appeal if not taken at the trial. So of objections to the admissibility of a deposition when none were made on the trial. (*Ibid.*) When particular objections are made to the reading of a deposition and properly overruled, the party taking them cannot start other objections on the

II. BY AN EXAMINER.

In what cases.] Except in cases where they reside more than twenty miles from an examiner, or out of the state; or where, for special reasons, it is expedient to have them examined by a vice-chancellor or by the court itself, witnesses are usually examined by examiners; who are officers of the court appointed for that purpose.

By what examiner.] Each party has a right to select his own examiner; and the court will not, on motion of the opposite party, interfere with that right. But a direct examination may be had before one examiner, and a cross-examination before another. (e)

At what time to be had.] Witnesses cannot be examined by an examiner until the expiration of twenty days after the replication is put in, or twenty days after the cause is in readiness for hearing or to take testimony against all of the defendants. After the twenty days have elapsed, however, if no notice of an application for the examination of witnesses before a vice-chancellor or in open court, or for an issue, has been given; or if the application has been denied; either party may have an order of course to produce witnesses within forty days after notice of the order. (f) Which order operates upon both parties equally.

Notice of this order must be served upon the opposite party; and until such notice is served, the time does not commence running.

If the notice is served upon the agent of the solicitor for the opposite party, each party has double the usual time to produce his witnesses. *And if the adverse party wishes to shorten the time, he [*278] must obtain an order on his part, and serve notice thereof upon the opposite solicitor, either personally or by leaving the same at his office. (g)

(e) *Troup v. Haight*, 6 John. Ch. Rep. 335.

(f) Rules 67, 68.

(g) *James v. Berry*, 1 Paige, 647.

argument of the appeal, if they are of such a nature that they might have been obviated, if taken on the trial. (Ibid.) If, in taking depositions *de bene esse*, there be defects in the mere form of the officer's certificate, which can be remedied on a return of the deposition to him to be corrected; or if there be other defects of form which can be remedied by re-examining the witness, a party intending to object, on the ground of such defects, must move to suppress the deposition, if there be ample time, before the trial; and, if he fail to do so, they will be disregarded if not made until the trial. (Ibid.) When, under section 6 of the statute (3 R. S. 5th ed. 674), authorizing the deposition of a witness to be taken before a judge, out of court, which requires that the deposition "shall be carefully read to, and subscribed by, the witness," the judge taking it certifies that it "was read to the witness," the deposition will not be excluded at the trial, because the certificate does not state that it was "carefully" read. Under such circumstances the court will presume that the officer performed the duty properly, which the statute enjoins, before he made his certificate. (Ibid.)

The order to produce witnesses having been entered, and notice thereof served upon the solicitor for the adverse party, the next step to be taken by the party obtaining the order is to arrange with the examiner a day when he will be able to examine the witnesses, and to give notice of the time and place of examination, to the other party.

Enlarging time to examine witnesses.] One order to enlarge the time to produce witnesses may be granted, on sufficient cause shown, without notice to the adverse party; but an ex parte order will not be granted after the time to produce witnesses has actually expired; nor will a second order be granted to the same party, except on the usual notice of the application to the adverse party, and upon such terms as the court may prescribe. (*h*)

Where one party has obtained an order to extend the time, both parties have a right to take testimony until its expiration. The order operates as an enlargement of the forty days rule. But the opposite party is not precluded from obtaining an ex parte order extending the time, still further. (*i*)

Where the time to produce witnesses has been extended by agreement of the parties, an ex parte order further to extend the time is regular, if made before the expiration of the time agreed on by the stipulation of the parties. But the party applying for such further extension should state the fact of the previous extension by agreement of the parties. (*k*)

Notice of examination.] It is not necessary to show witnesses prior to their examination; but notice of the examination, and of the names, places of abode, and additions of the witnesses must be given to the adverse party at least ten days before the examination, if his solicitor resides more than fifty miles from the place of examination, and in all other cases at least six days. (*l*)

Notice that witnesses will be examined at a particular tavern in a city named in the notice, without mentioning the christian name of the tavern keeper, is good; unless it is shown there were, in the same city, two tavern keepers of the same sur-name. (*m*)

[* 279] *The examiner does not require proof of the service of the notice, before commencing the examination; but allows the party to proceed, at the peril of having the depositions suppressed, upon the application of the opposite party, if notice has not been given.

An irregularity in the service of notice of examination, will be waived by a neglect to complain of it in season. (*n*)

(*h*) Rule 86.

(*k*) *Fitch v. Hazeltine*, 2 Paige, 416.

(*m*) *Overstreet v. Thompson*, 1 Littell, 120.

(*i*) *Osgood v. Joslin*, 3 Paige, 195.

(*l*) Rule 74.

(*n*) *Skinner v. Dayton*, 5 John. Ch. Rep. 191.

Attendance of witnesses how compelled.] Whenever there is reason to suppose that a witness will not voluntarily attend to be examined, recourse must be had to the compulsory process of *subpœna ad testificandum*; which commands the witness to whom it is directed to appear before the examiner to testify on behalf of the party requiring his testimony.

Process of subpœna to compel the attendance of witnesses before an examiner may issue of course. It must specify the time and place of attendance. But no witness can be compelled to appear before an examiner more than forty miles from his place of residence, except by special order of the court. (*o*)

Any number of names may be inserted in one writ.

The statute makes it the duty of the register, assistant register, and clerks of the court to furnish to solicitors, when required, and on payment of the fees allowed by law, blank process of subpœna for this purpose, duly sealed. (*p*)

Subpœna duces tecum. In case the witness is required to bring with him any written document or paper in his possession, the writ must be a *subpœna duces tecum*; which is in the same form as the ordinary subpœna, except that before the words "and hereof fail not at your peril," the words "*and that you then and there bring with you and produce*" [naming the document or paper required,] are inserted.

Under this process, the party may, in court, object to the production of the document; and if the objection be overruled, production is compelled. (*q*) An attorney, who is a witness to a deed, and in possession of the same, cannot be compelled to attend with it at the hearing, otherwise than by a *subpœna duces tecum*. (*r*) A solicitor who has been served with a *subpœna duces tecum*, for the purpose of having a deed in his possession proved on behalf of the complainant, cannot object to producing the deed, on the ground that he has a lien on it for costs due *from the defendant. If he does, the court will order him to [*280] produce the deed at his own expense, and to pay all the costs consequent on his refusal. (*s*)

Service of subpœna. The subpœna is served by exhibiting to the witness the original writ under the seal of the court; delivering to him a copy of such writ, or a ticket containing its substance; and paying or tendering to him the fees allowed by law for travelling to, and returning from, the place of examination, and the fees allowed for one day's attendance. (*t*) Those fees are, fifty cents per day to each witness,

(*o*) Rule 76.

(*q*) Field v. Beaumont, 1 Swanst. 209.

(*s*) Brassington v. Brassington, 1 Sim. & Stu. 455.

(*p*) 2 R. S. 179, § 75, (orig. § 69.)

(*r*) Burk v. Lewis, 6 Mad. 29.

(*t*) 2 R. S. 400, § 54.

for attending, and four cents for travelling every mile in coming to or returning from the place of attendance, if the witness resides more than three miles from the place of attendance. (*u*)

If the witness, whose attendance is required, is a married woman, the subpoena must be served upon her personally, and the fees should be tendered to her personally, and not to her husband. (*v*)

The person serving the subpoena should be careful to see that the copy delivered to the witness is a true copy of the original writ; in order that he may make affidavit of the fact, if necessary. And he should tender to the witness, in specie, the fees for attendance and travel to which he is by law entitled.

Proceedings against witness who fails to attend. The statute relative to proceedings as for contempts to enforce civil remedies, contains a provision authorizing persons summoned as witnesses who shall refuse, or neglect to obey such summons, or to attend, be sworn, or answer, to be proceeded against in the manner therein provided. (*w*) And by another article of the statute, a failure of such witness to attend is declared a contempt of court, and subjects him to the payment of the sum of fifty dollars; besides the damages the party subpoenaing him may have sustained. (*x*)

The 76th rule also contains a provision that witnesses duly subpoenaed may be punished for contempt, if they fail to attend and submit to an examination.

The particular method of proceeding against witnesses, under these provisions, will be stated hereafter, under the head of "CONTEMPTS."

Furnishing names of witnesses.] Before the commencement of the examination of any witnesses, except those examined *de bene esse*, the [*281] *parties must furnish to each other, or to the examiner, the names of the several witnesses intended to be examined, with their places of abode, and additions. And no witnesses, whose names are not thus furnished, can be examined by either party without special permission of the court on sufficient cause shown, and after notice to the opposite party. (*y*) But this rule does not extend to witnesses who are examined merely as to the general character of other witnesses. (*z*)

If the attention of a party is called to the provisions of the above rule, at the commencement of the examination, and he neglects to furnish a list of his witnesses, he must, in addition to showing a sufficient

(*u*) Laws of 1840, p. 331, § 8.

(*v*) 2 R. S. 534, § 1.

(*y*) Rule 83. *Mott v. Kellogg*, in Chan. Dec. 7th, 1830.

(*w*) 1 Phil. Ev. 782.

(*x*) Id. 400, § 55.

(*z*) Idem.

excuse for his neglect, state what facts he expects to prove by his witnesses. (a)

Proceedings before examiner.] The parties, with their counsel, have a right to be present at the examination of witnesses by an examiner. (b) And such examinations are public.

The witnesses are to be examined, cross-examined, and re-examined orally. (c) It is not the practice in this state to make use of written interrogatories before examiners, as is done in England; although there is nothing in the statute or rules to prohibit it.

We have already stated that where a party to the cause is to be examined as a witness, the order for his examination must be produced to the examiner, before his examination is entered upon. (d)

Oath to witnesses.] The first thing to be done by the examiner is to administer the oath to the witnesses. The form of the oath is as follows:—the witness laying his hand upon, and kissing the gospel: “You shall true answer make to all such questions as shall be asked of you upon the examination in this cause pending in the court of chancery of the state of New York, wherein A. B. is complainant and C. D. is defendant, without favor or affection to either party; and therein you shall speak the truth, the whole truth, and nothing but the truth, so help you God.” Or, if the witness desire it—“You do swear in the presence of the ever-living God, that the answers,” &c. While taking this oath, the witness may or may not hold up his hand, in his discretion. (e)

If the witness is a Quaker, or declares that he has conscientious scruples against taking any oath, or swearing in any form, he will be allowed to give his testimony upon his solemn affirmation, as follows: “You *solemnly, sincerely, and truly declare and affirm, that you will [*282] true answers make,” &c. If the witness believes in any other than the christian religion, he is to be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of the modes above prescribed. (f) In this latter case the examiner must certify, in his jurat, the manner in which the oath has been administered, the religion of the witness, and that the mode pursued is the usual and most solemn form in which oaths are most usually administered to witnesses professing such religion. (g)

Method of examining witnesses.] The direct examination of the witness must be completed and signed by him before his cross-examination is commenced. Previous to every adjournment also, the testimony-

(a) *Gaul v. Miller*, 3 Paige, 192.

(b) 2 R. S. 180, § 09. (orig. § 83.)

(c) *Id. ib.*

(d) *Ante*, p. 262.

(e) 2 R. S. 407, § 103, (orig. § 83.)

(f) 2 R. S. 407, §§ 104, 105, (orig. §§ 84, 85.)

(g) *Omychund v. Barker*, 1 Atk. 21.

ny, so far as it has been taken, must be read over to the witness, and be signed by him. (*h*)

The witness may be permitted to explain or correct any mistake made by him, at any time before his examination is finally closed; but no part of his testimony previously reduced to writing can be erased or altered. (*i*)

The examination of each witness must proceed from day to day, until it is completed. (*k*)

Counsel have no right to advise a witness that he is not bound to answer a particular question. It is the duty of the examiner to inform a witness of his legal rights. (*l*)

The questions may be put to the witness, either by the solicitor or by the examiner; and the examiner takes down the answers in writing; concluding the answer to each question before another one is put.

Use of notes by witness.] A witness may be permitted to use short notes to refresh his memory, but not the substance of his depositions; nor may he transcribe such notes *verbatim*. (*m*) The rule is that he may refresh his memory by notes, as to dates and names; because there is nothing to guide the memory as to them; but he cannot be allowed to give his whole evidence from writing. (*n*)

Demurrer by witness.] If improper questions are put to a witness, he may, by a demurrer, object to answering them. This species of demurrer signifies merely the witness' tender of reasons why he should not answer the question; and is not, like a demurrer in pleading, confined to the facts appearing upon the record, but states the facts upon which the witness relies as the ground of his objection. (*o*)

The grounds upon which a witness may protect himself from answering interrogatories or questions, are principally, 1. That his answers may subject him to pains or penalties, or to a forfeiture, or something in the nature of a forfeiture; 2. That the disclosure required may subject him to a decree against himself; or 3. That he cannot answer without a breach of professional confidence. (*p*)

Another ground of demurrer has been attempted to be set up, viz. that the question is immaterial to the case, or irrelevant; but it has been held that this ground of objection will not prevail; because it does not concern a witness to examine what is the point in issue. (*q*)

(*h*) Rule 84.

(*i*) Idem.

(*k*) Idem.

(*l*) Taylor v. Wood, 2 Edw. 94.

(*m*) Curs. Canc. 260.

(*n*) Anon., Amb. 252. See also Shaw v. Lindsey, 15 Ves. 380.

(*o*) Parkhurst v. Cowten, 2 Swanst. 203.

(*p*) 2 Dan. 555. Davis v. Reid, 5 Sim. 443.

(*q*) Ashton v. Ashton, 1 Vern. 165. But see 9 Price, 486.

Where a witness is served with a subpoena *duces tecum* to produce a deed or other document, it is not necessary that there should be a written interrogatory as to the fact of his having it in his possession; and if, upon being asked, *viva voce*, to produce it, he objects to doing so, either upon the ground of his having an interest in the deed or otherwise, he may refuse to do so without a formal demurrer. The proper course to be adopted by the party, in such a case is, to move that the witness attend and produce the deed and pay the costs occasioned by his refusal; upon the hearing of which motion the court will decide whether the reasons alleged by the witness are satisfactory or not. (*r*)

A witness is not excused from answering a question, on the ground that the conduct inquired into on his part would subject him to a penalty, if the time limited for proceeding for the penalty is past. (*s*)

The second ground of objection above stated—that the answer may lead to a decree against the witness, is available only in those cases in which the witness is a party to the suit, or has otherwise a direct interest in the subject matter. (*t*)

Where the witness demurs to the question—on the ground that he cannot answer without a breach of professional confidence—he must name the party to whom he was attorney or solicitor. (*u*) He must also swear that the facts from the discovery of which he desires to be protected, came to him in his capacity of solicitor or attorney to a particular person; for a solicitor or attorney, like any other witness, is bound to discover all *secrets of his client which did not [*284] come to the knowledge of—in his relation of solicitor or attorney to his client. (*v*) It must also appear that the knowledge came to him in the character of a professional adviser, and in such character only. Therefore, where a demurrer stated that the witness was the attorney or agent for a person, it was held not sufficiently precise; for an agent may only be a steward or servant. (*w*)

But it is not necessary that the facts should have been communicated to the witness in relation to a suit pending, or even in contemplation of a suit. If the witness was consulted professionally, or the facts were communicated to him for the purpose of obtaining his advice or assistance, professionally, the communication is privileged. (*x*)

There is no regular form of demurrer by a witness to a question or interrogatory. It is sufficient if he states his reasons why he should

(*r*) Bradshaw v. Bradshaw, 1 Russ. & My. 358. 2 Swanst. 213.

(*s*) Roberts v. Ellatt, 1 Moo. & Malk. 192.

(*t*) 2 Dan. 556.

(*u*) Parkhurst v. Lowten, 2 Swanst. 191, 201.

(*v*) Morgan v. Shaw, 4 Mad. 54.

(*w*) Vaillant v. Dodemead, 2 Atk. 525.

(*x*) Crosby v. Crosby, In Chan. April 5, 1842. Herring v. Cleobury, 23 Legal Obs. 362.

not answer. (*y*) He must submit to the judgment of the examiner or commissioner, whether he has not stated a sufficient reason for protecting himself from answering. If the examiner or commissioner is of opinion that he ought to answer, and he will not, he should take down in writing the witness' reasons for declining to answer; (*yy*) and if the reasons are founded on facts which do not appear upon the pleadings, the facts upon which they are founded must also be stated upon the oath of the witness. (*z*)

Thus, where a witness demurred to an interrogatory because she claimed an interest in the land, it was disallowed on the ground that she did not answer to the interest, nor state what interest she claimed. (*a*)

It seems, however, that if the facts upon which the witness relies as the ground of his exemption, appear upon the record, there will be no necessity for re-stating them in the demurrer; as where the witness is party to the suit, and the interest he has in the matter appears upon the pleadings. (*b*)

In taking down a demurrer, the examiner ought to take the witness's statement upon oath. Where this is not done, the demurrer must be supported by affidavit; as it is necessary the court should, in some way [*285] *or other, have the sanction of an oath to the facts on which the objection is founded. (*c*)

A demurrer to two interrogatories may be allowed as to one and overruled as to the other. (*d*)

A witness who demurs to a question is not the proper person to bring it before the court. If the party putting the question does not ask for an attachment, nor in any way bring the point before the court, no one else can. The question will be considered as waived, or the demurrer well taken, unless he who puts the question persists in it, and takes measures to have the demurrer disposed of. (*e*)

Interpreter.] If a witness whom it is proposed to examine does not understand English, an order should be obtained to appoint an interpreter. This order may be obtained on an *ex parte* application to the court, upon an affidavit showing the necessity for it.

The person appointed must be sworn to interpret truly; and the deposition is to be taken down by the examiner, from the interpretation, in English. (*f*)

(*y*) *Morris v. Williams*, 2 Molloy, 342.

(*yy*) *Parkhurst v. Lowten*, 2 Swanst. 201.

(*z*) *Nightingale v. Dodd*, Mos. 228.

(*a*) *Jefferson v. Dawson*, 2 Ch. Ca. 208.

(*b*) Mos. 228. 2 Swanst. 197.

(*c*) 2 Swanst. 203. *Bowman v. Rodwell*, 1 Mad. 266. *Morgan v. Shaw*, 4 Mad. 54.

(*d*) *Davis v. Reid*, 5 Sim. 443.

(*e*) *Mowatt v. Graham*, 1 Edw. 13.

(*f*) *Smith v. Kirkpatrick*, 1 Dick. 103. See also *Lord Belmore v. Anderson*, 2 Cox. 288; 4 Bro. C. C. 90, S. C.

The oath to be administered to the interpreter, is as follows: "You do solemnly swear that you will truly and faithfully interpret the oath to be administered and the questions to be put to E. F., a witness now to be examined, out of the English language into the *French* language, and that you will truly and faithfully interpret the answers of the said E. F. thereto, out of the *French* into the English language."

Signature to depositions.] The signature of the witness to his deposition is absolutely necessary; and if he should die after his examination is completed but before it is signed, the deposition cannot be read. (*g*)

The testimony of the witness is complete, so far as the party calling him is concerned, when the direct examination is finished and signed by the witness. But the party calling him is bound to keep the witness before the examiner a sufficient length of time afterwards to enable the adverse party to complete the cross-examination; or the deposition may be suppressed. (*h*)

Practice where witness is in prison.] If the witness to be examined is confined in prison, so that he cannot be examined elsewhere, the examiner will proceed to the prison, and take his examination there, in *the usual manner. (*i*) And if no examiner will consent to go [*286] to the prison to take his examination, a commission may be procured for the purpose.

Where witness is sick.] In like manner, if a witness is incapable, by reason of sickness, of attending at the examiner's office to be examined, the examiner may go to the place of the witness' residence and administer the oath, and take the deposition of the witness. (*k*)

But in either case, notice should be given to the other party of the time and place of examination, in the usual manner.

Cross-examination.] The cross-examination of a witness should always commence as soon as the direct examination is finished; (*l*) and without suffering him to go abroad. (*m*)

It must be completed and signed before the witness is re-examined by the party calling him. (*n*)

The party producing a witness must bring him before the examiner for cross-examination, if it is not completed at one meeting; or the deposition in chief may be suppressed. (*o*) But if the witness refuses to

(*g*) Copeland v. Stanton, 1 P. Wms. 414.

(*h*) Trustees of Watertown v. Cowen, 5 Paige, 510.

(*i*) 2 Dan. 479. Hinde's Ch. 330.

(*k*) Id. ib. See 4 Mad. 463.

(*l*) Beatagh v. Beatagh, 1 Hogan, 98.

(*m*) Gilb. For. Rom. 128.

(*n*) Rule 84.

(*o*) Whittuck v. Lysaght, 1 Sim. & Stu. 446. 5 Paige, 510.

be cross-examined, it is no reason for such suppression; as the adverse party should enforce his right of cross-examination, by proceeding against him as for a contempt. (*p*)

A complainant cannot read the cross-examination of one of the defendant's witnesses if the defendant declines to read the examination in chief. (*q*)

If the witness dies before his cross-examination, his deposition may, in some cases, still be read; (*r*) the court, however, bearing in mind the fact that the cross-examination has not taken effect; especially if it should appear that the party had lost any material fact which was within the knowledge of the witness, and which could not have been proved by other means. (*s*)

Where a party is examined as a witness against another party, he may be cross-examined like any other witness, by the party against whom he is called, and his evidence cannot be used in his own favor. (*t*)

The chancellor has decided that the fees of the examiner upon the cross-examination of a witness are chargeable to the solicitor of the party [* 287] *for whose benefit or at whose request such cross-examination is had, and not to the solicitor of the party calling the witness. (*u*)

As respects the *effect* of a cross-examination, it has been already stated that the cross-examination of a witness will not prejudice the right of the party to move to suppress his deposition on the ground of incompetency. (*v*)

Re-examination. After the examination of a witness is finally closed, he cannot be again examined to the same facts, without the consent of the adverse party, or by order of the court, on sufficient cause shown. But he may be re-examined as to any new matter arising out of the testimony of other witnesses. (*w*)

On an application for liberty to re-examine a witness to correct a mistake involving the direct contradiction of a material fact, the court made the order, with a direction that the examiner should certify specially as to the circumstances. (*x*)

A party will not be allowed to re-examine a witness whose memory has been refreshed since his examination closed, except as to documentary evidence. (*y*)

After a hearing and final decree in a cause, a witness cannot be re-examined to explain or correct his testimony taken on his examination

(*p*) Courtenay v. Hoskins, 2 Russ. 253.

(*r*) Arundel v. Arundel, 1 Rep. in Ch. 90.

(*s*) Renson v. Le Roy, 1 Paige, 122.

(*t*) See ante, p. 267.

(*x*) Byrne v. Frere, 1 Moll. 396.

(*q*) Smith v. Biggs, 5 Sim. 391.

(*s*) O'Callaghan v. Murphy, 2 Sch. & Lef. 158.

(*u*) Trustees of Watertown v. Cowen, 5 Paige, 510.

(*w*) Rule 84.

(*y*) Noel v. Fitzgerald, 1 Hogan, 135.

in chief and read at the hearing; unless under very special circumstances. (z) Such a re-examination rests in discretion; and though granted, under peculiar circumstances, is contrary to the ordinary practice of the court. (a)

How long examination may continue.] In the case of *Green et al. v. Wheeler et al.*, (b) Chancellor Walworth decided, that where an examination of witnesses is commenced before the time for taking testimony expires, it may be continued by the examiner, if necessary, after the expiration of such time; until an order to close the proofs is actually entered.

Objections to competency of witnesses.] We have before stated that if a party wishes to exclude the testimony of a witness on the ground that he is incompetent, he must raise the objection before the examiner; otherwise he cannot insist upon it at the hearing. (c)

*Upon the objection being made, the examiner is bound to [*288] decide upon it. If he decides against the objection, he must note the objection, together with his decision, and proceed to take down the testimony. But if he decides that the objection is well taken, he should not take down the testimony, unless it is insisted on by the party against whom the decision is made, or by his solicitor or counsel. (d)

If the taking down of the testimony is insisted on, the objection and decision and the fact that it was so insisted on, and the person by whom, are to be noted, and the testimony taken down. And in that case, or in case the examiner has erroneously admitted testimony, the party making the objection may apply to have the deposition suppressed, or the objectionable testimony expunged, with costs. (e)

And where the deposition is suppressed, or where the testimony taken down in opposition to the decision of the examiner is expunged, no costs will be allowed, on taxation, for such depositions or testimony; unless the court shall so direct, or the party shall satisfy the taxing officer that the decision of the examiner was wrong. (f)

The chancellor has decided that the right which is given to a party by the 85th rule, to proceed with the examination, notwithstanding the decision of the examiner that the witness is incompetent, or that the interrogatory is irrelevant and improper, cannot properly be exercised,

(z) *Gray v. Murray*, 4 John. Ch. Rep. 412. *Hallock v. Smith*, id. 649. *Sterry v. Arden* 1 id. 62. *Newman v. Kendall*, 2 A. K. Marsh. 236.

(a) *Beach v. Fulton Bank*, 3 Wend. 57.

(b) Decided Aug. 16th, 1842.

(c) See ante, p. 266.

(d) Rule 85.

(e) Idem.

(f) Idem.

except in cases where the solicitor or counsel of such party has reason to doubt the correctness of the decision. And that if the solicitor or counsel who is conducting the examination insists upon proceeding in a case where there is no reasonable ground for doubt as to the correctness of the decision, he will be personally charged with the costs of the application to the court to suppress the deposition, or to expunge the objectionable testimony. (*g*)

And it was decided, in the same case, that the examiner has no right to reserve the question, upon an objection to the competency of a witness, or the propriety of an interrogatory, where he has no rational doubt as to the validity of the objection. It is his duty in such cases to decide the question, and leave the solicitor or counsel conducting the examination to proceed with the illegal testimony, at the peril of being personally charged with costs.

Where facts are distinctly put in issue by the pleadings, the examiner cannot reject evidence which is material to prove such facts, on the [*289] ground that the matters put in issue by the pleadings are immaterial. (*h*)

Filing depositions.] The examiner, within ten days after the order to close the proofs is entered, on being applied to by either party for that purpose, must cause the depositions and exhibits taken or produced before him, to be returned and filed with the register, assistant register or clerk. And unless this is done, the examiner is not entitled to receive pay for taking the depositions or marking the exhibits. (*i*)

Copies of depositions or exhibits will not be allowed to be read on the hearing, unless the original have been returned and filed in the proper office. (*k*)

III. BY A VICE-CHANCELLOR.

In what cases allowed.] Whenever it shall appear to a vice-chancellor that it is expedient that the witnesses in any cause authorized to be heard by him should be examined in his presence, he shall order such examination to be had accordingly, either at a stated or special term. (*l*)

And whenever it shall appear to the chancellor that it is expedient that the witnesses in any cause not authorized to be heard by a vice-chancellor should be examined by a vice-chancellor, the chancellor shall order such examination to be had before any vice-chancellor to be designated by him. (*m*)

(*g*) Scott v. Young. 4 Paige, 542.

(*i*) Rule 87.

(*l*) 2 R. S. 180, § 90, (orig. § 83.)

(*h*) Putnam v. Ritchie. 6 Paige, 391.

(*k*) Idem.

(*m*) Id. § 91, (orig. § 85.)

Whenever an order for such examination of witnesses has been made, no witnesses can be examined by either party, before an examiner or upon a commission, without the special direction of the chancellor or vice-chancellor making such original order. (*n*)

At what time to be applied for.] The chancellor has followed up these statutory provisions, by the 67th rule of the court. That rule provides that where a cause is at issue upon a replication to the plea or answer of all or any of the defendants, and is in readiness for hearing or to take testimony against all of the defendants, if the complainant, or any of the defendants as to whose plea or answer a replication has been filed, desires an examination of the witnesses in the presence of the vice-chancellor, he may, within twenty days after the replication is put in, or after the cause is in readiness for hearing or to take testimony, apply to the court for that purpose.

*Notice of such application should be given for the first [*290] regular motion day, either in term or vacation, after such notice can be given. (*o*)

Special cause to be shown.] But such order will not be granted without sufficient cause shown, whether the application is opposed or not. (*p*)

Notice of motion for.] Notice of the application must be given to the several parties who have a right to take testimony in the cause. And to enable a defendant to give such notice to his co-defendants, where they appear by a different solicitor, the complainant's solicitor, as soon as the cause is in readiness to take testimony, must give notice thereof to each defendant to whose plea or answer he has filed a replication; stating in such notice the names of the other defendants who have a right to take testimony, and the solicitors by whom they appear. And the defendant is allowed twenty days thereafter to give notice of his application. (*q*)

The chancellor has decided that, under this clause of the 67th rule, it is not necessary to give notice of the names of solicitors of defendants against whom the bill has been taken as confessed, and who are therefore not entitled to take testimony in the cause. (*r*)

Hearing of application.] Upon the hearing of the application, the party applying must furnish the court with a brief abstract of the matters of fact in issue, not exceeding five folios; and either party may read or refer to the pleadings of any of the parties who are entitled to take testimony in the cause. (*s*)

(*n*) Id. § 92, (orig. § 86.)
(*q*) Idem.

(*o*) Rule 67.
(*r*) Germain v. Beach, 9 Paige, 232.

(*p*) Idem.
(*s*) Rule 67.
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Time and place of examining witnesses.] If the application for an order to examine witnesses in the presence of the vice-chancellor is granted, and the time and place for taking the testimony is not designated in the order, the party obtaining the order must, within ten days thereafter, apply to the vice-chancellor to assign a time and place for that purpose. (*t*)

Notice of examination.] The party obtaining the order must give to the adverse party at least fifteen days' notice of the time and place thus assigned for the examination. If he neglects to apply and give notice within the time prescribed, the adverse party may consider the order as abandoned, and may obtain a rule of course to produce witnesses in the usual form. Or he may himself apply to the vice-chancellor and give notice of the time and place assigned by him. (*u*)

[*291] **Furnishing names of witnesses.*] The names of the witnesses to be examined must be furnished before the commencement of the examination, in the same manner as upon an examination before an examiner. (*v*)

Postponing examination.] If any material witness cannot be procured at the time and place appointed or assigned, the vice-chancellor may postpone the taking of the testimony till some future day, on payment of costs, or otherwise in his discretion, and upon such terms and conditions as he may think proper. (*w*)

Mode of examining witnesses.] The testimony is to be taken down in the mode usually adopted in trials at *nisi prius*, and the vice-chancellor may decide all questions as to the competency of witnesses and the relevancy of testimony, or may, in his discretion, reserve any such question until the hearing. (*x*) Or the testimony may, in the discretion of the vice-chancellor, be taken down by the clerk at the time of the examination, and be signed by the witnesses, in the mode in which testimony is taken before an examiner. (*y*)

Examining a defendant.] An order for the examination of a defendant as a witness against the complainant, or a co-defendant, subject to all just exceptions, may be made by the vice-chancellor on the usual affidavit. But such order cannot be granted after the examination of other witnesses has commenced, unless a sufficient excuse is shown for the delay. Such notice of the application must be given to the adverse party as the vice-chancellor may deem reasonable. (*z*)

Motion to dismiss bill.] After the testimony on the part of the complainant is closed, and before the defendant proceeds to examine any

(*t*) Rule 77.
(*w*) Rule 77.

(*u*) Idem.
(*x*) Rule 78.

(*y*) Rule 82. (*v*) See ante, p. 280.
(*z*) Rule 78.

witnesses on his part, he may move the vice-chancellor to dismiss the bill for want of proof. If the vice-chancellor is satisfied that the evidence on the part of the complainant, in connection with the admissions in the answer, is insufficient to sustain the suit, he may, in his discretion, decree a dismissal of the bill, or may reserve the question till the hearing. (a)

Examination, how to proceed.] The parties must proceed *de die in diem*, with the examination of the witnesses, unless the vice-chancellor shall adjourn for his own convenience to a more distant day. (b)

Documentary evidence.] All documentary evidence not set forth or *distinctly referred to in the pleadings, which either party [*292] wishes to use on the hearing, must be produced before the examination is closed, and be marked as exhibits, unless notice of the intention to use the same on the hearing is given to the adverse party before the examination commences. (c)

Testimony to be drawn up.] Within four days after the examination is closed, or within such further time as may be allowed by the vice-chancellor for that purpose, the solicitor for the party who obtained the order must draw up a statement of the testimony, or of so much thereof as is material to be engrossed and filed. And a copy thereof must be served on the solicitor for the adverse party, with a notice to appear before the vice-chancellor to have the testimony settled. This notice must be the same as upon a special motion. (d)

Testimony to be settled by vice-chancellor.] The adverse party may propose amendments in writing to this statement of the testimony; and the vice-chancellor may correct any errors or omissions therein, whether amendments are proposed or not. (e)

Statement to be filed.] The statement of the testimony, after having been settled by the vice-chancellor, must be correctly engrossed by the clerk of the court, certified by him, and filed in his office. (f)

The practice of examining witnesses before a vice-chancellor is seldom, if ever, resorted to. In fact, no instance of the kind has come to my knowledge since the provisions in relation thereto in the revised statutes were enacted. And I am informed by a gentleman engaged in very extensive practice, (g) that he has not known of any such cases.

IV. BY COMMISSIONERS, UPON A COMMISSION.

By the revised statutes the chancellor is authorized to direct a commission to be issued to any person or persons to take testimony in any

(a) Rule 79.
(e) Idem.

(b) Rule 80.
(f) Idem.

(c) Rule 80.
(g) Julius Rhoades, Esq., of Albany.

(d) Rule 81.

cause depending in this court. The vice-chancellors are also authorized to direct such commissions to be issued in those causes which they are respectively authorized to hear. (*h*)

A commission may also be issued by the register, assistant register, or either of the clerks, under such regulations as the chancellor may from time to time prescribe. (*i*)

[*293] *This court, however, independent of any statutory regulations, always possessed the power to issue a commission for the examination of witnesses, either in or out of the state, and to direct the manner in which the same should be returned. (12)

The above provisions of the statute are only in affirmance of the power which this court previously possessed and exercised. And the manner of executing the commission and returning the same depend upon the rules and practice of the court, and not upon any statutory provisions; except so far as is specified in 2d Revised Statutes, p. 109, § 89. (*k*)

There are two kinds of commissions to examine witnesses: 1. To examine witnesses within the state; and 2. To examine witnesses residing out of the state—called a foreign commission.

1. *Commission to examine Witnesses within the State.*

The 69th rule provides, that if a party wishes to examine witnesses residing more than twenty miles from an examiner, and no order has been made to examine the witnesses in the presence of a vice-chancellor, or to take the testimony in open court at the hearing, or for an issue, he may at any time within twenty days after he has received or served a notice of the rule to produce witnesses, apply for a commission.

Petition for.] Such commission may be issued upon the petition of the party wishing to examine such witnesses. (*l*)

The petition is to be presented to the register, assistant register, or either of the clerks, and must state the names and residence of the witnesses, and of the persons proposed as commissioners; and pray that a commission may be issued to take the examination of such witnesses. (*m*)

(*h*) 2 R. S. 180, § 84, (orig. § 78.)

(*k*) Brown v. Southworth, 9 Paige, 351. (*l*) 2 R. S. 180, § 86, (orig. § 80. (*i*) Id. § 85, (orig. § 79.)

(*m*) Id. § 87. Rule 69.

(12) Possibly this power of issuing a commission, to take the testimony of witnesses, formerly possessed by the court of chancery, may still exist in the supreme court; but that method is not now resorted to in practice; the general course of proceeding being, in the case of witnesses residing out of the state, to take their testimony upon a commission issued under the provisions of the Revised Statutes. (See Van Sant. Eq. Pr. 284.)

But the chancellor still has the power to grant commission, if he thinks proper to do so; notwithstanding the authority given to the register, &c., by the statute, to issue it. Thus, where a special application was made to the court for a commission, within the twenty days allowed by the 69th rule to apply to the register, upon a notice of the application, to the adverse party, the court granted the commission; but refused costs of the special application to the party applying. (*n*)

**Notice.*] The like notice of this application must be given [*294] to the opposite party, as is required in cases of special motions. (*o*)

Order for commission.] If the adverse party does not appear and join in the commission, or object to the persons named as commissioners, a commission will be issued, agreeably to the prayer of the petition. (*p*)

As to the *effect* of an order for a commission, it has been decided by the vice-chancellor of the first circuit, that such an order will not stay the closing of the proofs until the commission is executed and returned, without a special order of the court. (*q*)

Joining in commission.] If the adverse party wishes to join in the commission, he must, at the time of presenting the petition, furnish the names and residence of the witnesses on his part, and they will be inserted in the commission. If he is not satisfied with the commissioners named in the petition, he may name commissioners on his part. And the register, assistant register or clerk to whom the petition is presented, after hearing the allegations of the parties, must designate a suitable person or persons to execute the commission, and issue the same accordingly. (*r*)

Application to court for commission.] The 71st rule provides, that if it shall be necessary to have a commission in any case not specified in the 69th and 70th rules, or after the expiration of the time therein limited for applying to the register, &c., the party may present a petition to the court for that purpose, setting out the facts which entitle him to a special commission. The usual notice of this application must be given to the adverse party.

Carriage of commission.] The party suing out a commission is entitled to the carriage of it. But if he loses it, or commits any gross abuse in the execution of it, so that it is necessary to have the commission renewed, the carriage of the new commission is generally entrusted to the adverse party. (*s*) Or, if the adverse party *has not joined* in it,

(*n*) *Clark v. Bundy*, 6 Paige, 432.

(*p*) Rule 69.

(*r*) Rule 70.

(*o*) 2 R. S. 180. § 87. Rule 69.

(*q*) *Barrett v. Pardow*, 1 Edw. Ch. Rep. 11.

(*s*) *Hinde's Pr.* 303. *Prac. Reg.* 83.

his remedy for a delay is to enter an order to close the proofs as soon as he is entitled to it, and thus drive the party to a special motion for time. And if he *has* joined, the court will sometimes indulge him with an order for a duplicate commission, where it appears doubtful whether the other party will execute his commission or not; especially [*295] in injunction *cases where the object is delay. Such duplicate commission, the party obtaining it may carry and execute himself. (*t*)

Manner of executing commission.] Any of the commissioners named in the commission may execute it, in case the others neglect or refuse to join in the execution thereof, or are from any cause prevented. (*u*) It is not necessary for the commissioners to take an oath. (*v*)

The attendance of witnesses before the commissioners for the purpose of being examined, may be compelled by process of subpoena in the same manner as before an examiner. (*w*)

And the like notice of the time and place of examining them must be given to the adverse party as is required for the examination of witnesses before an examiner. (*x*) This notice is not to be given by the commissioners, but by the party.

If a witness served with a subpoena *duces tecum* refuses to produce the document mentioned in the subpoena, upon being required to do so by the commissioners, an application may be made to the court by motion; when, if the witness shows no sufficient ground for withholding the production, an order will be made that he attend again before the commissioners and produce it, and pay the party the costs occasioned by his previous refusal. (*y*)

The witnesses are also to be sworn in the same manner as witnesses under examination by an examiner; (*z*) the commissioners being authorized to administer oaths or affirmations to them. (*a*)

The parties and their counsel have a right to be present at the examination, and the witnesses may be examined, cross-examined, and re-examined orally. (*b*) There is nothing in this section of the statute, or in the rules, prohibiting their examination upon written interrogatories annexed to the commission. The party obtaining the commission may doubtless, therefore, resort to interrogatories if he thinks proper; but the adverse party will not be thereby deprived of his right under the statute, of cross-examining the witness orally, nor the party obtaining the commission, of the right of re-examining them orally.

(*t*) Id. ib. 2 How. Exch. Pr. 579.

(*w*) See ante, p. 279. Rule 76.

(*y*) Bradshaw v. Bradshaw. 1 Russ. & My. 358.

(*a*) 2 K. S. 180, § 88, (orig. § 82.)

(*u*) Rule 70.

(*x*) See ante, p. 278. Rule 72.

(*z*) See ante, p. 281.

(*b*) Id. ib. § 80, (orig. § 83.)

(*v*) 1 Hoff. Pr. 473.

The particular method of taking the testimony, and of objecting to witnesses, is the same as that in use before examiners, and is regulated by the 84th and 85th rules. (*c*)

*The commissioners must subscribe their names to each sheet [*296] of depositions taken by them. (*d*)

Return to commission.] Neither the statute nor rules specify any particular time within which commissions are to be returned. The time may be fixed by the order granting the commission, according to the circumstances of each case, or by the court, upon a special application under the 71st rule.

After the examination of the witnesses is completed, the depositions are to be annexed to the commission; upon the back of which the return is endorsed in the following form: "The execution of this commission appears in a certain schedule (or schedules) hereunto annexed." This return is made by two or more (generally all) of the acting commissioners, who must subscribe their names thereto. (*e*)

Commissioners making a false return, *e. g.*, by certifying that a witness was examined, upon oath, who was never examined, are, by the English practice, finable. (*f*)

If any of the commissioners obstruct the others in their examination, or examine irregularly, such misbehavior, or whatever else it may be necessary to communicate to the court, may be certified by the commissioners in the return of the commission. This may be done without affidavit, because, being officers of the court, they are allowed to certify. But it seems that a party wishing to avail himself of such certificate, must make an application supported by affidavit of the fact; otherwise the court will not take notice of the commissioners' certificate alone; because they are appointed for another purpose, and are not to certify but of necessity. (*g*)

So if a witness, upon being produced before the commissioners, demurs or objects to being examined, they must return the objection, with the commission. (*h*)

The commissioners enclose the depositions and the commission, with the return endorsed thereon, in an envelope, seal the envelope, and sign their names upon the outside of the package, in their own proper handwriting, and direct it to the register, assistant register, or clerk. (*i*)

In a recent case before the chancellor, (*k*) he stated it to be the settled practice of the court, that a commission may be returned by the com-

(c) See ante, p. 281 *et seq.*

(e) 1 Smith, 350.

(g) Id. ib.

(i) Brown v. Southworth, 9 Paige, 351.

(d) Hinde, 345. 2 R. S. 394, § 24, sub. 4, (orig. § 16.)

(f) Hinde, 358. Cro. Eliz. 623.

(h) 2 Dan. 512, 560.

(k) Idem.

missioners by mail in all cases; unless there is a special order to the [*297] contrary. *And he observed that the return of a commission by mail was as safe as the return of it by a special messenger; and that the sanctioning of this practice would save the delay and expense of special applications to the court for directions in that class of cases where the commission is issued upon a petition to the register, or clerk, without a previous order of the court.

If the commission is returned by mail, the commissioners must deposit the packet, directed as above mentioned, in the nearest post office, and endorse thereupon: "Deposited in the post office at . . . , this . . . day of . . . by A. B. and C. D., commissioners."

If the commission is directed to be returned by a messenger, the commissioners, unless the order names some particular person, must deliver it to such person as the party suing out the commission shall designate; who will bring it to the office of the register, &c.

The messenger, on delivering the commission to the registers, &c., must make oath, before him, "that he received the commission from the hands of the commissioner or commissioners, and that it has not been opened or altered since he received it." (l)

Where a commission for the examination of witnesses in Lisbon, was executed, and forwarded with the depositions to England, but the ship in which they were sent was lost on the passage, the court ordered the commissioners, or any two of them, to transmit the *drafts* of the depositions, and to certify the circumstances of the return of the commission; but would not make any order for the reading of the drafts of the depositions, &c., at the hearing of the cause, until after the commissioners had made their return and certificate. (m)

In another case, (n) where the messenger accidentally lost the commission upon the road, and it was picked up by travellers, it was allowed to be read, upon their affidavit that they had not opened or altered it.

So where depositions of witnesses examined in India were, by mistake, transmitted from thence to the complainant's solicitor by post, and the packet was delivered to the master unopened, they were received, on the facts being verified by affidavit. (o)

Opening of packet.] When the commission is returned, it is opened [*298] *by the chancellor or the register, &c., and objections of every kind to the evidence are taken and considered at the hearing of the cause. (p)

(l) *Hinde's Pr.* 352.

(n) *Smales v. Chayter*, Dick. 99.

(p) *Strike v. McDonald*, 2 Harris & Gill. 192.

(m) *Burn v. Burn*, 2 Cox, 426. 1 Dick. 352.

(o) *Kennedy v. Kennedy*, 1 Hogan, 311.

Examining parties, on a commission.] Parties in the cause may be examined upon a commission, whenever they are competent witnesses, as well as before an examiner. (q)(13) But whenever a party is to be examined, the order for his examination must be produced to the commissioners before his deposition is taken; as without an order of the court, they would not be authorized to examine a party. (r)

Commission to examine de bene esse.] A commission may also be issued to examine witnesses *de bene esse*, when necessary; to be executed either in this state or in a foreign country. (s)

2. Commission to examine Witnesses out of the State.

In what cases issued.] It sometimes occurs that witnesses whose testimony is important to the parties in the cause, or some of them, reside abroad, or in some place out of the jurisdiction of the court. In such cases a commission to examine witnesses abroad must be obtained. (14)

(q) *Plainville v. Brown*, 4 Hen. & Munf. 482.

(r) *Hinde*, 357.

(s) See 2 Dan. 548. *Hinde*, 315.

(15) See ante, note 1, chap. 10, and Code, § 300. A commission may be issued to examine a non-resident party as a witness, in the usual manner. (*Block v. Haws*, 8 Ab. 335.) But only as to such matter as can be used on the trial; not as to matter to be used on a collateral motion. (*Harlin v. Ridner*, 6 Ab. 19; *Stake v. Andre*, 9 id. 420; S. C. 18 How. Pr. 159.)

(14) EXAMINATION OF WITNESSES OUT OF THE STATE, ON A COMMISSION.

It is provided by the Revised Statutes that whenever an issue of fact shall have been joined in any action in a court of law, being a court of record, and it shall appear, on the application of either party, that any witness not residing within this state is material in the prosecution or defence of such action, the court may, upon such terms as it shall think proper, award a commission to one or more competent persons, authorizing them, or any one of them, to examine such witness on oath, upon the interrogatories annexed to such commission; to take and certify the deposition of such witness; and to return the same according to the directions given with such commission. (3 Rev. Stat. 5th ed. 675, § 11.)

If such action be pending in the supreme court, any justice of the court may, in vacation, grant an order that such commission issue, upon proof that due notice of application for such order has been served on the adverse party, at least ten days before the time of making such application. (Ibid, § 12.) A county judge may also grant such an order. (Code, § 403.)

Section 24 of the Revised Statutes directs that if an *interlocutory* judgment shall have been obtained, in any action, a commission may be awarded, on the application of the plaintiff, in the like cases and in the same manner as if an issue of fact had been joined; and the depositions taken thereon may be used in evidence on any proceeding to assess the plaintiff's damages, with the like effect as is provided in case of a trial. (3 R. S. 677, 5th ed.) And the act of April 19, 1862, amending the Revised Statutes, directs that whenever a default shall have been taken for want of any appearance or answer or other pleading, in any action, and in any proceeding pending in any court of record, and whenever any issue of fact shall have been joined in any such action or proceeding, and it shall appear, on the application of either party, that any witness not residing in this state is material in the prosecution or defence of such action or proceeding, the court may, upon such terms as it shall think proper, award a commission to one or more competent persons, authorizing them, or any one of them, to examine such witness on oath, upon the interrogatories annexed to such commission; to take and certify the deposition of such witness, and return the same

Commissions of this description may be issued to take the depositions of witnesses in any country. Where the country in which the witnesses reside is at war with this, the usual practice appears to be to direct it to the nearest neutral port; (*t*) but in *Cahill v. Shepherd*, (*u*) the court made an order for a commission to examine witnesses in *Seville*, in Spain; although there was then a war between England and Spain.

(*t*) — *v. Romney*, 1 Amb. 62.

(*u*) 12 Ves. 335.

according to the directions given with such commission. But in all cases of default for want of appearance, no notice of such application shall be required to be served on the adverse party. (Laws of 1862, ch. 375.)

By the act of April 17, 1852, the *marine court* of the city of New York is authorized to issue commissions to take the testimony, in actions pending in that court, of witnesses residing out of the city and county of New York, or out of the state. (Laws of 1852, ch. 389, § 8.) By the act of April 13, 1857, the *district courts* in the city of New York are authorized to issue commissions to take the testimony of witnesses residing out of the city and county of New York, to be read on the trial of actions therein, in the same manner as justices of the peace are authorized to do, and the power is extended so as to authorize the issuing of commissions to take the testimony of witnesses residing out of the state. (Laws of 1857, ch. 344, § 30.)

The power to issue a commission is an innovation on the common law, and must be strictly pursued. (*Creamer v. Jackson*, 4 Ab. 413.)

In *Deshon v. Packwood*, (16 Ab. 272, note,) it was decided (in 1862) by the superior court of New York, that a commission could not be granted to examine witnesses orally, instead of upon interrogatories, and in *Ferrie v. The Public Administrator*, (3 Bradf. 249.) it is said by the surrogate of New York that the court will not depart from the usual method of issuing commissions to take testimony in foreign countries; unless it is shown that there are important advantages to be gained by some other mode. In *Clayton v. Farrington*, (16 Ab. 273, note,) however, it was decided, at a general term in New York, (in 1858,) that an order granting a commission might be upon condition that the applicant consent that the witnesses be also examined and cross-examined orally.

A commission may issue to examine a non-resident *party* as a witness, under section 399 of the Code, in the usual manner. (*Block v. Haws*, 8 Ab. 335; *Fairbanks v. Tregant*, 16 How. Pr. 187; S. C. 17 id. 258; 7 Ab. 21; *Shufelt v. Power*, 10 How. Pr. 286; *Burling v. Ogden*, 14 id. 75; S. C. 6 Duer, 681.) But a commission will be issued to examine a *party* only as to such matter as can be used on the *trial*; not as to matter to be used on a mere collateral *motion*. (*Harlin v. Ridner*, 6 Ab. 19; *Stake v. Andre*, 9 id. 420; S. C. 18 How. Pr. 159.)

By section 389 of the Code, no examination of a party shall be allowed or had on behalf of the adverse party, except in the manner prescribed in the Code. By the subsequent sections, he can be so examined as a *witness*, *only*. And one who is examined merely as to matters controverted on a motion, or whose examination is used only on such motion, cannot be called as a witness. (*Ibid.*)

Where a party swears, upon the advice of counsel, that another party, who is absent from the state, is a material witness, he should be regarded as having made a *prima facie* case for a commission. (*Shufelt v. Power*, 10 How. Pr. 286.)

An application for a commission is a *motion*, as defined in section 401 of the Code, and must be made within the district in which the action is triable, or in a county adjoining that in which it is triable. (*Erwin v. Voorhees*, 26 Barb. 127; *Sturges v. Weed*, 13 How. Pr. 130; *Dodge v. Rose*, 1 Code Rep. 123; *Newcomb v. Reed*, 14 How. Pr. 100.) Accordingly, where the place of trial was in the county of Steuben, and a commission was issued, and the interrogatories settled and allowed, by the county judge of Otsego county, upon notice; it was held that the county judge had no power to hear the application and allow the commission, and that the deposition taken under such commission was properly rejected. (*Erwin v. Voorhees*, *supra.*) The Revised Statutes and the judiciary act, in reference to such a motion, are inconsistent with section 401 of the Code, and the latter must prevail. (*Sturges v. Weed*, *supra.*) But as the constitution gives to the supreme court general jurisdiction throughout the state, if a motion for a commission is heard and decided by the court,

How obtained.] A foreign commission may be applied for by petition to the register, assistant register, or clerk, in the same manner as a commission to examine within the state. (v)

(v) See ante, p. 293, 294.

in the wrong county, by default, the order is not void for want of jurisdiction, but is merely irregular; and is binding until vacated, or set aside. (*Blackmar v. Inwager*, 5 How. Pr. 367; S. C. 1 Code Rep., N. S. 80; *Gould v. Root*, 4 Hill, 554.)

Whenever the *bona fides* of the application is doubtful, a commission (that is, with stay of proceedings,) will not be ordered on the common affidavit. (*Vandervoort v. The Columbian Ins. Co.* 3 John. Cas. 137.)

The statute authorizes the granting of the order for a commission upon the "application" of either party. This may be made upon affidavit, or petition, or an order to show cause, with a preliminary stay of proceedings, if absolutely necessary. When the application is made to a judge of the court, at chambers, or to a county judge, a notice of ten days must be given. When made in open court, it seems the usual notice of eight days is sufficient. (Van Sant. Eq. Pr. 287.) The adverse party may oppose the application by affidavits; and if he shows valid grounds of opposition, the application will be denied; the granting of a commission being always in the discretion of the court. (*Vandervoort v. Columbian Ins. Co.*, 3 John. Cas. 137.)

It seems that there is nothing in the rules of practice, or the statute, which requires the motion papers for a commission to state in what county the action is to be tried. (*Blackmar v. Van Inwager*, 5 How. Pr. 367.)

The proof of the materiality of a witness may be made by the agent or attorney of a party, if he is able to prove facts sufficient to make out a case. (*Beall v. Dey*, 7 Wend. 513; *Eaton v. North*, 7 Barb. 631; S. C. 3 Code Rep. 234; *Demar v. Van Zandt*, 2 John. Cas. 69; *Murray v. Kirkpatrick*, 1 Cowen, 210.) The agent in fact of the plaintiff, acting under a letter of attorney, may make the affidavit on which the motion is founded; without showing any excuse for its not being made by the party himself. (*Johnson v. Lynch*, 15 How. Pr. 200. See *Deshay v. Persse*, 9 Ab. 289, n.) It is surplusage to add that the party cannot safely proceed to trial without the testimony sought. (*Brckett v. Dudley*, 1 Cowen, 209.) The residence of the witness need not be positively sworn to: information and belief is sufficient. (*Eaton v. North*, 7 Barb. 631; S. C. 3 Code Rep. 234.) The affidavit must set forth that the party applying for a commission has stated to his counsel what he expects to prove by the witness. (*Mygatt v. Garrison*, 18 Ab. 292, note.) But when the affidavit is made by an attorney, he need not swear to the advice of counsel. (*Beall v. Dey*, 7 Wend. 513; *Demar v. Van Zandt*, 2 John. Cas. 69.)

The order for a commission, shall be granted by a justice or county judge out of court, only in the like cases, and upon the same terms, that the supreme court would allow such commission; and shall be subject to the control of the court, in all respects. (3 Rev. Stat. 5th ed. 675, § 13.) It must be filed in the office of the clerk of the court. (*Ibid.*) When the order is allowed by the court, it will, of course, be entered with the clerk of the county, in the usual way.

It has been decided that there is no authority either under the Revised Statutes, or section 399 of the Code, as amended in 1860 and 1862, for issuing a commission in *supplementary proceedings*. (*Morrell v. Hey*, 15 Ab. 430; S. C. 24 How. 48.)

An insurance company, acting as receiver, in relation to claims against the former capital and assets of the corporation, is not entitled to a commission to examine witnesses, where the matter in controversy has been submitted to referees, under a special statute authorizing such proceeding. (*Wood v. The Howard Ins. Co.* 18 Wend. 646.) It seems that such commission can issue only when there is an action pending in a court of record, and an issue joined upon pleadings, in the forms prescribed by law. (*Ib.*)

The rule declaring that a motion once denied cannot again be renewed without special leave, is applicable to motions for a commission. (*Dollfus v. Frosch*, 5 Hill, 493; *Mitchell v. Allen*, 12 Wend. 290; *Allen v. Gibbs*, id. 202.)

The order for a commission does not operate, *per se*, as a stay of proceedings. If it be intended that it have such an effect, the court will so direct. (*Maynard v. Chapin*, 7 Wend. 520.) To entitle a party to a stay of proceedings, on applying for a commission, the application for the commission should be made within twenty days after the service of the reply. (*Bank of Charleston v. Hurlbut*, 1 Sandf. 717; S. C. 1 Code Rep. 96.)

But in some cases the party will be obliged to make a special application to the court. For instance, in a petition and commission under the 69th rule, the names of the witnesses must be stated; and there are sometimes various provisions necessary in a foreign commission, which the register is not authorized to insert in the order. Sometimes also the party allows the time for applying to the register, &c., to pass by without having presented a petition to him. For these reasons it is quite common to apply to the court itself for an order.

This practice is authorized by the 71st rule; which provides, that if [*299] *it shall be necessary to have a commission to examine witnesses in any case not provided for in the 69th and 70th rules, or after the expiration of the time therein limited for making an application to the register, assistant register, or clerk, the party may present a petition to the court for that purpose, setting out the facts which entitle him to a special commission. The usual notice of this application must be given to the adverse party.

Duplicate commission.] Where the adverse party will join in the commission, the court will sometimes give him liberty to take out a duplicate and transmit it to his own commissioner. (*w*) But if the oppo-

(*w*) 1 Hoff. Pr. 475. Hinde, 303.

Where no laches is imputable to a party applying for a commission, and there is nothing to cast suspicion upon the application, he is not bound to state what he expects to prove by the witness whose testimony he seeks to procure. (*Eaton v. North*, 7 Barb. 631; S. C. 3 Code Rep. 234; *Rogers v. Rogers*, 7 Wend. 514.) But there may be such suspicious circumstances as will authorize the court to require the party applying, to state what he expects to prove by his witnesses. (*Rogers v. Rogers*, *supra*.) And if the adverse party shows that the testimony sought will probably be insufficient and proposes to admit whatever the applicant will swear he expects to prove, on the commission, the latter will be required to state what he expects to prove, and on his opponents stipulating to admit the same, the commission will be refused. But, in such a case, the facts are to be admitted—not that the foreign witness will testify to such facts. (*Bank of Commerce v. Michel*, 1 Sandf. 687. See, also, *Vandervoort v. Columbian Ins. Co.*, 3 John. Cas. 137.)

In a proper case, a second commission may be issued. (*Washington Bank of Westerly v. Palmer*, 2 Sandf. 686; S. C. 8 N. Y. Leg. Obs. 92; *Fisher v. Dale*, 17 John. 343; *Bank of Ithaca v. Bean*, 1 Code Rep. 133; S. C. 7 N. Y. Leg. Obs. 525; *Nichol v. Columbian Ins. Co.*, 1 Caines, 345; *Coles v. Thompson*, 2 id. 47.) A motion for a further commission is proper where pleadings are amended after the return of a commission, and further testimony is required. (*Vincent v. Conklin*, 1 E. D. Smith, 203.) So where depositions of witnesses residing abroad, taken under a commission, were read on the trial of a cause, and the jury, not being able to agree, were discharged, a second commission was issued to re-examine the same witnesses; it being shown by affidavit that some of the doubts which existed at the trial would probably be removed by such re-examination. (*Fisher v. Dale*, 17 John. 343.) But a party cannot have a new commission to re-examine a witness, merely on the expectation that he may now swear more definitely than before; where there is no suggestion that the witness has made a mistake, or that new evidence has been discovered; especially when the only other witness who is cognizant of the fact to which the witness is sought to be re-examined is dead. (*Raney v. Weed*, 1 Barb. 220.) Newly discovered evidence, or imposition; or fraud practised upon the witness; or a mistake on his part clearly shown; and the like, will be sufficient causes to authorize the court, in its discretion, to issue a new commission. (Van Sant. Eq. Pr. 296.)

site party has thus an opportunity of joining, and fails to do so, he will not be permitted to sue out a new commission to the same place himself, except on special grounds. (x)

Number of commissioners.] Four is the usual number of commissioners; (y) but where the commission is to be executed in a foreign country, particularly if very distant, it is the custom to increase the number—sometimes as many as eight have been appointed. (z)

Form of commission.] The commission differs but little, in form, from a commission to be executed within this state; unless it be a commission to examine foreigners in their own language; in which case it directs that they shall “be examined on their respective corporal oaths, to be first taken before the commissioners, or any two or more of them, solemnly.” (a)

It also differs in another respect from a commission to be executed within this state. As the court has no power to compel foreign commissioners to execute the commission, it simply *authorizes* them to examine the witnesses; but when directed to commissioners within the state, it *authorizes and requires* them to do so. (15)

Interrogatories.] Witnesses examined out of the state, if the parties do not consent to an oral examination, are to be examined on written,

(x) Campbell v. Scougall, 19 Ves. 554.

(y) 1 Newl. 410.

(z) Anon.. Atk. 633. 2 Fow. Pr. 74.

(a) Hinde. 309. Ramkissenseat v. Barker, 1 Atk. 19. 2 Dan. 535.

(15) A commission must be under the seal of the court out of which it issues; otherwise it will be defective. (*Whitney v. Wyncoop*, 4 Ab. 370; *Ford v. Williams*, 24 N. Y. 359.)

To every commission authorized by article 2, of title 3, chapter 7, of part 3 of the Revised Statutes, there must be annexed a copy of section 16 of that article; which directs as to the manner of executing and returning the commission. (3 Rev. Stat. 5th ed. 676, § 16, sub. 6.)

It seems that this provision is not applicable to commissions issued by justices of the peace. It is merely directory, and not absolutely essential. The main question is, has the commission been properly executed? (*Hall v. Barton*, 25 Barb. 274.)

In *Williams v. Eldridge*, (1 Hill, 249,) the deposition was held to have been properly read in evidence, though it did not appear that a copy of section 16 of the statute had been annexed to the commission; and that if annexing a copy of that section was essential, the court would intend it to have been done; unless the contrary were shown.

The names of the witnesses to be examined ought always to be inserted in the commission, if possible; and where their names might have been ascertained, with due diligence, but were not, the commission was refused. (*Wright v. Jessup*, 3 Duer, 642.) When the names cannot be given, the witnesses should be described as accurately as possible, in some manner likely to identify the persons; e. g. the clerks of a person named. (*Shaffer v. Wilcox*, 2 Hall, 502.) Where, by mistake, the witness intended to be examined under a commission was not rightly named therein, but the commissioners, notwithstanding such mistake, examined the witness, it was held that the deposition was extrajudicial, and could not be received as evidence in the suit (*Brown v. Southworth*, 9 Paige, 351.)

direct, and cross, interrogatories, to be allowed by a vice-chancellor, or master, and annexed to the commission. (b)(16)

(b) Rule 72.

(16) The interrogatories to be annexed to a commission must be settled by a judge of the supreme court in vacation; or, if the action be in the supreme court, by a justice thereof, upon such notice as shall be established by the practice of the court. (3 Rev. Stat. 5th ed. 675, § 14.)

A county judge has no power or authority to settle and allow interrogatories. (*Erwin v. Voorhees*, 26 Barb. 127.)

In settling such interrogatories, either party shall be allowed to insert any question pertinent to the cause, which he shall propose. (3 Rev. Stat. 675, § 15.)

The interrogatories must embrace the subject of inquiry, and be governed by the rules applicable to oral examinations. The parties, however, may insert a general interrogatory, whether the witness knows of any other matter or thing material to the party, besides what he has been particularly interrogated unto; under which the witness may state facts not previously called for under the particular interrogatories. And if this general interrogatory is not answered, the deposition cannot be read; it being well settled that the witness must answer, substantially, all the interrogatories; as it is otherwise impossible to say that he has told the whole truth. And it is no objection to a deposition that a material part of the evidence comes out under the general interrogatory. (1 Monell's Pr. 2d ed. 703.)

Where interrogatories were settled by stipulation of the attorneys, indorsed upon them as follows: "It is hereby stipulated by and between the attorneys of the respective parties in this cause, that the within interrogatories and cross-interrogatories are agreed upon, and that this stipulation have the same effect as the allowance of a judge, reserving all legal rights;" Held that on the trial of the cause neither party could object to the reading of the depositions on the ground that the interrogatories were leading. (*Cope v. Sibley*, 12 Barb. 521.)

Witnesses may be examined, on commission, as to an original paper, by annexing a copy to the interrogatories, for the purpose of reference, description and identification, and producing the original on the examination of the witness. It is not indispensable that the original be annexed to the interrogatories. (*Commercial Bank of Pennsylvania v. The Union Bank of New York*, 11 N. Y. 203; S. C. 19 Barb. 391.) A motion, at the trial, to suppress the whole of a deposition, on the ground that some of the interrogatories, and parts of the deposition are improper, should be denied. If any part of the deposition is competent, the objection should be confined to the part which is not so. (*Ibid.*)

Interrogatories and cross-interrogatories must necessarily embrace every subject which is material to the prosecution or the defence of an action. The questions contained in the interrogatories, ought to conform to the rules of evidence, in like manner as though the witness was to be examined in court, at the trial. It is permitted to either party to put a general interrogatory, and any evidence which is given in response to such general interrogatory is as competent as that which is given in response to a particular question. (*Percival v. Hickey*, 18 John. 257, 289; *McCarty v. Edwards*, 24 How. Pr. 236.)

When the interrogatories are settled by the consent of the parties, they may agree to waive all objections as to the form of the questions, or as to the competency of the witnesses, or of specific items or qualities of evidence. Where it is expressly stipulated that certain objections are reserved, and may be made at the trial, it will be presumed that all other objections were intended to be waived, and therefore no others can be raised, on the trial. (*Morse v. Cloyes*, 11 Barb. 100.)

If a direct interrogatory, and the answer of the witness to it, are properly excluded by the court, cross-interrogatories, and the answers thereto, which are dependent upon the direct interrogatory, should also be excluded. (*Fleming v. Hollenback*, 7 Barb. 271.)

The supreme court has no power, in an action upon a draft or bill of exchange, to order the draft to be annexed to a commission issued to take the examination of witnesses for the defendant, residing in another state. (*Butler v. Lee*, 32 Barb. 75; S. C. 19 How. Pr. 384. See also *Gould v. McCarty*, 11 N. Y. 575; *Edmonstone v. Hartshorn*, 19 N. Y. 9; *Hoyt v. American Exchange Bank*, 1 Duer, 652; S. C. 8 How. Pr. 89.)

The settlement of interrogatories is equivalent to passing upon questions propounded to a witness when called to testify at the trial. (*Macdonald v. Garrison*, 2 Hilt. 510;

If the opposite party does not join in the commission, the party obtaining the order should serve him with the interrogatories, and a notice that the officer will be applied to at such time and place, to settle *and allow the interrogatories, direct and cross. This notice [*300] should be similar to that required to be given of special motions. (c)

Where there was a joinder in a commission, the following course was taken in a case referred to by Mr. Hoffman, (d) before the vice-chancellor of the first circuit. The commission was issued on the application of the defendant. An order was obtained, on notice, that the complainant furnish to the defendant's solicitor, and the defendant furnish to the complainant's solicitor, the direct interrogatories proposed by them respectively, to be exhibited within six days of the order; and that each party respectively furnish the other with his cross-interrogatories within ten days from the date of such order; and that the whole would be settled by the vice-chancellor at his chambers on such a day, twelve days from the order.

The interrogatories should be signed by counsel. (e)(17)

The officer should endorse his allowance at the foot of the interrogatories, direct and cross. (f)(18)

(c) 1 Hoff. Pr. 477. See Rule 89.
(e) 2 Fow. Ex. Pr. 150.

(d) *Brush v. Vandenberg*, 1 Hoff. Pr. 477.
(f) 1 Hoff. Pr. 478.

S. C. 9 Ab. 178; 18 How. Pr. 249. See *Blaisdell v. Raymond*, 9 Ab. 178, n.) Although it is usual to allow a commission as a matter of course, where no stay is desired, yet upon settling the interrogatories, it is the duty of the judge, if required, to allow only such as relate to the issues to be tried in the action. (Ibid.)

Cross-interrogatories cannot be withdrawn, except by consent of the opposite party. (*Union Bank of Sandusky v. Torrey*, 2 Ab. 269; S. C. 5 Duer, 626.)

(17) When both parties join in a commission, copies of the direct interrogatories should be served by each party upon the other simultaneously. (*Brush v. Vandenberg*, 1 Edw. 649.)

(18) The officer settling interrogatories must indorse his allowance thereof, and annex them to the commission. (3 Rev. Stat. 5th ed. 675, § 15.) Upon the commission, he must direct the manner in which it shall be returned, and may, in his discretion, direct the same to be returned by mail, addressed to the clerk of the court out of which it shall issue; or, if issued out of the supreme court, addressed to the clerk of the county in which the venue in the action is laid, designating the name of such clerk, and his residence. (Ibid.)

It is no objection to receiving in evidence depositions taken on commission that the officer's direction as to the manner in which the commission should be returned, was indorsed on the *interrogatories* annexed, instead of being indorsed on the commission itself. (*Hurd v. Pendrigh*, 2 Hill, 502.)

Taking testimony upon commission is a statutory proceeding, innovating upon the common law rules of evidence, and the statute must be strictly complied with. A commission, and the testimony taken under it, are not admissible in evidence, although returned by mail, addressed to the clerk, &c., unless an *order or direction* for its return in that manner was made by the officer settling the interrogatories. (*Richardson v. Gere*, 21 Wend. 156.) Without the *direction* provided for by the statute, no return can be legally made; for in the absence of it, there is no mode recognized by the law. (Ibid.)

Where there is no allegation of fraud or surprise, it is a sufficient compliance with the statute, that the judge before whom the interrogatories are settled indorses his allowance of the same upon the commission, by referring to them as annexed to, and accompanying, the commission. (*Halteran v. Field*, 23 Wend. 38.)

Carriage of commission.] As in the case of a commission to be executed within this state, the party obtaining a foreign commission has the right to transmit or carry it. (*g*)

Notice to other commissioners.] The commissioner or commissioners to whom the commission is delivered, must keep it unopened until the day of attendance, and must give notice of the time and place of executing it to all the other commissioners whose names are upon the direction. This should be in writing; and the party obtaining the commission should see to the service. (*h*) By the English practice, this is a notice of eight days. (*i*)

Notice to adverse party of executing commission.] No notice of the time and place of executing a commission out of the state is necessary to be given to the opposite party. (*k*)

One commissioner sufficient.] Any of the commissioners may execute the commission, in case the others neglect or refuse to join in the execution, or are prevented from attending. (*l*)(19)

Oath of commissioners.] There is nothing in our statute or rules making it necessary for the commissioners to take an oath before proceeding to execute the commission; though it is the English practice for them to do so.

[*301] **Attendance of witnesses.*] No compulsory process can be issued to compel the attendance of witnesses to be examined who are resident out of the jurisdiction of the court. Therefore no subpœna can be issued for that purpose. If the witnesses will not attend voluntarily, they cannot be examined; unless there is some statute of the state, in which the witness resides, compelling him to appear and testify upon a foreign commission. There is such a provision in our revised statutes respecting commissions from other states. (*m*)

Oaths to witnesses.] The commissioners are authorized to administer oaths or affirmations to such witnesses as attend before them. (*n*) This is to be done in the manner already directed; (*o*) except that as the witness is examined upon interrogatories, the word "interrogatories" must be substituted, in the oath, for "questions."

It seems that it is not necessary for the commissioners to certify, in their return, the form of the oath administered. (*p*)(20)

(*g*) See ante, p. 294.

(*h*) Hinde, 334

(*i*) Id. 362.

(*k*) Rule 72.

(*l*) Rule 70.

(*m*) 2 R. S. 397, art. 4.

(*n*) Id. 180. § 88, (orig. § 82.)

(*o*) See ante, p. 281.

(*p*) Keene v. Meade, 3 Peters, 9. 1 Hoff. Pr. 430.

(19) The moving party usually names the commissioners. (*Harris v. Wilson*, 2 Wend. 627.) No person, however, will be appointed against whom any reasonable objection can be shown. But there must be an affidavit, stating the grounds of objection. (*Biays v. Merrihue*, 3 John. 251.)

(20) The statute directs that the commissioners, or any one of them, shall publicly

If an interpreter is employed, the same oath should be administered to him as upon an examination before an examiner. (*q*)

Method of examination.] If the commissioners on both sides attend the execution of the commission, and one side examines and the other side neither examines nor puts in interrogatories, he will not be allowed afterwards to examine, except upon special order made, on good cause shown. (*r*) So where a defendant has joined in a commission, and his commissioners do not attend, or if upon due notice being given, one party proceeds and examines his witnesses, the other party, if he does not examine, will not be permitted to have a new commission; unless upon affidavit made of some reasonable cause of non-attendance. (*s*) (21)

A commissioner may be examined as a witness under the commission; but the other commissioners have no power to enforce his attendance for that purpose. (*t*) Under special circumstances, the court will permit a commissioner to be examined; even after the commission has been opened and the examination of a witness proceeded with. (*u*)

The witnesses are to be examined upon the interrogatories, as already stated, and their testimony to be reduced to writing by the commissioners. (22)

(*q*) See ante. p. 285.

(*r*) *Richardson v. Louthen*, 1 Ch. Ca. 174. *Hinde*, 355. 1 Dick. 18.

(*s*) *Hinde*, 355.

(*t*) 2 Roll. Rep. 90.

(*u*) *Grubb v. Grubb*, 1 Young & Jer. 36.

administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them shall be the truth, the whole truth, and nothing but the truth. (3 Rev. Stat. 5th ed. p. 676, § 16.)

When the commissioners certify that they administered an oath to the witnesses, that the answers given by them to the interrogatories proposed should be the truth, &c., the court will intend that the oath was *publicly* administered; and such oath will be deemed to apply to the interrogatories on both sides. (*Halleran v. Field*, 23 Wend. 38; *Williams v. Eldridge*, 1 Hill, 249.) In the absence of any evidence as to the form of the oath administered by the commissioner, it will be presumed to be regular. (*Ibid.*)

Depositions will be received in evidence, although the oaths to the witnesses were not administered by the commissioners, if it appears that the commissioners were prohibited from administering them, and they were in fact administered by the local authorities. (*Lincoln v. Battelle*, 6 Wend. 475.)

Where it appeared, by the return of a commission that the witnesses were sworn "to make true answers to the interrogatories read to them," instead of being sworn "to tell the truth, the whole truth, and nothing but the truth," as required by the statute; it was held that the oath administered was insufficient, and that the depositions should not have been received in evidence. (*Whitney v. Wyncoop*, 4 Ab. 370.)

(21) The parties have a right to appear by counsel, on the execution of a commission. (*Union Bank of Sandusky v. Torrey*, 2 Ab. 269; S. C. 5 Duer, 626.)

(22) The commissioners shall cause the examination of each witness to be reduced to writing. (3 Rev. Stat. 5th ed. 676, § 16, sub. 2.)

A refusal to suppress the deposition of a witness, at the trial, where it was proved that the attorney of the party examining him, at the request of the witness, and before he was sworn, wrote down for him, at his dictation, the substance of what he afterwards testified to in his answers to the interrogatories, is not error; it goes to the credibility of the evidence. (*Commercial Bank of Pennsylvania v. The Union Bank of New York*, 11 N. Y. 203.) If the witness was imposed upon, or any fact was misstated, colored or concealed, the court, on motion for that purpose, might set aside the deposition, and order the commission to be executed anew, or grant other appropriate relief. (*Ibid.*)

[*302] *The title of the depositions is written before commencing the examination, as follows: "Depositions of witnesses produced, sworn, and examined on the . . . day of . . . , in the year . . . , at . . . , under and by virtue of a commission issued out of the court of chancery of the state of New York, in a certain cause therein depending and at issue between A. B. complainant, and C. D. defendant."

The deposition then goes on as follows: "E. F., of the city of . . . , in the state of . . . , laborer, aged . . . years, being duly and publicly sworn (or affirmed) and examined, on the part and behalf of the complainant, deposeth and saith as follows:

1st. To the first interrogatory this deponent saith as follows." Then must follow the substance of the deposition.

The cross-examination is introduced in a similar way.

"To the first cross-interrogatory this deponent saith as follows:

If a witness cannot depose to any matter contained in an interrogatory, the deposition must be taken down in these words—"To such an interrogatory this deponent cannot depose." (*v*)

A witness may, upon his examination, demur to the interrogatory, in the same manner as upon an examination before an examiner. (*w*)

The witness must first be examined upon the interrogatories of the party who produces him, and then, forthwith, without suffering him to go abroad, upon the cross-interrogatories on the other side. (*x*)

The party suing out the commission has the right to examine the first witness. (*y*)

If a witness does not understand the English language, the course of proceeding is the same as that to be pursued where such a witness is examined before an examiner. (*z*)

Commissioners are not bound to examine each witness upon all the interrogatories, but they may examine them to those interrogatories or parts of interrogatories to which they are called upon to examine them. (*a*)(23) They are not to judge what interrogatories are perti-

(*v*) 2 Dan. 512.

(*x*) Hinde's Pr. 346. Gilb. For. Rom. 123.

(*z*) See ante, p. 285.

(*w*) See ante, p. 282.

(*y*) 1 Newl. 267.

(*a*) Whitelock v. Baker, 13 Ves. 511.

Where a witness is required to state any thing known to him which is material to the issue, or to the benefit of the party interrogating, under the general and common interrogatory, he may state a fact material to the issue, notwithstanding it is detrimental to the party putting the interrogatory. (*Van Ness v. Bush*, 22 How. Pr. 481; *S. C.* 14 Ab. 33.)

(23) Where after the taking of a deposition had been commenced, and four or five interrogatories were answered, it was adjourned, upon the witness refusing to answer further because of vestigo, and consequent confusion of mind, and subsequently the witness appeared again, with his counsel, and the examination being commenced from the beginning, the witness read his answers from a paper, which had been prepared by himself and counsel, and was in the handwriting of the latter; the depo-

nent and what are not; but are to examine upon the interrogatories as they find them. (b) They are not bound, however, to divest themselves entirely of all discretion as to what is or is not legal evidence; and they are not obliged to take all that is offered to them whether it has the character *of evidence or not; yet they must be careful that, in rejecting any thing, they do not reject too much. (c)

The commissioners should also be careful not to take down from a witness matters reflecting upon the character of any of the parties: unless the interrogatory leads to it. Therefore, where a witness, examined under the last general interrogatory, had testified to several things reflecting upon an individual, which the commissioner took down, the court discharged an order by which the witness was directed to pay the costs; because it was the commissioner's fault to take down any matter that was scandalous and impertinent. (d)

When the direct examination of the witness is completed, it must be signed by him and certified by the commissioners, as follows:

Examination taken, reduced
to writing, and sworn to
this day of,
Before us,

J. K.

L. M.

Commissioners." }
" E. F.

This should be done before his cross-examination is commenced. (e) (24)

And when his cross-examination is completed, it should be signed and certified in the same way, before the witness is re-examined by the party calling him. (f)

Previous to every adjournment also, the testimony, so far as it has been taken, must be read over to the witness and be signed by him. (g)

The witness may be permitted to explain or correct any mistake at any time before his examination is finally closed; but no part of his testimony previously reduced to writing can be erased or altered. (h) (25)

(b) Baker v. Cole, 2 Swanst. 207, (n).

(d) Anon., 2 P. Wms. 406.

(f) Idem.

(c) Whitelock v. Baker, *supra*.

(e) Rule 84.

(g) Idem.

(h) Idem.

sition was suppressed, on motion. (*Creamer v. Jackson*, 4 Ab. 413.) Held, also, that the answers taken on the first examination should not have been disregarded by the commissioner; but that the proceedings should have been stated by him as they took place, and both examinations should have been included in the deposition returned. (*Ibid.*)

(24) The commissioners shall cause the examination of each witness to be subscribed by him and certified by such of the commissioners as are present at the taking of the same. (3 R. S. 5th ed. 676, § 16, sub. 2.)

(25) The commissioners must subscribe their names to each sheet of the depositions taken by them. (3 Rev. Stat. 5th ed. 676, § 16, sub. 4.)

Method of examining witness who does not speak English.] Under a commission to examine witnesses who cannot speak English, the usual and proper course is to take down the depositions from the interpreter, in English. (*i*) This, however, does not appear to be absolutely necessary; since, in some cases, examinations taken down in a foreign language, have been recognized by the court. If the depositions are taken down in the language of the witness, they must afterwards be translated [*304] *out of that language into the English, by a person appointed by the court for such purpose, who must be sworn to the truth of his translation; (*k*) and must attend at the office for the purpose of making it; for the court will not make an order for the record of the depositions to be delivered out, in order that they may be translated. (*l*)

The translation, after the correctness of it has been sworn to, is annexed to the record, and an office copy made of it, which will be permitted to be read at the hearing; an order for that purpose having been previously obtained; which is usually applied for at the same time that the application is made for the appointment of a person to translate the depositions. (*m*)

Exhibits, how endorsed.] Where a book, deed, paper, or other exhibit is proved, the following endorsement (without which it cannot be read at the hearing,) is written upon the exhibit produced and signed by the commissioners:

[*Title of the cause.*]

At the execution of a commission for the examination of witnesses in this cause, this paper writing was produced and shown to J. S., a witness sworn and examined, and by him deposed unto at the time of his examination on the complainant's behalf, this day of, before us,

J. K. }
L. M. } Commissioners." (26)

Return to commission.] The commission and depositions are to be returned in the same manner as in the case of a commission executed within this state. (*n*) (27)

(i) Lord Belmore v. Anderson, 4 Bro. C. C. 90. (k) 1 Newl. 279. 2 Dan. Pr. 533.
(l) Fauquier v. Tynte, 7 Ves. 292. (m) 1 Newl. 279. (n) See ante, p. 296.

(26) If any exhibits are produced and proved before the commissioners, they shall be annexed to the depositions to which they relate, and shall be subscribed by the witness proving the same, and shall be certified by the commissioners. (3 Rev. Stat. 5th ed. 676, § 16, sub. 3.)

Where an exhibit, proved before the commissioner, was a bill of sale executed by J. M. and his wife, and the commissioner certified that the same "was produced and shown to the said J. M., a witness sworn and examined, and by him deposed unto at the time of his examination as a witness, under such commission;" it was held that the certificate was sufficient. (*Hall v. Barton*, 25 Barb. 274.)

(27) The statute directs that the commissioners shall annex all the depositions and

There is no certain time within which it is to be returnable. But a reasonable time is allowed according to circumstances. (o)

o) Wake v. Franklin, 1 Sim. & Stu. 95.

exhibits to the commission, upon which their return shall be indorsed; and that they shall close them up, under their seals, and shall address the same, when so closed, to the clerk of the court from which the commission issued, or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission, at his place of residence. (3 Rev. Stat. 5th ed. 676, § 16, sub. 4.) If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet, so directed, in the nearest post-office. (Ib., sub. 5.) If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet, so directed, shall be delivered to such agent. (Ib., sub. 5.)

If such packet be delivered to an agent, he shall deliver the same to the clerk to whom it shall be directed, or to one of the judges of the court in which the action is pending, who shall receive and open the same upon such agent making affidavit that he received the same from the hands of one of the commissioners, and that it has not been opened or altered since he so received it. (3 Rev. Stat. 5th ed. 676, § 17.) If such agent be dead, or from sickness or other casualty unable to deliver such packet personally, the same may be received by the clerk or judge from the hands of any other person, upon such person making affidavit that he received the same from such agent; that such agent is dead, or otherwise unable to deliver the same; that it has not been opened or altered since such person so received it; and that he believes the same has not been opened or altered since it came from the hands of the commissioners. (Id., § 18.)

The clerk or judge receiving and opening such commission and return, shall immediately file the same in the office of the clerk of the court from which it issued; or, if the action be pending in the supreme court, in the office of the clerk of the county in which the venue in the action is laid. (3 R. S. 5th ed. 676, § 19.)

If the packet containing such commission and return be transmitted by mail, the clerk to whom the same shall be addressed shall receive the same from the post-office, and open and file it in his office. (Id. 677, § 20.)

The parties, or their attorneys, may, in writing, agree on the manner in which a commission may be returned; and on filing such agreement with the clerk of the court, the attorney for the party suing out the same may indorse thereon a direction according to such agreement; and such commission shall be returned accordingly. (Ib. § 21.)

It has been held that it cannot be urged on the trial as an objection to the introduction of depositions taken under a commission, that they were not deposited in a post-office "immediately" after they were taken. The statute is, in that respect, merely *directory* to the commissioners. If there be unreasonable delay in the return of a commission, the remedy of a defendant is to move for judgment, as in case of non-suit, and of a plaintiff for leave to proceed to trial, notwithstanding the commission. (*Halleran v. Field*, 23 Wend. 38.)

If the body of the commission contains an explicit direction in respect to the return of such commission, this is sufficient, although there be no direction indorsed on the back of it. (*Hall v. Barton*, 25 Barb. 274.) Where the return of the commissioner was written on the deposition, and the deposition and the commission, &c., were all annexed together in such a manner that the return could not be separated from the commission and evidence, it was held that this was a substantial compliance with the statute, although there was no return indorsed on the commission. (Ibid.) Although there be nothing on the envelope, or elsewhere, showing that the commission was deposited as required by the statute, or that it was returned by mail, it will be presumed that the commission was so deposited and returned. (Ibid.)

Where the direction as to the return of a commission required it to be enclosed in a wrapper, and deposited in the post-office at Toronto by the commissioners, directed to W. B., Buffalo, "and a certificate thereof indorsed upon the wrapper by the commissioners," and the commission was received from the post-office at Buffalo, post-marked Toronto, it was held that it was not requisite that the certificate on the wrapper should state that the commission was deposited in the post-office by the commissioners. (*Brumskill v. James*, 11 N. Y. 294.)

The commissioners should enclose the commission and the deposition under their seals, and should severally write their names upon the outside of the envelope. But a mere irregularity of the commissioners in suffering one of their number to write

Where the commission is ordered to be returned *without delay*, this *ex vi termini* imports no definite period wherein the party is restricted to return it. (*p*) But this latitude of returning the commission must not be converted to oppressive purposes. And if the commission be not executed and returned within a reasonable time—due allowance being made for the distance and other concurrent circumstances of [*305] *time and place—the court upon application, will interfere, if it appears that unnecessary or wilful delay has occurred. And probably in a gross case it will so far interfere as to make an order upon the party to expedite and return the commission by a limited time; and in default, order the proofs to be closed, and let the cause proceed to a hearing. (*q*)

(*p*) Wake v. Franklin, 1 Sim. & Stu. 97.

(*q*) Hinde, 307.

the names of all the commissioners upon the envelope, where there is no doubt as to the genuineness of the depositions, and that they have not been altered since they were taken and certified by the commissioners, will not prevent the court from receiving the testimony. (*Brown v. Southworth*, 9 Paige, 351.)

The objection that an interrogatory annexed to a commission is leading, may be made upon the trial, when the answer of the witness is proposed to be read in evidence. (*Fleming v. Hollenback*, 7 Barb. 271; *Ocean Ins. Co. v. Francis*, 2 Wend. 64; *Williams v. Eldridge*, 1 Hill, 249.) Depositions cannot be received in evidence unless the return of the commissioners is indorsed upon the commission. It is not a compliance with the statute for the commissioners to make their return upon a separate piece of paper, and annex it to the commission or depositions. (*Ibid.*) It has been held, however, that the return of the commissioner need not be indorsed upon the commission itself, nor be upon a paper containing the depositions annexed, or any part thereof; but when it is necessary, by reason of the paper containing the depositions being filed thereby, to annex an independent sheet, the return may be on the sheet so annexed. (*Pendell v. Coon*, 20 N. Y. 134.) And it is no objection to receiving a deposition in evidence, that the return of the commissioner is indorsed upon the interrogatories, which, together with the deposition, are annexed and secured to the commission. (*McCleary v. Edwards*, 27 Barb. 239.)

When a commission is returned by an agent, his affidavit, as prescribed by the statute, stating that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it, is indispensable, unless waived by consent. (*Dwinelle v. Howland*, 1 Ab. 87.) A commission returned by *express*, and unaccompanied by such affidavit, is inadmissible, although that method of returning it was expressly authorized by the commission. (*Ibid.*)

Where the commissioner signed his name on the margin of each sheet of the depositions, held that this was sufficient without signing it at the bottom. (*Burrill v. Watertown Bank, &c.* 51 Barb. 105.) Mere formal objections to the return of a commission will not, in general, be regarded at the trial. To avail himself of such objections, the party should move the court, before the trial, to suppress the deposition. (*Ibid.*; *Sheldon v. Wood*, 2 Bosw. 269; S. C. 24 N. Y. 607. See *Union Bank of Sandusky v. Torry*, 2 Ab. 271.)

When sufficient time has elapsed, *prima facie*, to have obtained the return of a commission, issued with a stay of proceedings, the stay will be vacated on motion of the adverse party; and on the cause being called for trial, the party taking the commission must establish the grounds for a further stay, if there be any, for the return of the commission. (*Foss v. Fielden*, 2 Sandf. 690; S. C. 3 Code Rep. 202; *Halleran v. Field*, 23 Wend. 38.) Showing that the commission has been mislaid is a good excuse for delay. (*Coles v. Thomson*, 2 Caines, 47.) And where the place of residence of a witness is not exactly known, that is a good ground for enlarging the time. (*Ferris v. Smith*, 3 Caines, 253.) So if the opposite party has, by his own acts, delayed the return of the commission. (*Bouchereau v. Le Guen*, 2 John. 176; *Coles v. Thomson*, *supra*.)

The above is the English practice, and is founded upon the supposition that the court has fixed some period for the return of the commission. By the practice here, if the court has fixed the time for the return of the commission, and it is not returned within that time, the opposite party can close the proofs. If the commission is issued without an extension of the time to take proofs, the party can close the proofs, as if no commission had issued. (28)

(28) A commission on being returned executed, must be filed in the office of the clerk of the court from which it issued, or, if the action be pending in the supreme court, in the office of the clerk of the county in which the venue in the action is laid. (3 R. S. 5th ed. 676, §§ 19, 20.) And the commission, return, depositions and exhibits thereto annexed, must remain on file in the office of the clerk to whom the same were addressed, unless the court, by a special order, shall direct them to be filed in the office of some other clerk. They are at all times to be open to the inspection of the parties, who shall be entitled to copies of such parts thereof as they may require, on payment of the fees allowed by law. (Id. 677, § 22.)

The examinations and depositions taken under a commission issued, executed and returned, as directed in the statute, or an exemplification thereof when the originals are filed in any other county than that in which the cause is tried, may be offered and used in evidence, on the trial of the cause by either party; and every objection to the competency or credibility of a witness so examined, or to the competency or relevancy of any question put to him, or of any answer given by him, may be made in the same manner and with the like effect as if such witness were personally examined at such trial. (Ibid. § 23.)

Upon the deposition of a witness taken under a commission being offered in evidence at the trial, the defendants objected on the ground that two cross-interrogatories were unanswered in part, but in what respect they were unanswered was not specifically stated. After the deposition had been received and read, the same objection was renewed, and exception taken. Held, that it would be an unjustifiable exercise of discretion to suppress the entire deposition upon such a vague and indefinite objection, and that the refusal to do so was no ground for a new trial. (*Valton v. National Loan Fund Life Assurance Society*, 22 Barb. 9.) It is only when the officer neglects to put the interrogatories as settled, or when the witness refuses to answer, that the deposition will be suppressed on the ground of the commission having been imperfectly executed. (Ibid.)

Where pertinent evidence is given in answer to the general interrogatory, to which the attention of the opposing counsel was not called by the others, if he desires to cross-examine the witness as to such evidence, he should apply to the court for relief before trial. It is not a ground for suppressing the whole deposition on the trial. (*Commercial Bank of Pennsylvania v. Union Bank of New York*, 11 N. Y. 203.) If any part of the evidence so given is incompetent or impertinent, such part may be excluded. (Ibid.)

Where depositions are offered to be read on the trial, and the other party objects to them on the ground that the interrogatories are leading, the question whether the interrogatories, and the answers thereto, are admissible, is one addressed to the discretion of the court; and the same rule is to be applied to the case, which prevails where a witness is on the stand in court, undergoing a personal examination at the trial. (*Cope v. Sibley*, 12 Barb. 521; *Hall v. Barton*, 25 id. 274.) Such questions are, of necessity, left very much to the discretion of the judge at the trial; and unless it appears that he has abused the discretion, so that injustice has been done, his decision will not be disturbed. (Ibid.) Where interrogatories are settled by a stipulation of the attorneys, which states that such stipulation shall "have the same effect as the allowance of a judge, reserving all legal rights," neither party can object, on the trial, to the reading of the depositions, on the ground that the interrogatories are leading. (Ibid.) So where the interrogatories are answered under a stipulation expressly saving "all legal exceptions." (*Williams v. Eldridge*, 1 Hill, 249.) When a commission is directed to two, either or both of whom are authorized thereby to execute it, and the return is signed by only one of them, it will be presumed that he alone was present at its execution; although the words "by virtue of a commission to us directed" appear in the caption of the return. (Ibid.)

Letters rogatory.] Where the government of a foreign country in which the witnesses proposed to be examined reside, refuses to allow the commissioners to administer oaths to such witnesses, or to allow the commission to be executed, unless it is done by some magistrate or judicial officer there, according to the laws of that country, letters rogatory must be issued. (*r*)

(*r*) Commissioners are forbidden to administer oaths in the Island of St. Croix. (6 Wend. 476;) in the Havana, 1 Peters' C. C. Rep. 236,) and in Sweden, (2 Ves. sen. 236.)

The question as to the competency of the witnesses must be determined on the trial of the cause. The court will not determine or prejudice the question *in limine*, upon affidavits. (*Graves v. Delaplaine*, 11 John. 200.) A deposition cannot be excluded solely for the reason that *interest* rendered the witness incompetent to testify at the time the deposition was taken; provided his oral testimony would have been admitted at the trial, notwithstanding such interest. (*Fielden v. Lahens*, 9 Bosw. 436; S. C. 6 Ab., N. S. 34; 3 Trans. App. 218.)

An answer which is not responsive to an interrogatory may be objected to, on the trial, by either party, and the answer must be stricken out. (*Lansing v. Coley*, 13 Ab. 272.)

In *Williams v. Eldridge*, (1 Hill, 249,) where there was a stipulation between the attorneys, that either party might receive the return of the commissioners, duly sealed, and deliver it to the clerk, which was done, it was held no objection to the reading of the testimony that the direction on the return did not specify the clerk's residence, as required by section 16, sub. 4 of the statute. It will be presumed that the commissioner who took the testimony closed and sealed the package himself. (*Ibid.*) That the papers composing the return are connected by *wafers* only, is not an objection to the reading of the deposition. (*Ibid.*)

A commissioner to take testimony is, *quoad hoc*, an officer of the court in which the proceeding is pending; and his signature, like that of the clerk to an office copy, will be judicially noticed, though his name be not written at length. (*Williams v. Eldridge*, 1 Hill, 249.) On the same principle, the court will presume that the commissioner discharged his duty, by doing all those things in the execution of the commission which he is not bound to certify officially as done. (*Ibid.*)

Where, on the return of a commission, it does not appear that the last general cross-interrogatory was put to and answered by the witnesses, the depositions cannot, in general, be read in evidence. But where the counsel of the parties were present, at the execution of the commission, and no objection was taken, at the time, to the omission, the depositions will be received. (*Brown v. Kimball*, 25 Wend. 259.)

It is not a valid objection to a deposition that the cross-interrogatories are not all answered; where it appears that some of them are, in whole or in part, answered by reference to previous answers, and the latter are full and explicit. (*McCarty v. Edwards*, 24 How. 236. But see *Union Bank of Sandusky v. Torrey*, 5 Duer, 626; S. C. 2 Ab. 269.)

Before the depositions taken under a commission can be read in evidence, the commission must be actually filed in the clerk's office. (*Jackson v. Hobby*, 20 John. 357.) The precise grounds of objection to them must be pointed out, specifically and distinctly. General exceptions will not be available. (*Ibid.* See also, *Van Gorden v. Jackson*, 5 John. 440; *Beekman v. Frost*, 18 id. 544.) The presumption of law is in favor of the validity of the proceedings; and in the absence of proof to the contrary, the court will assume that the deposition was subscribed by the commissioner, as the statute requires; and that the person executing the commission was the person to whom it was addressed. (*Rust v. Eckler*, 41 N. Y. 488.)

A general objection, made before a deposition is read, to all such parts thereof as involve matter of opinion of the witness on a particular subject, cannot avail the party. The court cannot be called upon to scrutinize the testimony of witnesses, and decide for the party, to what particulars his objections shall apply. (*Champney v. Blanchard*, 39 Barb. 111.)

When a commission is defectively executed, the court may order it to be returned to the commissioner, in order that it may be amended. (*Keeler v. Vanderpool*, 1 Code Rep., N. S. 289.) Thus, where the commissioner refused to require an answer to cross-interrogatories, because the party who framed had withdrawn them, and this without the consent of the other party, it was held that the commission could be re-

These are directed to any judge or tribunal having jurisdiction of civil causes in the foreign country, recite the pendency of the suit in this court, and that there are material witnesses residing at that place, without whose testimony justice cannot be done between the parties; and then *request* the said judge or tribunal to cause the witnesses to come before them, and answer to the interrogatories annexed to the letters rogatory, to cause their depositions to be committed to writing and returned with the letters rogatory.

This practice is derived from the civil law, by which these letters are sometimes called letters requisitory. (*s*)

A special application must be made to the court, to obtain an order for letters rogatory. And Mr. Hoffman supposes the court would allow them to issue, even without a commission having been previously sent; on satisfactory proof that the authorities would not permit its execution. (*t*)

*V. BY THE COURT, AT THE HEARING.

[*306]

The 67th rule of the court provides, that where a cause is at issue upon a replication to the plea or answer, and is in readiness for hearing, or to take testimony therein against all the defendants, if the complainant, or any of the defendants as to whose plea or answer a

(*s*) Nelson v. The United States, 1 Peters' C. C. Rep. 236.

(*t*) 1 Hoff. Ch. Pr. 482.

turned for the purpose of taking such answers. (*Union Bank of Sandusky v. Torrey*, 2 Ab. 269; S. C. 5 Duer, 626.)

But when a commission has been executed and returned, the court will not order that it be sent back to the commissioner for the purpose of enabling a witness to modify his testimony; especially where the change will have the effect of contradicting a witness who has died since the execution of the commission. (*Raney v. Weed*, 1 Barb. 220.)

If a party is examined as a witness, on a commission, his statements may be read as admissions, even if his answers would not be admissible by way of cross-examination, if he were an ordinary witness. (*Gellatt v. Lowery*, 6 Bosw. 113, 122; *Forrest v. Forrest*, 6 Duer, 102; S. C. 25 N. Y. 501.) A party who has caused a deposition to be taken does not necessarily, by offering parts of it in evidence, bind himself to read it all. The opposite party may, however, read the entire deposition as evidence, if he chooses. (*Ibid*; *Weber v. Kingsland*, 8 Bosw. 415.)

Notwithstanding the deposition of a witness has been taken, in a cause, if he comes into the state before the trial, he may be examined. (*Fisher v. Dale*, 17 John. 343.)

The declarations of witnesses whose testimony has been taken under a commission, made after the execution of the commission, contradicting or invalidating their testimony, are inadmissible in evidence. Such evidence is always inadmissible until the witnesses have been examined upon the point, and an opportunity furnished them for explanation or exculpation; and the rule applies as well when the testimony is taken under a commission as otherwise. (*Brown v. Kimball* 25 Wend. 259; *Stacy v. Graham*, 14 N. Y. 492; S. C. 14 Ab. 33.)

An amendment of the pleadings will not exclude, at the trial, a deposition previously taken, when the amendment simply changes the technical issue, without altering the true issue between the parties. (*Vincent v. Conklin*, 1 E. D. Smith, 203.) If, in consequence of the amendment, either party wishes a further examination of a witness named in the deposition, a motion should be made for a further commission; or, if his testimony is inapplicable to the new issue, a motion to suppress the deposition would be proper. (*Ibid*.)

replication has been filed, wishes to have the testimony taken in open court, at the hearing of the cause, he may apply for an order to that effect.

Within twenty days after the replication is put in, or within twenty days after the cause is in readiness for hearing, or to take testimony against all the defendants, he may give notice of an application to the court, for such an order for the first regular motion day, either in term or vacation.

But such an order will not be granted, without sufficient cause shown, whether the application be opposed or not. Neither will such order be granted until the cause is in readiness for hearing, or to take testimony, against all of the defendants.

Notice of the application must be given to such of the parties as have a right to take testimony in the cause. And to enable a defendant to give such notice to his co-defendants, where they appear by a different solicitor, the complainant's solicitor, as soon as the cause is in readiness to take testimony, must give notice thereof to each defendant to whose plea or answer he has filed a replication; stating the names of the other defendants who have a right to take testimony, and the names of their solicitors. And the defendant is to have twenty days thereafter to give notice of his application.

As we have before stated, (u) notice need not be given of the names of solicitors of defendants against whom the bill has been taken as confessed.

Upon the hearing of this application, the party making it must furnish the court with a brief abstract of the matters of fact in issue, not exceeding five folios. And either party may read or refer to the pleadings of any of the parties who are entitled to take testimony in the cause. (v)

To obtain this order, draw up an affidavit stating the nature and situation of the cause and the facts or "special cause" making it necessary or expedient to have the witnesses examined in open court at the hearing; instead of being examined in the usual manner; and serve a [*307] *copy, with the notice of motion, within the time specified in the 89th rule for special motions.

VI. AS TO THE CREDIT OF WITNESSES.

In what cases proper.] Formerly, when witnesses were examined in secret, if either of the parties wished, after publication had passed, to

(u) Ante. p. 290.

(v) Rule 67.

impeach or discredit a witness examined by his adversary, he was obliged to exhibit articles for that purpose. And he could not do so, as a matter of course, but must have the sanction of an order of the court, to be applied for on notice to the adverse party.

But now, since examinations of witnesses are to take place in public, upon notice to the opposite party, and after furnishing him with a list of the names of the witnesses to be examined, (*w*) articles are unnecessary; the more especially, as the adverse party has a right to be present at the examination, and cross-examine the witnesses.

Witnesses may be impeached, however, by examining other witnesses as to their credit, in the same manner as the witnesses sought to be impeached were themselves examined; except that the names of witnesses examined as to the credit of other witnesses need not be furnished to the opposite party previous to the examination. (*x*)

Witnesses may be examined to discredit other witnesses, by proving that previously to their examination they had made declarations contrary to their depositions. (*y*)

At what time to be had.] Examinations as to credit must be made during the running of the rule to produce witnesses; unless some special circumstances prevent it; as for example, where the witness to be discredited was examined under a commission which was not returned until after the time for producing witnesses expired. In such a case the court would open the order to close the proofs and give the party time to examine as to the witness's credit.

Method of examining.] The rule of evidence as to impeaching the credit of witnesses is the same in equity as at law. The inquiry must be general, as to the general character of the witness for veracity. (*z*) A party, in examining as to the credit of a witness, can only put general questions, as, "whether you would believe the witness upon his oath." (*a*) It is not competent, even at law, to ask the ground of that *opinion, but only the general question is permitted. (*b*) The [*308] regular mode of examining into general character is to inquire of the witnesses whether they have the means of knowing the former witness's general character, and whether upon such knowledge they would believe him upon his oath. (*c*)

A commission may be resorted to for the purpose of discrediting witnesses not residing abroad, when necessary, as well as in ordinary cases. Where a commission is required, it will, in general, be directed to the

(*w*) See Rule 74.

(*y*) *Piggott v. Croxhall*, 1 Sim. & Stn. 467.

(*a*) *Anon.* 3 Ves. & B. 94.

(*x*) See Rule 83.

(*z*) *Troup v. Sherwood*, 3 John. Ch. Rep. 553.

(*b*) *Carlos v. Brook*, 10 Ves. 89.

(*c*) *Phil. & Amos' Ev.* 925.

same commissioners as were named in the former commission. (*d*) But a commission will not be directed for the purpose of examining witnesses abroad; unless in case of great emergency, and where it is sworn that no person here can prove any thing as to the witness's credit. (*e*)

If a party, who has obtained a commission to examine a witness as to credit, delays the execution of it till after decree, he will be made to pay the costs. (*f*)

The method of proceeding upon an examination as to the credit of witnesses, whether before the examiner, or under a commission, is precisely similar to that employed in other cases. (29)

(*d*) *Wood v. Hammerton*, 9 Ves. 145.
(*f*) *White v. Fussell*, 1 Ves. & B. 151.

(*e*) *Callaghan v. Rochfort*, 3 Atk. 643.

(29) EXAMINATION OF WITNESSES, GENERALLY.

It is provided by rule 37 of the supreme court, that on the trial of issues of fact, one counsel, only, on each side, shall examine or cross-examine a witness, and one counsel, only, on each side, shall sum up the cause; and during such examination the examining counsel shall stand, and the testimony, if taken down in writing, shall be written by some person other than the examining counsel; but the justice who holds the court may otherwise order, or dispense with this requirement.

Where a witness, on his examination, at the trial, being asked if he has in his possession a writing between the parties, answers in the affirmative, but refuses to produce it in court, on request of counsel, the court has the power, and it is its duty, to compel the witness to produce the writing, or to punish him for the contempt. (*Boyn-ton v. Boyn-ton*, 25 How. 490; S. C. 16 Ab. 87; 31 N. Y. 619, note.) And this, although no subpoena *duces tecum* has been served upon him, or notice given to produce the writing. (*Ibid.*)

Where a witness has been sworn and the examination conducted to its close without objection, if any part of the testimony is competent, a motion to strike it out, without particularizing, is too broad, and will not be granted. (*Spalding v. Hallenbeck*, 30 Barb. 292; S. C. 39 id. 79; 35 N. Y. 204.)

A memorandum may be referred to by a witness for the purpose of refreshing his memory. (*Feeter v. Heath*, 11 Wend. 477; *Holladay v. Marsh*, 3 id. 142; *Lawrence v. Barker*, 5 id. 301; *Huff v. Bennett*, 6 N. Y. 337; *Kendall v. Stone*, 2 Sandf. 269; *Howland v. Willetts*, 5 id. 219; S. C. 9 N. Y. 170.) A memorandum made by the witness may be read by him, when it is clear from his testimony that he recollects the facts, and testifies to them from his memory. (*Wilder v. Hexter*, 50 Barb. 448.) A witness may be allowed to refer to his cash book, to refresh his recollection; but after having sworn positively, he cannot refer to his cash book for the purpose of corroborating his testimony. (*Sackett v. Spencer*, 29 Barb. 180.)

Whether or not a leading question may be put to a witness, on his examination, is a matter of discretion with the judge, or a referee, at the trial; and the allowance of a leading question has ceased to be considered a matter to be reviewed on appeal. (*Black v. The Camden & Amboy R. R. Co.* 45 Barb. 40; *Cheaney v. Arnold*, 18 Barb. 434; S. C. 15 N. Y. 345; *Beach v. Raymond*, 2 E. D. Smith, 497; *Pearson v. Fiske*, 2 Hilt. 146; *Budlong v. Van Nostrand*, 24 Barb. 25; *Vrooman v. Griffiths*, 1 Keyes, 53; *Walker v. Dunspough*, 20 N. Y. 170.)

It is highly improper for counsel to interrupt the orderly proceedings of a court of justice by instructing a witness not to answer questions. The right to refuse to answer resides with the witness alone; and its exercise is at his personal peril. (*Heerdt v. Wetmore*, 2 Rob. 697.) For such conduct, if not overlooked or excused, as not being an intentional contempt of court, it is the duty and within the power of a referee to adjudge such counsel to be guilty of disorderly or contemptuous behavior, and to issue an attachment and commit him. (*Ibid. Fellows v. Wilson*, 31 Barb. 162; *Taylor v. Wood*, 2 Edw. 94.)

On the trial of a cause before referees, after the direct examination of a witness called by the defendant was closed, they adjourned the further hearing to a future day, for their own accommodation, but with the consent of both parties, the plaintiff saying nothing at that time as to his intention to cross-examine; and before the ar-

SECTION III.

PROOFS AT THE HEARING.

In what cases received.] An examination *viva voce* at the hearing is admitted where written documents, essential to the justice of the cause, have been neglected to be proved previously; or where the complainant, finding sufficient matter confessed in the defendant's answer to ground a decree upon, proceeds to a hearing of the cause upon bill and answer only. (g) The defendant's answer in such case being taken as true, no examination of witnesses is requisite. Therefore the proof of the documents referred to in the pleadings, when such proof is necessary, must be by witnesses, *viva voce*, at the hearing. (h) So if a replication is *filed; but all the testimony which the complainant [*309] requires is matter of record; he may prove the record at the hearing. (i)

(g) *Hinde's Pr.* 369. 2 *John. Ch.* 482.

(h) *Id. ib.* See also *Fielder v. Cage*, *Prac. Reg.* 219.

(i) *Mills v. Pittman*, 1 *Paige*, 490.

rival of the adjourned day, the witness died. *Held*, that the referees had no right to reject the testimony called out by the direct examination, but were bound to consider it in making their report. (*Forrest v. Kissam*, 7 *Hill*, 463.) Otherwise, if the opportunity to cross-examine had been lost by the misconduct of the witness, or by the fault or negligence of the party calling him. (Per *WALWORTH*, Ch. *Ibid.*)

Where a witness examined before a referee refuses to answer a question pertinent to the issue, it is said to be the better practice for the referee to set forth the questions, with the objections of the witnesses to answering them, in detail, and his decision upon them, in a certificate, in order that the court may pass upon the remedy. (*Burnett v. Phalon*, 19 *How. Pr.* 530; S. C. 11 *Ab.* 157.)

When a witness claims his privilege on the ground that the answers may criminate him, it is for the court, or referee, to decide whether it is a case for such a claim. (*Fellows v. Wilson*, 31 *Barb.* 163.)

Whether or not a referee shall allow a witness to be recalled, at the close of a case, is a matter entirely within his discretion. (*Pearson v. Fiske*, 2 *Hilt.* 146.) Where an order of reference directs the referee to decide upon the facts in a case, he cannot receive, as proof of those facts, an affidavit which has been sworn to before another officer. The witness must actually be sworn before the referee. (*Security Fire Ins. Co. v. Martin*, 15 *Ab.* 479.)

A judgment will not be reversed because a witness, not stating any difficulty in giving the language of parties, was permitted to state its import; the fact thus proved being established by other evidence. (*Walker v. Dunsbaugh*, 20 *N. Y.* 170.)

Where a witness gives testimony upon the plaintiff's examination, and in reference to a matter about which no inquiry has been made by the defendant, the plaintiff cannot be allowed to call witnesses to contradict him. (*First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.* 23 *How.* 448; S. C. 28 *N. Y.* 153.)

A witness whose credibility is impeached is still competent. The jury may disregard his testimony, but are not bound to do so. (*Lee v. Chadsey*, 3 *Keyes*, 225, 543.)

It is in the discretion of a judge or referee to determine when testimony respecting the character of witnesses shall cease, when it may be resumed, and, under some circumstances, which party shall close the examination; and the court will not interfere with the exercise of such discretion, unless it has been abused. (*Spear v. Myers*, 6 *Barb.* 445.)

The admission of evidence after the testimony has been closed, is matter of discretion in a referee, not reviewable in the court of appeals. (*Williams v. Hayes*, 20 *N. Y.* 58; *Sheldon v. Wood*, 2 *Bosw.* 267; S. C. 24 *N. Y.* 607; *Chancel v. Barclay*, 1 *E. D. Smith*, 384.) So as to limiting the number of witnesses, and determining whether or not a witness shall be recalled. (*Treadwell v. Stebbins*, 6 *Bosw.* 533; *Anthony v. Smith*, 4 *id.* 503; *Burger v. White*, 2 *id.* 92; *Ward v. Washington Ins.*

What may be proved.] Proof at the hearing is confined to the verification of exhibits; (*k*) and it will scarcely ever be received where any thing except handwriting is to be established. (*l*)

(*k*) *Graves v. Budget*, 1 Atk. 444. 3 Bibb, 199.

(*l*) *Eade v. Lingood*, 1 Atk. 203. 2 Fow. Ex. Pr. 188. 2 Ves. sen. 473.

Co. 6 id. 229. This discretion is reviewable on a motion for a new trial, but not on a bill of exceptions. (*Nolton v. Moses*, 3 Barb. 31.) And it is within the ordinary discretion of the judge presiding at the trial, to refuse to allow the plaintiff to re-open the case, after the defendant has rested. (*Henry v. Lowell*, 16 Barb. 268; *Anthony v. Smith*, 4 Bosw. 503.) The order of proof, on a trial is also in the discretion of the judge, and his decision is not reviewable. (*Bedell v. Powell*, 13 Barb. 183; *Seeley v. Chittenden*, 4 How. Pr. 265.) So, whether a witness shall be put upon his own *voir dire*, or the oath in chief be administered. (*Seeley v. Engell*, 17 Barb. 530.)

A party calling a witness may be called upon by his adversary to state what he proposes to prove by him, and must do so. (*Beal v. Finch*, 11 N. Y. 128; S. C. 9 How. Pr. 385.) And where a conversation between persons is offered in evidence, it is for the party offering it to disclose how it may be material. (*First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.* 23 How. 448; S. C. 28 N. Y. 153.)

The general rule, in litigated cases, is, for each party to put in all his evidence before resting, and afterwards be confined to evidence in reply. (*Seeley v. Chittenden* 4 How. Pr. 265; *Ayrault v. Chamberlin*, 33 Barb. 264.)

The court in which an action is tried, may, in the exercise of its discretion, exclude disparaging questions not relevant to the issue, on the cross-examination of a witness, though put for the avowed purpose of impairing his general credit, on the objection of the party, without the witness claiming his privilege. (*Third Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; *Varona v. Socarras*, 8 Ab. 302.) On questions of this nature, the decision of the original tribunal is not subject to review, except in cases of manifest abuse or injustice. (*Ibid.*) A court has the power to restrain the abuse of the right of cross-examination, and to prevent a vexatious or improper delay in the progress of a trial. (*Peck v. Richmond*, 2 E. D. Smith, 380.)

The right of counsel cross-examining a witness, to inquire into collateral facts, for the purpose of discrediting the witness, is in the discretion of the court; and the decision of the judge at the circuit is conclusive, except in a clear case of abuse of discretion. (*Allen v. Bodine*, 6 Barb. 383. See *Graham v. Crystal*, 2 Keyes, 21; S. C. 37 How. 279.) If the opposite party desires to cross-examine a witness, he should do so while the witness is on the stand; unless the court, for some good reason, allows him the privilege of doing so at a subsequent stage of the trial. (*Sheffield v. Rochester & Syracuse R. R. Co.* 21 Barb. 339.) The judge, at the trial, may permit a party examined as a witness, to be asked, on his cross-examination, with a view of discrediting him, if he has not sworn falsely in a particular suit, or on some specified occasion; for that would be an act of his, which, if he admitted, he might possibly explain; but he has not discretion to permit the question, whether other persons have not accused him of swearing falsely. (*Hannah v. McKillip*, 49 Barb. 342.) For the purpose of affecting his credit, a witness may, on his cross-examination, be interrogated as to his religious belief, to show that he does not believe in the existence of a God who will punish false swearing. (*Stunbro v. Hopkins*, 23 Barb. 265.)

Counsel may be required to state the grounds of his objection to a question put to a witness. (*Harris v. Panama R. R. Co.* 5 Bosw. 312; *Elwood v. Deiefendorf*, 5 Barb. 398.) And such objection, where no grounds are stated, cannot be taken advantage of on appeal. (*Shaw v. Smith*, 3 Keyes, 316; S. C. 5 Ab., N. S. 129; 1 Trans. Ap. 238.)

An objection to the admissibility of evidence, so broad in its terms that, if sustained, it would exclude admissible testimony, is not available, on review. (*Wilson v. New York Central R. R. Co.* 2 Trans. App. 298; S. C. 3 Keyes, 381. The exception, in order to be available, must point out specifically, the particular portion deemed objectionable. (*Id.*) Unless the grounds are apparent without such statement, or are such that, if stated, they could not be obviated. (*Fillo v. Jones*, 4 Keyes, 328; *Sawyer v. Chambers*, 43 Barb. 622; S. C. 44 id. 42; *Brookman v. Hamill*, 54 id. 209.)

Objections to the competency of individual answers given by a witness cannot be raised under a general objection to his competency. (*Anon.* 3 Ab. 102.)

Ancient records and writings may be proved at the hearing; (*m*) and office copies of records. (*n*) So, deeds, bonds, or other instruments which require proof of their due execution by a subscribing witness or witnesses; or promissory notes, bills of exchange, letters or receipts of which proof must be made of the handwriting of the persons writing or subscribing the same, are all considered as exhibits which may be proved, *viva voce*, at the hearing. (*o*)

It is to be observed that, with the exception of documents coming out of the hands of a public officer having the care of such documents,

(*m*) 2 Fow. Ex. Pr. 157.

(*n*) 2 Dan. 442.

(*o*) Id. ib.

Where testimony is offered which is relevant as to one of two defendants, but irrelevant as to the other, it must be objected to by the latter on that ground, and not by both. (*Black v. Foster*, 28 Barb. 387; S. C. 7 Ab. 406.)

An exception to a question put to a witness must be taken before the question is answered, and not afterwards. (*Cheesebrough v. Taylor*, 12 Ab. 227.)

The refusal of the court to permit a witness to answer a question put to him is not error, unless it appears that the answer might be material to the question at issue. (*Pratt v. Strong*, 3 Keyes, 53.) If improper evidence is received, under objection, the error is not cured by subsequently striking it out, and directing the jury to disregard it, if the verdict cannot be supported without it. (*Mandeville v. Gurney*, 51 Barb. 99.) The reception of incompetent testimony, duly objected and excepted to, is ground for reversal; unless it is obvious that it could not possibly have injured the opposite party. (*Wilson v. Wilson*, 4 Keyes, 413.) When evidence offered in defence is excluded on the ground that it is not warranted by the pleadings, the party should offer it again, in mitigation of damages, if he desires to avail himself of it for that purpose. (*Travis v. Barger*, 24 Barb. 614.)

If an offer of evidence contains any matters not admissible, the whole may be rejected. (*Hosley v. Black*, 26 How. 97; S. C. 28 N. Y. 438; *Harger v. Edmonds*, 4 Barb. 256.)

Whether a witness is *credible* or not, is solely a question for the consideration of the jury. (*Merritt v. Lyon*, 3 Barb. 110.) The jury must determine the credibility of the witness, at the time he testifies. (*The People v. Haynes*, 38 How. 369.) A witness's credibility cannot be impeached by proof of any single act of bad conduct. (*Varona v. Socarras*, 8 Ab. 302.) It is not error not to give credit to the testimony of a witness upon a point where his testimony stands uncontradicted; when he has testified in direct conflict with other witnesses and the finding of the court upon the principal questions of fact in the case. (*Tomlinson v. Miller*, 3 Keyes, 517; S. C. 3 Trans. Ap. 250.)

After a party has introduced evidence before a jury, on the trial of an action, he cannot withdraw it, on finding that it does not answer his purpose. (*Decker v. Bryant*, 7 Barb. 182.) The judge, at circuit, has no power to strike out evidence bearing upon the issues, after it has been duly taken without objection; or to exclude it from the consideration of the jury. (*Hall v. Earnest*, 36 Barb. 585.) Where a witness testifies to facts not within his knowledge, his testimony cannot be stricken out. The only remedy is to show his want of knowledge by cross-examination. (*Rushmore v. Hall*, 12 Ab. 421.)

A party cannot impeach his own witness, directly or indirectly; but if surprised by his testimony, he may show by other witnesses that the facts are otherwise. (*Hunt v. Fish*, 4 Barb. 324.)

On the direct examination of a witness, as to the character of another, the only proper inquiry is as to the general moral character of the latter, and his public reputation as a truthful or untruthful person. It is not permissible for the assailing party to show specific acts of immorality or misconduct, with the view of impeaching or discrediting a person as a witness. (*Wehrkamp v. Willett*, 1 Keyes, 250.) When husband and wife are parties to an action, the statute, in terms, makes them competent witnesses in their own behalf, or in behalf of any other party. As such witnesses, they are subject to the same rules of examination, except that they are protected from being required to make disclosures of communications between themselves. (*Ibid.*)

(which are proved by the mere examination of the officer to that fact,) no exhibit can be proved, *viva voce*, at the hearing, that requires more than the proof of the execution or of handwriting, to substantiate it. (*p*) If it be any thing that admits of cross-examination, or that requires any evidence besides that of handwriting, it cannot be received. (*q*) Therefore a will cannot be so proved; because the sanity of the testator, and other requisites under the statute, must be proved. (*r*)

This rule is so strictly adhered to that in many cases where an instrument which, *prima facie*, appears to be an exhibit, requires more formal proof, it cannot be received as one. Thus, in the case of *Earl Pomfret v. Lord Windsor*, (*s*) the court refused to admit certain receipts to be proved *viva voce*, although ordinarily they might be taken as exhibits; because, in order to make them evidence of the fact they were intended to substantiate, a further fact must have been proved which the other side would have had a right to controvert and cross-examine upon. So where a deed was offered in evidence, the subscribing witnesses to which were dead, and witnesses were produced at the hearing to prove the handwriting of such witnesses, they were not allowed to be examined, because something more, viz. the death of the [*310] witnesses, was necessary *to be proved. (*t*) It has been also held that where a power is required to be exercised by a deed executed in the presence of, and attested by, witnesses, the deed by which the power is exercised cannot be proved, *viva voce*, at the hearing of the cause. (*u*) So where a book in which the collector of a former rector had kept accounts of the receipts of tithes, was offered to be proved *viva voce*, it was rejected, because, besides proving the handwriting, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes. (*v*)

If a document is impeached by the answer of a defendant, it cannot be proved *viva voce* on the part of the complainant against such defendant. Thus where the answer of one of the defendants in a cause insisted that a covenant was fraudulently inserted in a deed, &c., the court refused to admit such deed to be proved, *viva voce*, against that defendant; although it was held that it might have been so proved against the other defendant who had not impeached its authenticity. (*w*) So where a bill was filed for the payment of an annuity, the circum-

(*p*) *Lake v. Skinner*, 1 Jac. & Walk. 9. 15.

(*q*) *Id. ib.* *Emerson v. Berkeley*, 4 Hen. & Munf. 411. *Ellis v. Deane*, 3 Moll. 63.

(*r*) *Earle v. Lingood*, 1 Atk. 203. *Harris v. Tagglew*, 3 P. Wms. 93. *Niblett v. Daniel*, Bunb. 310.

(*s*) 2 Ves. 472.

(*t*) *Boxton v. Drewitt*, Prec. in Ch. 64.

(*u*) *Brace v. Blick*, 7 Sim. 619.

(*v*) *Lake v. Skinner*, 1 Jac. & W. 9.

(*w*) *Barfield v. Kelly*, 4 Russ. 355.

stances under which the annuity-deed was executed, being disputed by the parties, the complainant was not allowed to prove the deed, *viva voce*, as an exhibit; but leave was given to file interrogatories for that purpose. (x)

It is only, however, where the *execution* or the *authenticity* of a deed is impeached that it cannot be proved *viva voce*. If the *validity* of it only is disputed, it may be so proved. (y)

Order for.] No deed or other writing can be proved at the hearing, except on an order previously obtained, after due notice to the adverse party. (z)

The notice of motion for such an order must describe the deed with reasonable particularity. (a)

A copy of the order must be served upon the opposite party.

What documents may be read without being proved.] Documentary evidence, set out or distinctly referred to in the pleadings, and which is of itself evidence, without further proof—such as exemplifications of records, deeds duly acknowledged, &c.—may be read at the hearing, without notice to the adverse party, or any order previously obtained for *that purpose; although not made an exhibit before the ex- [*311] aminer. (b) And the 17th rule contains a provision that where any deed or other instrument in writing, which is duly acknowledged or proved in such a manner as to authorize it to be read in evidence, is stated in the bill, or where any judgment or other matter of record is set out or distinctly stated in the bill, such deed or instrument, or an authenticated copy of the record, may be read upon the hearing of the cause on bill and answer; unless the defendant has, in his answer, denied the due execution of such deed, &c., or the existence of such record.

The chancellor has decided that to authorize a complainant to read deeds or other instruments in writing under this rule, he must not only set out the deed, &c., in his bill, but that he must also state therein that such deed or instrument has been duly acknowledged or proved, in such a manner as to entitle it to be read in evidence without further proof. (c) It was also held in the same case that where the complainant, supposing that a deed set out in his bill had been admitted by the answer of the defendant, has omitted to file a replication and prove the execution of the deed, if he discovers his mistake for the first time at

(x) *Mabur v. Hobbs*, 1 Younge & Coll. 585.

(y) *Attorney Gen. v. Pearson*, 7 Sim. 309.

(z) Rule 75. See *Emerson v. Berkley*, 4 Hen. & Munf. 441. *Barrow v. Rhinelander*, 1 John. Ch. Rep. 559.

(a) 1 Hoff. Ch. Pr. 490.

(b) *Pardee v. De Cala*, 7 Paige, 132.

(c) *Latting v. Hall*, 9 Paige, 383.

the hearing of the cause on bill and answer, he should apply to the court to postpone the further hearing of the cause to a future day, to enable him to make a special application for leave to file a replication and prove the execution of the deed.

In the case of *De Peyster v. Golden*, (*d*) the cause was set down for hearing on bill and answer, and it was asked that certain receipts might be proved at the hearing; but leave was refused.

Examination of witness.] When the cause is called on and the exhibit required to be proved, the original order and the exhibit described therein, together with the witness to prove the same, are to be produced to the register or clerk; who will administer the usual oath. And by the English practice, the examination of the witness, as to the execution, &c., is also performed by the register. (*e*)

On a re-hearing or appeal.] A motion for leave to prove exhibits, *viva voce*, on a re-hearing before the lord chancellor, has also been granted, in a case where the exhibits were not proved on the hearing at the rolls; saving just exceptions. (*f*) And a similar order will be granted in the ordinary case of appeal; upon a special application and payment of costs. (*g*)

[*312] **Subpœna to testify viva voce.*] The attendance of an unwilling witness to prove an exhibit at the hearing, may be enforced by process of subpœna; which is to be issued in the same manner as subpœnas *ad testificandum* in other cases, and in a similar form.

A subpœna of this nature requires the same personal service as a subpœna to testify in other cases, and the same tender of fees as upon an examination before an examiner. (*h*) (30)

(*d*) 1 Edw. 68.

(*e*) Hinde. 371.

(*f*) Walker v. Symonds, 1 Meriv. 37, n.

(*g*) Higgins v. Mills, 5 Russ. 287.

(*h*) See ante, p. 280. 2 Dan. Ch. Pr. 445.

(30) The constitution of 1846, (Art. VI, sec. 10,) provides that the testimony in equity cases shall be taken in like manner as in cases at law.

CHAPTER XI.

HEARING.

Sect. 1. PRELIMINARY PROCEEDINGS.

2. HEARING OF THE CAUSE.

SECTION I.

PRELIMINARY PROCEEDINGS.

Notice of hearing.] (1) After the proofs are closed, either party may notice the cause for hearing at the next or any subsequent term, and have it entered on the calendar of causes for the term. (a)

(a) Rule 88.

(1) NOTICE OF TRIAL.

Either party may give notice of trial at any time after issue, and at least fourteen days before the court, in case of personal service, (Code, § 256,) or sixteen days, including the day of service, when the service is by mail. (Code, § 412.) In the first judicial district there need be but one notice of trial from either party, and the action shall then remain on the calendar until disposed of; and when called, may be brought to trial by the party giving the notice. (Code, § 256.)

In the computation of the time for service of notice of trial, the day of service of the notice should be excluded, and the first day of the court included. (*Dayton v. McIntyre*, 5 How. Pr. 117; S. C. 3 Code Rep. 164; Code, § 407.)

Section 407 of the Code establishes a general rule for computing time, notwithstanding section 256. (*Easton v. Chamberlin*, 3 How. Pr. 412; *Bissell v. Bissell*, 11 Barb. 96.)

If no notice of trial has been given, or the notice is clearly irregular or insufficient, a verdict obtained by the plaintiff will, on proper application, be set aside. (*Jenks v. Payne*, 15 John. 399.)

When all the defendants appear, but one or more of them does not put in an answer, it is necessary to give them all notice of trial—those who do not answer as well as those who do. (*Tracy v. New York Steam Faucet Co.* 1 E. D. Smith, 349.)

The provision in section 256 of the Code, that in the first judicial district there need be but one notice of trial from either party, does not apply to notice of argument on an appeal to the general term. (*Walsh v. Gregory*, 19 Ab. 363.)

When there are two or more actions pending between the same parties, one of which only is noticed for trial, the notice will be considered insufficient, unless it specifies which action is meant to be brought to trial. (*Lisher v. Parmelee*, 1 Wend. 22.)

Unless all the defendants have been served with the summons, or have appeared in the action, it cannot be brought on to trial by one or more of the defendants who have been served. (*Morris v. Crawford*, 16 Ab. 124; *Ward v. Dewey*, 12 How. Pr. 193.)

While a judgement rendered on issue joined without notice of trial, or appearance at the trial, is not *ipso facto* void, it is irregular, and liable to be vacated on motion. (*People ex rel. Barrett v. Bacon*, 18 Mich. 247.)

The plaintiff must serve a notice of trial upon every defendant who has separately appeared in the action, either by attorney or in person; otherwise he cannot bring on the cause as against those with respect to whom he had omitted so to do. (*Van Sant. Eq. Pr.* 329.)

Under ordinary circumstances it is not necessary for a defendant to serve his co-defendants with a notice of trial; yet it has been recommended as prudent practice

If the complainant does not reply to the defendant's answer within ten days after it is deemed to be sufficient, the cause will stand for hearing on bill and answer; and either party may notice it for hearing as soon as it is in readiness for hearing against the other defendant, if there are any. (b).

It is not necessary to obtain an order, to set the cause down for hearing. (c)

Notices of hearing must be served upon the opposite party, where [*313] his *solicitor resides over one hundred miles from the place where the court is held, at least eight days before the commencement of the term; if he resides over fifty and not exceeding one hundred miles from such place, six days; and in all other cases at least four days previous to the term. (d)

Causes must be noticed for hearing for the first day of term, or for as early a day in term as practicable. But if a cause is not in readiness for hearing in time to notice it for the first day in term, it may be

(b) Rule 65.

(c) Rule 88.

(d) Rule 89.

to do so where a defendant seeks affirmative relief as against his co-defendants. (1 Whit. Pr. 596.)

Although notice of trial may be given immediately on issue being joined, yet a notice so given is liable to be defeated if, between the time of service and the sitting of the court, the opposite party amends his last pleading, which, of course, raises a new issue that requires to be noticed anew. (Van Sant. Eq. Pr. 329.) It seems, however, the plaintiff is not bound to proceed immediately on joining issue, but may wait until the time to amend has expired, and even a reasonable time to prepare for trial after that, before he will be in default for not bringing on his cause, under Rule 27 of the court. (Id. 330.) But when the defendant has given notice of trial, he waives his right to amend, and the plaintiff, after a reasonable time to prepare, is bound to go on. (Ibid.)

In *form*, the notice of trial is similar in all respects to that in use in actions at law, except that the intention to take an *inquest* should not be inserted, because an inquest is not appropriate to an action of an equitable nature. (Van Sant. Eq. Pr. 330.)

Issues of fact, in equity cases, may be noticed and placed upon the calendar of either a circuit court or special term in the county where the action is triable, unless an issue has been ordered to be tried by a jury, in which case the action must be placed on the circuit calendar. The special term at which an equity cause can be noticed, however, is a special term appointed for the trial of equity actions and issues of law, and not a special term for the hearing of motions only. The latter kind (except in the first judicial district) have no calendars. (Van Sant. Eq. Pr. 331.)

The action must not only be in readiness for trial as between all the parties, but it must also have been noticed for trial by all the defendants who have a right to appear on the trial and move for judgment against the plaintiff. Where the action has not been noticed for trial by the plaintiff, and only one of several defendants who have appeared and answered has noticed it, no effectual trial can be had. The plaintiff cannot be forced to a trial in such a case. (*Ward v. Dewey*, 12 How. Pr. 193; *Tracy v. N. Y. Steam Faucit Manuf. Co.* 1 E. D. Smith, 349; *Burnham v. De Bevoise*, 8 How. Pr. 159; *Powell v. Finch*, 5 Duer, 666.) If a plaintiff fails to prosecute his action against several defendants with diligence, one of such defendants may, in a proper case, and upon motion for that purpose, have the action dismissed as against him, leaving it to stand against the other defendants. In such a case a notice of trial will be of no avail, unless given by all the defendants who are parties to the issues to be tried. (Ibid.)

The same notice of trial is required where the hearing is before a *referee* as when the trial is before a jury or before the court. (*Welter v. Schlieper*, 7 Ab. 92.)

placed at the foot of the calendar; and if the bill has been taken as confessed, may be heard out of its regular order. (e)

Note of issue.] (2) The solicitor noticing the cause for hearing, must furnish the register, assistant register, or clerk, who is to make up the calendar, with a note of issue specifying the class to which the cause belongs, and the time from which it is entitled to priority. This must be furnished at least four days before the commencement of the term. (f)

Notice to the register to set down the cause, is not necessary, or taxable; the note of issue being all that is necessary. (g)

Case and abbreviation of pleadings.] When a cause is heard or submitted, if the parties do not agree upon a case to be signed by them, containing, with all requisite brevity, a statement of the pleadings and proofs, the complainant must furnish the court with a case. This should state the times of filing the bill and other pleadings, the names of the original parties, the change of parties, if any has taken place, and a very brief history of the proceedings in the cause. And it should contain an abbreviation of the pleadings, not exceeding one sixth of the number of folios contained in such pleadings. (h)

Method of making up the calendar.] (3) In making up the calendar,

(e) Rule 92.

(g) *Doe v. Green*, 2 Paige, 347.

(f) *Idem*.

(h) Rule 90.

(2) The Code requires that the party giving notice of trial shall furnish the clerk, at least eight days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue. (Code, § 256.) In the first judicial district there need be but one note of issue from either party, and the action shall then remain on the calendar until disposed of, and when called, may be brought to trial by the party giving the notice. (*Ibid.*) In every action in the supreme court of the first judicial district, or in the superior court of the city of New York, the party who shall file a first note of issue of fact, shall, as a condition precedent to such filing, pay to the clerk of the court the sum of three dollars, (towards the stenographer's fund.) (*Ibid.*)

The notes of issue to the clerk should always show what the issue for trial is, so that the causes may be placed on the calendar, and called in their relative order. (*Per E. D. SMITH, J. 13 How. Pr. 345.*)

The court will not fix the date as of which the cause shall be placed on the calendar; and if it is placed there as of a wrong date of issue, the error may be corrected, on motion, at the circuit. (*North v. Sargent*, 14 Ab. 224.)

The defendant, as well as the plaintiff, should file a note of issue, if he designs to compel the plaintiff either to proceed with the action or be driven out of court; for there can be no dismissal of the complaint until the cause is on the calendar. (*Van Sant. Eq. Pr. 330.*) And it has even been held that it cannot be dismissed until put regularly on the calendar; that is, placed there by the party giving the notice, on a regular note of issue filed eight days previous to the sitting of the court. (*Browning v. Paige*, 7 How. Pr. 487.)

In the New York superior court, the New York common pleas, and in the first and second judicial districts, special rules have been adopted in regard to filing notes of issue, &c., which can readily be consulted. (*Van Sant. Eq. Pr. 330.*) So, also, in the 3d and 4th judicial departments. (See *Wait's Code*, 878, 880.)

(3) Section 257 of the Code directs that the issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties, or the dis-

the causes to be heard are arranged in the following classes. 1st. Causes to be heard on bills taken as confessed, which are entered according to priority from the date of the order to take the bill as confessed. 2d. Pleas and demurrers; which have priority from the time of filing the

patch of business, the court shall otherwise direct: 1. Issues of fact to be tried by a jury; 2. Issues of fact to be tried by the court; 3. Issues of law.

By chapter 433 of the Laws of 1869, § 5, actions by widows for *dower* are, in certain cases, to have a preference upon the calendar of the court.

By section 1 of chapter 49 of the Laws of 1870, actions in which *executors and administrators* are sole plaintiffs or sole defendants, and actions for the *construction of, or adjudication upon, a will*, in which the administrators with such will annexed, or the executors of such will, are joined as plaintiffs or defendants with other parties, shall have a preference in the court of appeals, and in the supreme court at the general, special, and circuit terms thereof, over all actions, except in criminal cases, and may be moved out of their order accordingly. Certain actions brought by the *attorney general* are also to have a preference on the calendar. (Laws of 1850, ch. 123; Laws of 1858, ch. 37.)

Rule 48 of the supreme court directs that the clerk shall prepare a calendar for the general term, and cause the same to be printed for the use of each of the justices holding the court. Appeals shall be placed on the calendar according to the date of the service of the notice of appeal, and other cases as of the time when the question to be reviewed arose. Cases entitled to a preference shall be placed on a separate calendar.

By rules adopted for the third judicial department, Feb. 7, 1871, provision is made for a calendar of appeals from orders. (See Wait's Code, p. 846, 878, 880.)

By rules adopted for the fourth judicial department, June 8, 1870, provision is made for the calendars of the courts in that department. (See Wait's Code, p. 879.)

Inquests may be taken in actions out of their order on the calendar, in cases in which they were heretofore allowed, at the opening of the court, on any day after the first day of the court, provided a sufficient affidavit of merits shall have been filed and served. (Rule 36.)

The provisions of 2 Rev. St. 459, § 11, are still in force, viz: "that every issue in an action on any evidence of debt against a corporation shall have a preference on the trial and argument thereof in any court where the same may be pending." (*Brainard v. New York & Harlem R. R. Co.* 23 How. 491.)

The court has entire control over its calendar, and may regulate the order of the trial of the cases brought before it. (*Maretzek v. Cauldwell*, 4 Rob. 666.) At the circuit, issues of fact to be tried by the jury should be placed first on the calendar, in their order, according to the dates of their respective issues. Demurrers, and other issues of law and issues of fact to be tried by the court, should be placed by themselves, forming a separate class, as at the special term. Demurrers have the preference, and then other issues of law and issues of fact to be tried by the court last. This is the only rational method of getting over the inconsistency of §§ 255 and 257 of the Code, and giving to issues of law the preference obviously intended for them. (Per E. D. SMITH, J. 13 How. Pr. 345.)

A party not finding a cause on the calendar for the term stated in the notice of trial, is not bound to examine the calendar from term to term to ascertain whether the cause is in a condition to be called. (*Culver v. Felt*, 4 Rob. 681; S. C. 30 How. 442.) The party must place his cause on the calendar for the term mentioned in the notice of trial; otherwise a new notice of trial must be given for a subsequent term. (Ib.)

The court will not fix the date as of which a cause shall be placed upon the calendar; and if it is placed as of a wrong date of issue, the error may be corrected, on motion, at the circuit. (*North v. Sargent*, 14 Ab. 224.) A motion to have the calendar corrected should be made on the day of opening the circuit. It is too late to do so on the Thursday following the first Monday. (*Anonymous*, 28 How. 394.)

It seems that counsel have the right to rely upon the presumption that the causes upon the calendar will be heard in their regular order; and that they may act on that presumption in determining how long a time they will have for preparation. (*Belmont v. Erie Railway Co.* 52 Barb. 637.)

It is irregular to take a dismissal of the complaint, founded upon service of notice of trial or hearing, unless the cause has first been placed upon the calendar. (*Browning v. Paige*, 7 How. Pr. 487.)

same. 3d. Causes to be heard on bill and answer; which take priority from the time when the answer was put in. 4th. Causes to be heard on pleadings or on pleadings and proofs; which have priority from the time the replication was filed.

Causes to be heard on exceptions, or upon the equity reserved in a decretal order, must be placed in the class to which they belonged *before the decretal order or reference, and according to their [*314] priority at that time. And causes for re-hearing are to be arranged in the same manner.

Appeals from orders, decrees, or sentences of the vice-chancellors or surrogates, when necessary to be placed on the calendar, have priority in the several classes and over other causes in the same class, except such as are specially directed to be heard before the chancellor, from the time when the matter arose before the vice-chancellor or surrogate. (*i*)

Appeal causes are to be placed on the chancellor's calendar, as of the same date at which they were entitled to be placed on the calendar of the court below. (*k*) An appeal from the decision of the surrogate upon a summary application, is not to be placed on the calendar, but is heard as a special motion. (*l*)

The court, in hearing calendar causes, however, may, in its discretion, give a preference to any particular cause or description of causes.

And mortgage causes of the 4th class are entitled to a preference over any other causes of the same class; unless the defendant, previous to the hearing, files an affidavit of merits, and that his answer has not been put in for delay. The filing of this affidavit should be noted on the calendar. (*m*)

Papers necessary to be furnished.] Where the cause is heard or submitted on *plea or demurrer* or on *bill and answer*, except in mortgage and partition causes, where the complainant's rights are not contested, the court must be furnished with copies of the pleadings and an abbreviation thereof not exceeding one sixth of the number of folios contained in the originals. (*n*) (4)

(*i*) Rule 91.

(*k*) *Belknap v. Tremble*, 2 Paige. 277.

(*l*) *Wood v. Wood*, M. S. Nov. 20th, 1833.

(*m*) Rule 91.

(*n*) Rule 93.

(4) When the issue shall be brought to trial by the *plaintiff*, he shall furnish the court with a copy of the summons and pleadings, with the offer of the defendant, if any shall have been made. When the issue shall be brought to trial by the *defendant*, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant. (Code, § 260.)

If the cause is heard on *bill, answer and replication*, or on *pleadings and proofs*, in addition to the case required by the 90th rule, the court is to be furnished with copies of the pleadings, and of the depositions, if any, and with short abstracts of the exhibits.

On an *appeal or rehearing*, a copy of the decree or order appealed from or reheard, must be furnished, and copies of the pleadings, abstracts, cases, depositions, &c., on which the same was founded, a copy of the notice of appeal filed with the clerk, and of the vice-chancellor's opinion if one was delivered, and a copy of the minutes of the clerk showing what papers were read or used, or offered or rejected upon the hearing in the court below. (*o*)

[*315] *And the court has decided that, upon the hearing of an appeal from the sentence or decree of a surrogate, the papers to be furnished for the use of the chancellor are, the copy of the surrogate's return, including a transcript of the appeal as entered in the court below, and copies of the petition of appeal and of the answer thereto, filed in the appellate court, and a copy of the points upon the appeal. (*p*)

It is the duty of the clerk of the vice-chancellor to enter in the minutes of the court, a statement of the pleadings, depositions, affidavits, &c., read or agreed to be considered as read, upon the hearing of the cause before the vice chancellor, or which were offered and rejected. And where any mistake has occurred, by the neglect of the clerk to enter a paper as read which was in fact read or agreed to be considered as read in the court below, the minutes may be corrected on application to the vice-chancellor. But papers which were not in fact used or agreed to be considered as read there, nor offered and rejected, cannot be used on the hearing of the appeal. (*q*)

Upon *exceptions to a master's report*, copies of the order of reference, report and exceptions, and of such parts of the evidence before the master, and of the pleadings, as are material, must be furnished.

Where the cause is heard upon the *pleadings and the verdict of a jury*, a copy of the order and master's report directing and settling the issue, and a copy of the clerk's minutes of the trial and verdict, are to be furnished in addition to the case and proceedings.

The necessary papers must be handed to the court when the hearing of the cause commences. (*r*)

By whom papers are to be furnished.] If the cause is heard or submitted on *plea or demurrer*, or on an *appeal*, or on *exceptions to a master's report*, or on a *rehearing*, the papers must be furnished by the

(*o*) Rule 93.

(*q*) *Studwell v. Palmer*, 5 Paige, 163.

(*p*) *Halsey v. Van Amringe*, 6 Paige, 12.

(*r*) Rule 93.

party pleading, demurring, appealing, or excepting, or who obtained the rehearing, except on appeals from the vice-chancellors, where the respondent or party principally interested in, or entitled to the benefit of the order or decree, has given notice of his election to furnish the necessary papers; in which case, the latter is to furnish them.

In all other cases, the papers must be furnished by the complainant; except that on an original hearing upon pleadings and proofs, each party must furnish copies of the testimony and abstracts of the exhibits, on his part only.

And each party must deliver to the court and to the adverse party, a copy of the points on which he relies; and he may also deliver to the *court and to the adverse party, a draft of the minutes of the [*316] decree to which he thinks himself entitled. (s)

Notice of motion to suppress depositions.] Where a party, upon the examination of witnesses before an examiner or a commissioner, has objected to the competency of any witness, or to the relevancy or propriety of any question, he may, at the hearing, apply to have the deposition suppressed, or the objectionable testimony expunged. But he must give due notice of such application, to the opposite party. (t) (5)

(s) Rule 75.

(t) Rule 85.

(5) OFFER TO COMPROMISE.

It is provided by section 385 of the Code, that the defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. The section then specifies the consequences of acceptance or non-acceptance of the offer. And in case the defendant sets up a counter-claim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below \$50, the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counter-claim to the amount specified, with costs. And the consequences of acceptance or non-acceptance of such offer are also stated.

The offer of judgment, under this section, is not confined to actions upon contract, nor to actions against a sole defendant, but may be made in all actions. (*Bridenbecker v. Mason*, 16 How. Pr. 203. See, also, *Keese v. Wyman*, 8 id. 88; *Hill v. Northrop*, 9 id. 525; *Marble v. Lewis*, 58 Barb. 432; S. C. 36 How. 337.) But if made to avoid the provisions of § 382 of the Code, the court may set it aside. (*Ross v. Bridge*, 15 Ab. 150; S. C. 24 How. 163.)

The offer should be so distinctly made that there can be no doubt or misunderstanding about it. (*Post v. New York Central R. R. Co.* 12 How. Pr. 552.) It will be of no avail unless it expressly states that judgment for the sum offered may be taken, with costs. (*Ranney v. Russell*, 3 Duer, 689.) There must be no condition attached to it, and nothing left to be ascertained or determined before the entry of judgment. (*Pinckney v. Childs*, 7 Bosw. 660; S. C. 15 Ab. 137, n.; *Hannah v. Dexter*, id. 136.) The offer may be for the full sum demanded in the summons and complaint, (*Ross v. Bridge*, 24 How. 163; S. C. 15 Ab. 150,) or it may be for the difference between the amount claimed in the complaint and a set-off or counter-claim set up in the answer, where such balance is susceptible of being ascertained by computation. (*Burnett v. Westfall*, 15 How. Pr. 420; S. C. aff'd, id. 525, n.)

An offer to allow judgment, signed by the defendant's attorney, is equivalent to an offer signed by the defendant himself (*Sterne v. Bentley*, 3 How. Pr. 331; S. C. 1 Code Rep. 109.) In *Webb v. Dill*, (18 Ab. 264,) it is held that where a defendant has appeared by attorney, the offer should be made and signed by the attorney; but

if, in such a case, the offer is made by the defendant in person, leave of the court should be obtained to enter judgment upon it.

In an action on a joint and several obligation, against several defendants, the plaintiff is not bound, at the peril of being subjected to costs, to accept an offer of judgment from a part of the defendants only. (*Griffiths v. De Forest*, 25 How. 336; S. C. 16 Ab. 292.) But, in an action against several defendants, on a joint demand, a defendant served with process may bind his co-defendants who are not served, by an offer of judgment; and if the plaintiff accept such offer, he may enter judgment against all the defendants, as joint debtors, and enforce it against the joint property of all, and the separate property of the defendant who made the offer. (*Emery v. Emery*, 9 How. Pr. 130; *LaForge v. Chilson*, 3 Sandf. 752; S. C. 1 Code Rep., N. S. 159.) And where, in such an action, some of the defendants make no defence, and the rest serve an offer, the plaintiff will be subject to costs if he proceeds and fails to recover more than the amount offered. (*LaForge v. Chilson*, *supra*.) Yet, where two defendants were regularly served with summons, and one of them, without the authority of the other, authorized an attorney to appear for both, who served an offer which the plaintiff accepted, and took judgment, the other defendant was permitted to come in and defend; the judgment, in the meantime, being allowed to stand as security. (*Blodgett v. Conklin*, 9 How. Pr. 442. And see *Yates v. Horanson*, 7 Rob. 12.)

One partner cannot, contrary to the known wishes, and against the explicit objections, of his co-partner, make an offer of judgment in favor of a partnership creditor, in the name of the firm, which will bind his co-partner, or the partnership property. (*Ererson v. Gehrman*, 10 How. Pr. 301; S. C. 1 Ab. 167; *Binney v. LeGal*, 19 Barb. 592; S. C. 1 Ab. 283.) But when an attorney appears for both, and there is no contrivance in employing him to appear, his appearance on the record may make the judgment regular. (*Binney v. LeGal*, *supra*; *Bridenbecker v. Mason*, 16 How. Pr. 203.) Yet, in *Owll v. McLaughlin*, (10 N. Y. Leg. Obs. 316,) the court refused to set aside a judgment entered upon the offer of one partner in a firm in failing circumstances, in favor of a bona fide partnership creditor, on motion of the other member of the firm who was not cognizant of, nor consented to, the proceeding.

An amendment of his pleadings by the plaintiff after the offer, will not deprive the defendant of the benefit of his offer if the plaintiff fails to recover a more favorable judgment. (*Kilts v. Secber*, 10 How. Pr. 270.)

The judgment recovered is not "more favorable" when the sum offered, with interest to the date of the judgment, exceeds the amount recovered, in which case the defendant is entitled to costs. (*Tilman v. Keane*, 1 Ab., N. S. 23.) In determining whether a judgment is more favorable to the plaintiff, he is entitled to the benefit of any counter-claims which the defendant may interpose subsequent to the offer, and which are extinguished by the judgment. (*Tompkins v. Ives*, 36 N. Y. 75; S. C. 3 Ab., N. S. 267; *Ruggles v. Fogg*, 7 How. Pr. 324; *Fieldings v. Mills*, 2 Bosw. 489.) In an action on a bond secured by mortgage, to recover the penalty by reason of default in the payment of interest, a judgment for the interest due is more favorable to the plaintiff than an offer of the whole amount secured by the bond and mortgage, not yet due, with interest and costs. (*Howard v. Farley*, 29 How. 4; S. C. 18 Ab. 367. See *Bettis v. Goodwill*, 32 How. 137.)

The direction of a judge is not necessary to the entry of a judgment upon an offer. (*Hill v. Northrop*, 9 How. Pr. 525; *Yates v. Horanson*, 7 Rob. 12.)

Where, in an action upon contract, at issue and noticed for trial, the plaintiff accepts the offer of the defendant to allow judgment against him for an amount less than fifty dollars, the defendant is entitled to costs. (*Johnson v. Sagur*, 10 How. Pr. 552.)

Where the plaintiff fails to obtain a more favorable judgment than the offer made by the defendant, he is not entitled to costs, whether disbursements or otherwise, after the offer made by the defendant, but is entitled to costs up to the time the offer was made. The defendant, in such a case, is entitled to costs from the time of his offer. (*Burnett v. Westfall*, 15 How. Pr. 430. See *Keesee v. Wyman*, 8 How. Pr. 88.)

MOTION TO SATISFY PART OF DEMAND ADMITTED.

Section 244 of the Code directs that when the answer of the defendant, expressly or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

The remedy given by this clause of section 244, may be enforced either as a judgment or a provisional remedy; that is, by execution against the property, if the claim be on contract, and, in other actions, by process of contempt. (Van Sant. Eq.

Pr. 238.) Where a defendant, by his answer, admits a part of the plaintiff's claim to be just, the court may, on motion, under this clause of the section, direct judgment to be given for the plaintiff for the amount of the claim admitted to be just, without prejudice to his right to proceed in the suit for the balance claimed by him. (*Duncan v. Ainslie*, 26 Barb. 199.) The legislature has given the court the power, when part of the plaintiff's claim is admitted, to enforce satisfaction, if it be in the case of a provisional remedy. (Ib.) But this provision cannot affect any demand, or any part of a demand, arising upon contract, where such contract is within the meaning of the first section of the act of 1831, abolishing imprisonment for debt. (*Lane v. Losee*, 11 How. Pr. 360.) Where it is sought to enforce the order as a provisional remedy, a judgment is not entered, but a mere order is allowed, directing the defendant to satisfy that part of the claim admitted to be just. (Van Santv. Eq. Pr. 238.)

The court will not make an order for payment under the above clause of section 244, unless the answer admits a specific sum to be due. (*Dolan v. Petty*, 4 Sandf. 673.) Such an admission is not made by an answer which traverses the plaintiff's claim, and adds that he is not entitled to more than a sum named, which is less than that claimed in the complaint. (*Dolan v. Petty*, 4 Sandf. 673.)

Where a partner, by his answer, admits that he has in his hands partnership funds, which on his statement appear to belong to the administrators of his deceased partner, he will be ordered to pay over such funds to them, although there are outstanding contested claims against the firm, and it has claims to enforce which will require time and disbursements. The order for such payment will, however, require the administrators to give security to the surviving partner to contribute to the outstanding claims, if established, and to pay their share of the expenses that may be incurred in prosecuting the demands of the firm. (*Roberts v. Law*, 4 Sandf. 642.) The surviving partner will also be permitted to retain sufficient to cover such claims against the deceased partner as are contested in the suit in which the order is made. (Ib.)

The order is obtained at special term, on the usual notice of motion or order to show cause. No papers, except the pleadings, are required on the argument, and consequently nothing is necessary to be served on the opposite attorney, except the notice of motion. (Van Sant. Eq. P. 239.)

The order will not be made where the defendants, by their answer, admit that they have in hand the fund which the plaintiff seeks to have paid over to him, but allege that they are ignorant whether the fund belongs to the plaintiff or a third person who claims it, and ask that they may be permitted to pay the money into court, or that the court may make some order in respect to its application. (*Bender v. Sherwood*, 15 How. Pr. 258.) This remedy is extraordinary and severe, and should be granted only in a case clearly within the terms and spirit of the statute. (Ib.) A provisional remedy is only auxiliary to the ultimate relief, and should never usurp or anticipate the office and effects of a trial on the merits. (*Popper v. Scheider*, 38 How. 34; S. C. 7 Ab., N. S. 56.)

Where a fund in litigation has been brought into court, and the defendant admits that a part of the fund is due to the plaintiff, the court may order the part so admitted to be due to be paid over to the plaintiff, without prejudice to his further claims. The circumstance that the defendant, both before and after the action was brought, has offered to pay to the plaintiff the sum so admitted to be due, provided it should be accepted in full satisfaction, or that he has offered to allow judgment to be taken for that sum, is no reason for refusing such order. (*Merritt v. Thompson*, 3 E. D. Smith, 599.) It seems that where a defendant is insolvent, or unable to make present payment, offers to suffer judgment to be taken, pursuant to § 385 of the Code, or makes the like offer in his answer, the court will be careful not to substitute an order that he pay the money, under § 244, to be enforced by an attachment for contempt, and the taking of his body in the place of an ordinary judgment and execution. (Ibid.; *Myers v. Trimble*, 3 E. D. Smith, 607; S. C. 1 Ab., N. S. 399; *Quintard v. Secor*, 3 E. D. Smith, 614.) But when the money is in court, and the defendant admits the sum due, and offers to pay it, the order should be granted. (Ibid.) It seems that on appeal from such an order the court will not review the discretion exercised at special term, in respect to the terms or conditions upon which the order was granted, where no right of the appellant, and no rule of law, are violated. (Ibid.)

Where the answer does not deny the demand alleged in the complaint, but sets up a counter-claim, the allowance whereof would still leave a balance due the plaintiff, the court is authorized to direct the defendant to satisfy such balance. (*Myers v. Trimble*, 3 E. D. Smith, 607.) And the order may be enforced by attachment, unless some excuse is shown. (Ib.) But it seems that it will not be enforced by attachment in any case where, on final judgment, there could be no execution against the

person. (*Lane v. Losee*, 11 How. Pr. 360; S. C. 2 Ab. 129; *Duncan v. Ainslie*, 26 Barb. 199; *Merritt v. Thompson*, 3 E. D. Smith, 600; S. C. 1 Ab. 223; 10 How. Pr. 428.)

Section 244 applies as well where the plaintiff's cause of action, as set up, is single and entire, and the answer admits a part thereof to be just, as where the complaint proceeds upon more than one cause of action, or more than one item of claim, one of which is admitted to the precise extent set up by the plaintiff; (*Quintard v. Secor*, 3 E. D. Smith, 614;) and as well, also, where the answer alleges that not more than a sum named is due, as where it concedes, affirmatively, that a certain amount is due. (Ib.)

MOTION TO COMPEL THE DEPOSIT IN COURT OF MONEY, OR OTHER PROPERTY, HELD IN TRUST.

Section 244 of the Code directs that when it is admitted, by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing *capable of delivery*, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs, or is due, to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

Under this subdivision of section 244, it has been held that where it appears by the pleadings that the plaintiff deposited money with the defendant, to pay for him to a third party, (the defendant being surety for the payment thereof to such third party,) which money is in the defendant's possession, the court will order it to be deposited in court, or paid to such third party. (*Burhans v. Casey*, 4 Sandf. 706.)

This provision of the Code applies only to cases where there is a question as to the proper distribution of the fund, and where it appears that the fund is in danger from the insolvency of the defendant, or any other cause. It is a mode for the safe keeping of a fund without the appointment of a receiver. But in order to authorize a resort to such a proceeding, it must appear, from the *admission* of a party, that he holds such a fund, which belongs to, or is due to, another party. (Van Sant. Eq. Pr. 270.) The motion is made either upon the pleadings, or the pleadings and examination, or other proceedings in the cause showing the *admission* of the defendant. No copies of any papers need be served, except the notice of motion, which must be served as in other cases. (Id. 271.) The motion is to be made at a special term of the court. (Ib.)

The property or thing directed to be brought into court, is to be deposited with the clerk of the county in which the action is triable. But if it be money, it is to be paid to the treasurer of the county where the action is triable, unless the court shall otherwise direct. (Rule 82 of Supreme Court.) And the rule directs as to the manner in which the county treasurer shall invest such moneys.

The chamberlain of the city and county of New York is to be considered the county treasurer thereof. (1 R. S. 370, § 29.)

When an order for the deposit of money or other property in court has been made, a certified copy should be served upon the party who is directed to make the deposit. If he refuse or neglect to comply with the order, the party obtaining it may move, upon proof of his refusal, and due notice of motion, for an attachment against him as for contempt in disobeying the order; and the proceedings will be the same as in other cases of proceedings for the punishment of contempts. (Van Sant. Eq. Pr. 271.)

In addition to the ordinary proceeding as for contempt, on the disobedience of such an order, section 244 of the Code, (subd. 5,) provides that "whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver or convey it, in conformity with the direction of the court."

As to the practice on motions for the *payment of money into court*, prior to the Code, see ante, p. 236.

OFFER TO LIQUIDATE DAMAGES CONDITIONALLY.

Section 386 of the Code provides that, in an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fail in his defence, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

If the plaintiff do not accept the offer, he shall prove his damages as if it had not been made, and shall not be permitted to give it in evidence. And if the damag-

assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defence in respect to the question of damages. Such expense shall be ascertained at the trial. (Code, § 387.)

The mere acceptance of an offer is not obtaining judgment, within the meaning of the statute. If the plaintiff neglects to obtain judgment, the defendant may apply for an order compelling him to do so. (*Lippman v. Petersberger*, 9 Ab. 209; S. C. 18 How. Pr. 270.)

By a failure to accept an offer made under the above sections, the plaintiff does not prejudice his right to recover the amount admitted by the answer to be due. (*Dusenberry v. Woodward*, 1 Ab. 443. See, also, *Smith v. Olssen*, 4 Sandf. 711.)

OBTAINING ADMISSION OF DOCUMENTARY EVIDENCE.

Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. (Code, § 388.)

Although it is not prescribed in terms, it is recommended that the exhibition of the document be accompanied by a written notice and request for an admission, as the proof of the giving of such notice will, in case of refusal, be more convenient and more satisfactory to the court than the adduction of exclusively verbal evidence. (1 Whit. Pr. 584.) Questions extending merely to the construction or purport of the instrument, apart from any as to its genuineness, or where the genuineness of it is not in question, though its real effect is, may be guarded against by a special form of admission; and no properly drawn request will require more than a mere dispensation from the necessity of giving technical evidence of the existence of such an instrument. (Ib.)

OBTAINING AN INSPECTION OF DOCUMENTARY EVIDENCE.

The proceedings for a discovery of books and papers to enable a plaintiff to frame his complaint, or the defendant his answer, have been already considered. (*Ante*, p. 210, note 3.)

Section 388 of the Code provides that the court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon due notice, order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers and documents in his possession or under his control, containing evidence relating to the merits of the action, or the defence therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or furnish the party refusing, or both.

This section is said to be more properly, and, perhaps, solely, applicable to proceedings taken after issue joined, with a view to obtain evidence, and prepare for trial. (1 Whit. Pr. 613; Van Sant. Eq. Pr. 273; *Keeler v. Dusenbury*, 1 Duer, 660; *Gelston v. Marshall*, 6 How. Pr. 398.)

Rule 18 of the supreme court provides that either party may be compelled to make discovery, as provided by § 388 of the Code; (*supra*;) that is, in case the book or document is shown to contain evidence relating to the action or defence. There is no authority to order it in any other case. (Van Sant. Eq. Pr. 274.)

It seems to be immaterial, however, whether the particular instrument would be evidence for or against the party seeking its production, the only limitation of the statute in this respect being that it shall be shown to be "evidence relating to the merits of the action or defence." Hence, it seems that under the present as under the former equity practice, a plaintiff seeking to enforce against a defendant an instrument which the latter believes to be forged, will, on the motion of the defendant, be ordered to produce it for inspection, in order to enable the defendant either to answer or prepare for trial. (Ib.; *Jones v. Lewis*, 2 Sim. & Stu. 242.)

The granting of the order is, in all cases, by the express terms of the statute, in the discretion of the court or judge applied to. (Ib. See *Van Zandt v. Cobb*, 12 How. Pr. 544; *Keeler v. Dusenbury*, 1 Duer, 660.) Therefore, in addition to showing the essential fact that the paper or document will be "evidence relating to the merits of the action or defence," the moving papers should also show the particular reasons which exist for the granting of such an order, so that a clear case for the exercise of a judicious discretion, in compelling the discovery, may appear upon the

SECTION II.

HEARING OF THE CAUSE. (6)

Before whom hearing to be had.] Whenever a cause which might be heard by a vice-chancellor, shall be ready to be set down for hearing, either party may apply to the chancellor for leave to set down the same for hearing before the chancellor; and he may direct the same to be set down accordingly, whenever, from the difficulty of the case, or for any other reason, he shall think proper. (*u*)

(*u*) 2 R. S. 178. § 69, (orig. § 63.)

face of the papers. (Van Sant. Eq. Pr. 274.) A general search and examination for evidence among the private books and papers of an adversary cannot be allowed. If the paper or document can be described, and its contents are known, the court can determine whether there shall be a production or inspection, and to what extent, and in what manner. If the applicant cannot specify, it cannot be necessary, safe or proper, to compel a general and unrestricted examination and inspection of the private books and papers of an adversary. (*Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 132; *Commercial Bank of Albany v. Dunham*, 13 How. Pr. 542.)

If the proceeding be under the Code, the order for discovery, in declaring the consequences of an omission to comply with it, may provide that the defaulting party be punished as for a contempt, which, it seems, cannot be done on a proceeding by petition under the statute. (Van Sant. Eq. Pr. 274.)

The order, being discretionary, is not reviewable on appeal. (Ib.)

(6) TRIAL.

1. Issues, what are.
2. Settling of issues.
3. What is a trial.
4. Place of trial.
5. Modes of trial.
 - (a) By jury.
 - (b) By the court.
 - (c) Before what court or judge.
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 - Reference, when ordered.
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 - Referees, how chosen; who may be.
 - Proceedings on the trial; power and duty of referee.
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Under the Code of Procedure, the *trial* takes the place of the *hearing* under the former chancery system.

1. *Issues, what are.*] Issues arise upon the pleadings when a *fact* or *conclusion* of law is maintained by the one party, and controverted by the other. They are of two kinds: 1. Of *law*; 2. Of *fact*.

An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof. An issue of fact arises: 1. Upon a material allegation in the complaint controverted by the answer; or 2. Upon new matter in the answer controverted by the reply; or 3. Upon new matter in the reply, except an issue of law is joined thereon. (Code, §§ 248, 249, 250.)

Applications of this nature are very rare. The chancellor is so overwhelmed with business that the case must be very difficult or the reason very substantial to induce him to grant such an application. The current usually sets the other way.

It has been decided that where a cause pending before a vice-chancellor is in readiness for hearing, but cannot be heard because such vice-chancellor, before his appointment, had been counsel in the cause, the

Issues both of law and of fact, may arise upon different parts of the pleadings in the same action. In such cases, the issues of law must be first tried, unless the court otherwise direct. (Code, § 251.)

In *Pardee v. Schenck*, (11 How. Pr. 500,) the complaint alleged that the defendant owed the plaintiff \$600. on a note; the answer did not deny it, nor say anything about the note, but alleged that the plaintiff owed the defendant \$40 for goods sold. The plaintiff made no reply to this. Held that there was no issue to be tried, and that the plaintiff could take judgment without a jury.

2. *Settling of issues.*] In cases where the trial of issues of fact is not provided for in § 253 of the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in § 72 of the Code of Procedure. (Rule 40 of Supreme Court.)

For the form of an order of reference to settle issues of fact, under this rule, see *Miller v. Wilson*, (1 Barb. 222,) and *Morrell v. Morrell*, (3 id. 236.)

The court will deviate from its general rules whenever, in its judgment, a proper case is presented, and allow a trial by jury, although the application therefor is made more than ten days after issue joined. (*Clark v. Brooks*, 26 How. 255.) But the application will come too late if made after the trial has commenced. (*People v. Albany & Susquehanna R. R. Co.* 7 Ab., N. S. 265; S. C. 38 How. 228; 55 Barb. 344; *O'Brien v. Bowes*, 10 Ab. 106; S. C. 4 Bosw. 657.) Yet the court may, for its own relief, at any time before the trial of the issues, invoke the aid of a jury, for their determination, or for the determination of any question of fact involved therein. (*Ibid.*)

On the trial of an issue of fact, in an equity case, the judge may submit to the jury such additional issues as are essential to bring to the view of the court all the facts material to a just and intelligent decision. (*Farmers' & Mechanics' Bank of Genesee v. Jostyn*, 37 N. Y. 353.)

3. *What is a trial.*] A trial is defined by the Code, to be the judicial determination of the issues between the parties, whether they be issues of law or fact. (Code, § 252.)

This definition of a trial, so far as an issue of fact is concerned, is said to be merely declaratory of the existing law. (*Dodd v. Curry*, 4 How. Pr. 123, per GRIDLEY, J.) It is true, the Code includes the examination of issues of law, as well as of fact, within the definitions contained in section 252; so that what was formerly an "argument," or "hearing," is now a trial; but this is the only difference between a trial under the Code, and under the former system of practice. (*Ibid.*)

When the merits of a cause are brought up, and the cause is placed on the calendar of the court, and the issues, whether of law or fact, and whether arising on the pleadings or out of subsequent proceedings, are presented to the court, and by the court judicially examined, there is a trial, within the meaning of the above section. (*Place v. The Butternuts Woolen & Cotton Manuf. Co.* 28 How. 184.) So, a non-suit, voluntarily submitted to, after evidence has been put in, is a trial. (*Allaire v. Lee*, 1 Ab. 125; S. C. 4 Duer. 609.) And a fee of \$12, for the trial of a cause, is allowable in an action at issue, where the plaintiff fails to appear when the cause is called upon the calendar, and the defendant takes an order that the complaint be dismissed. (*Dodd v. Curry*, 4 How. Pr. 123.) In such a case, the allowance of a fee for a trial of the cause is within the spirit and true meaning of the Code. The disposition of the case, when called on the calendar, by its final dismissal, is in pursuance of a notice of trial, and is, for all the purposes of the question, equivalent to an actual trial. (*Ibid.*) In *Tiltspaugh v. Dick*, (8 How. Pr. 33,) however, it is held that the dismissal

chancellor, upon application to him, may direct the cause to be heard before any other vice-chancellor, at a stated term of his court. And in such case the decree must be entered with the clerk of the circuit where the suit was pending; the name of the vice-chancellor before whom the cause was heard being inserted in the caption of the decree, instead of the name of the vice-chancellor of that circuit. (*v*)

Motion to suppress depositions.] In case notice has been given of a

(*v*) *Whitney v. Post*, 8 Paige, 36.

of a complaint, on motion at special term, for want of prosecution, is not a trial of the cause.

And a hearing on a motion for judgment, on the ground of the frivolousness of the demurrer, under section 247 of the Code, is not a trial. (*Bell v. Noah*, 24 How. 478; *Butchers' & Drovers' Bank v. Jacobson*, 22 id. 471; *Rochester City Bank v. Rapelje*, 12 id. 26; *Marquisel v. Brigham*, id. 399. See *contra*, *Pratt v. Allen*, 19 How. Pr. 450; *Roberts v. Morrison*, 7 id. 396; *Lawrence v. Davis*, id. 354; *Gould v. Carpenter*, id. 97.)

An assessment of damages, by a sheriff's jury, also, is not a "trial," within the meaning of the Code. (*Randolph v. Foster*, 4 Ab. 262; S. C. 3 E. D. Smith, 648.)

An action cannot be tried in sections, without leave of the court; nor can it be regularly brought to trial, until it is in such a situation that a final judgment can be rendered between all the parties to it. (*Ward v. Dewey*, 12 How. Pr. 193.)

4. *Place of trial.*] The Code directs that actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by statute: 1. For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property. 2. For the partition of real property. 3. For the foreclosure of a mortgage on real property. 4. For the recovery of personal property distrained for any cause. (Code, § 123.)

Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial in the cases provided by statute: 1. For the recovery of a penalty or forfeiture imposed by statute; except that when it is imposed for an offence committed on a lake, river or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offence was committed. 2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, shall do any thing touching the duties of such officer. (Code, § 124.)

In all other cases, the action must be tried in the county in which the parties, or any of them, shall reside at the commencement of the action; or if none of the parties reside in the state, the same may be tried in any county which the plaintiff shall designate, in his complaint; subject, however, to the power of the court to change the place of trial, in the cases provided by statute. (Code, § 125.)

An action may be tried in any county named in the complaint, although it be not the proper county; unless the defendant, before the time for answering expires, demands that the trial be had in the proper county. (Code, § 126.)

The term "proper county," in section 126 of the Code, means a county in which one or more of the parties to the action resides. (*Lynch v. Mosher*, 4 How. Pr. 86; S. C. 2 Code R. 54.)

In an action for the foreclosure of a mortgage, the "proper county" for the place of trial is where the mortgaged premises are situated, although the money may be loaned and the mortgage executed and delivered to the mortgagee in another county. (*Miller v. Hull*, 3 How. Pr. 325; S. C. 1 Code R. 113; *Vallejo v. Randall*, 5 Cal. 461.) It is, however, no objection to the regularity of the proceedings in a foreclosure suit, that the place of trial was in a county other than that in which the mortgaged premises are situated; where there has been no motion or demand made to change the place first selected. (*Marsh v. Lowry*, 26 Barb. 197; S. C. 16 How. Pr. 41.) And an action brought to set aside a statutory foreclosure of a mortgage, and to redeem the mortgaged premises from the mortgage is not necessarily local in its nature,

motion to suppress depositions at the hearing, it is usual to bring it on before entering upon the hearing of the cause. The court may either decide the question at once, as to the admissibility of the depositions, or *may allow them to be read *de bene esse*, reserving the question [*317] until the final disposition of the cause.

Submissions.] If the parties do not wish to argue the cause orally, they may submit the same to the court upon written arguments. All

and need not be tried within the county where the land is situated. (*Hubbell v. Sibley*, 4 Ab., N. S. 403.) But an action to recover damages consequent upon injuries to real property, caused by the negligence of the defendant, is of necessity local, and must be tried in the courts of the state where the land is situated. (*Mott v. Coddington*, 1 Rob. 267; S. C. 1 Ab., N. S. 290. See *Watts v. Kinney*, 6 Hill, 82.)

It is provided by the judiciary act, of 1847, that in all cases or proceedings, in law or equity, in the supreme or county courts, the parties or their attorneys, by consent of the justice or judge who shall try the cause, may, in writing, stipulate to hear, try and determine such cause or proceeding elsewhere than at the court house of the county where the same shall be pending. Such stipulation shall specify the place of trial or hearing, and shall be filed in the office of the clerk of the court; and such trial or hearing shall be brought on upon notice as in other cases, unless the time thereof shall be fixed by such stipulation. (Laws of 1847, p. 646, § 41.)

An action brought to obtain the judgment of the court that a conveyance of real estate by the defendant is fraudulent; the plaintiff seeking, by this means, to appropriate such property to the payment of his judgment; is an action brought for the determination of interests in real property, and must be tried in the county in which it is situated. (*Wood v. Hollister*, 3 Ab. 14.) In *Leland v. Hathorn*, (9 Ab., N. S. 97; 42 N. Y. 549,) where an action was brought to restrain the defendant from building a bridge across a public street, which structure, it was claimed, would injure the property of the plaintiff, the court of appeals held that it was a local action, and must be tried where the property was situated.

An action to set aside a statutory foreclosure of a mortgage on real property, and to redeem the land from the mortgage, is not local, and not necessarily to be tried within the county where the land is situated. (*Hubbell v. Sibley*, 4 Ab., N. S. 403.)

An action brought by the people, and prosecuted by the attorney general, comes within the 2d subdivision of section 124 of the Code. (*The People v. Hayes*, 7 How. Pr. 248.) When the act of an officer is beyond the scope of the authority of his office, he is not protected by that section; but when, in performing an act within the scope of his authority, he commits an error, or even abuses the confidence which the law reposes in him, he is still entitled to the protection of the statute. (*Brown v. Smith*, 24 Barb. 419.) Where a public officer is sued for an official act, he may waive the statutory provision that, unless it appears upon the trial that the act was done within the county where the trial was had, the jury shall be discharged, and a judgment of discontinuance entered, the omission to raise the objection, upon the trial, will be regarded as a waiver, by which the defendant is concluded. (*Howland v. Willetts*, 5 Sand. 219; S. C. 9 N. Y. 171.)

The section of the judiciary act requiring the venue to be laid in a county where some of the parties resided, means parties in interest and not nominal parties to the record. (*Hart v. Oatman*, 1 Barb. 229; *Henry v. Bank of Salina*, 5 Hill, 523.)

In an action in the nature of a *quo warranto*, the place of trial may properly be laid in any county in the state. The people are a party whose residence extends to every county. (*People v. Cook*, 6 How. Pr. 448.)

A railroad company may be treated as an inhabitant and freeholder in each county where its track is laid. (*Sherwood v. Saratoga & Wash. R. R. Co.* 15 Barb. 650; *Belden v. New York & Harlem R. R. Co.* 15 How. Pr. 17. *Contra*, *Wilde v. N. Y. & Harlem R. R. Co.* 1 Hilt. 302.)

Corporations, created under the laws of this state, are residents of the county where the office of the company is located and its general business carried on. (*Conroe v. The National Protection Ins. Co.* 10 How. Pr. 403.) The fact that such a corporation has an office in another county, where some of its business is done, does not change, or affect its residence. (*Hubbard v. Nat. Protec. Ins. Co.* 11 How. Pr. 149. See *Pond v. Hudson River R. R. Co.* 17 id. 548.)

A foreign corporation, having an agency and business office in one of the counties

submissions must be in writing, signed by the parties or their counsel or solicitors, and must be delivered to the register, assistant register, or clerk, where the court is held, with the necessary copies and papers. (*w*) As to what papers are necessary, see ante, p. 314.

On special motions and petitions as well as in calendar causes, the register, &c., must mark the papers and note them in his minutes, as on a hearing; and he is not to enter the submission until all the necessary copies and papers are furnished. (*x*)

(*w*) Rule 97.

(*x*) Rule 97.

of this state, is not a resident of such county, within the meaning of section 125 of the Code. (*International Life Assurance Co. v. Sweetland*, 14 Ab. 240.)

The place of trial of a transitory action should be in the county where the principal transactions between the parties occurred, and where it appears the largest number of the witnesses who know anything of the facts, reside. A majority of witnesses should not, necessarily, control. (*Jordan v. Garrison*, 6 How. Pr. 6; S. C. 1 Code Rep., N. S. 400)

Except so far as the place of trial of actions for injuries to the person has been regulated by statutes, (2 Rev. St. 409,) such actions have always been regarded as transitory, and triable in any county where the plaintiff might elect to bring his action. (*McIvor v. McCabe*, 16 Ab. 319; S. C. 26 How. 257.)

The common law maxim that the domicile of the wife follows that of the husband, has no application in actions for a divorce, where separation has actually taken place, and where the very proceedings in the action are to show that the relation of husband and wife should be dissolved, or so far modified as to establish separate interests, and especially of bed and board, and domicile and home. In such a case, the law will recognize the wife as having a separate existence and separate rights. Hence, in an action for a divorce *a mensa et thoro*, for cruel and inhuman treatment, the plaintiff may bring the action in the county where she actually resides when it is commenced; although the defendant resides in another county, where both parties formerly resided. (*Vence v. Vence*, 15 How. Pr. 497; id. 506, note.)

When an action is referred to a referee, although it is the better practice, it is not necessary that the referee should fix the time and place of hearing, in writing. (*Stephens v. Strong*, 8 How. Pr. 339; *Sage v. Mosher*, 17 id. 367.) The place of meeting need not be the same as the place of trial mentioned in the complaint. (*Wheeler v. Mailland*, 12 How. Pr. 35; *Newland v. West*, 2 John. 183.) In order that the witnesses may be more conveniently examined, an order of reference may give the referees leave to meet in a county different from the one named in the complaint as the place of trial. (*Pierce v. Voorhees*, 3 How. Pr. 111.) The city court of Brooklyn being a court of special and limited jurisdiction, a referee appointed by it has no power to try a cause in the city of New York. (*Bonner v. McPhail*, 31 Barb. 106.)

Rule 33 of the supreme court directs that when a *reference* shall be ordered, the same shall be executed in the county in which the action is triable, unless the court shall otherwise order.

Changing place of trial.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose, in the complaint, is not the proper county; 2. When there is reason to believe that an impartial trial cannot be had therein; 3. When the convenience of witnesses, and the ends of justice, would be promoted by the change. (Code, § 126.)

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed; unless otherwise provided by the consent of the parties, in writing, duly filed, or order of the court; and the papers shall be filed or transferred accordingly. (*Ibid.*)

It has been held that, under the Code, every action is so far *transitory* that the plaintiff may, with impunity, lay the venue in any county in the state. But if the proper county is not selected, the defendant has the right to have the place of trial changed. (*Houck v. Lasher*, 17 How. Pr. 520.) To secure this right, however, two things are necessary: 1st. He must, within a limited time, make the demand pre-

Course of proceeding.] Where the cause is heard upon *pleadings and proofs*, the complainant opens. The order of proceeding is as follows: The complainant's bill is first opened, or the substance of it briefly stated, and the defendant's answer also by the junior counsel, (if there is more than one counsel;) after which the same counsel states the case and the matters in issue, and the points of equity arising therefrom; and then such depositions and parts of the defendant's answer

scribed by section 126 of the Code, and then, unless the change be made by consent of parties; 2d. An order of the court, directing the change, must be obtained. Unless both these requirements are complied with, the plaintiff may bring his action to trial in the county selected by him for that purpose. (*Ibid.*)

Corporations created under the laws of this state are residents of the county where the office of the company is located and its general business carried on; and where the plaintiffs are non-residents, such corporation defendant is entitled to have the action tried in the county where it is located. And if the proper county is not designated in the complaint, the court, on application, will change the place of trial. (*Conroe v. National Protec. Ins. Co.* 10 How. Pr. 403.) In the *International Life Assur. Co. v. Sweetland*, (14 Ab. 240,) where the plaintiff was a foreign corporation, and the defendant a resident of this state, it was held that the proper county for trial was that in which the defendant resided, and that the fact of the plaintiff having an agency in this state did not affect the question. (In *Beardsley v. Dickerson*, (4 How. Pr. 81,) the cause of action arose in Saratoga county, the venue was laid in Rensselaer county, and the defendant served a written demand that the action should be tried in the city of New York. It was held that the defendant was irregular in not demanding trial in the proper county (Saratoga.) On motion, however, to change the place of trial from Rensselaer to New York, where all the parties resided, upon the merits the motion was granted.

A motion to change the place of trial cannot be made before issue joined. (*Mixer v. Kuhn*, 4 How. Pr. 409; S. C. 3 Code Rep. 106; *Hubbard v. National Protec. Ins. Co.* 11 How. Pr. 149; *Hinchman v. Butler*, 7 id. 462. But see *Myers v. Feeter*, 4 id. 240; *Schenck v. McKie*, id. 246; *Merrill v. Grinnell*, 10 How. Pr. 32.) But it may be made at any time after issue and before trial had. (Van Sant. Eq. Pr. 257; *Merrill v. Grinnell*, *supra*.)

The demand may be made at the time of putting in the answer. (*Mairs v. Remsen*, 3 Code Rep. 138.) But the defendant need not move to change the place of trial until after the time to amend the complaint expires. (*Conroe v. National Protec. Ins. Co.* 10 How. Pr. 403.)

The time to answer is deemed to have expired on service of the answer. Hence, a demand that the trial be had in the proper county, made after answer, comes too late, and may be disregarded, although the answer was put in before the time for answering had expired. (*Milligan v. Brophy*, 2 Code Rep. 118.)

In an action for the foreclosure of a mortgage, the court is not expressly authorized to change the place of trial where the county designated for that purpose in the complaint is not the proper county. A demand to change the place of trial, and a consent or order of the court thereon, are essential to change it. (*March v. Lowry*, 16 How. Pr. 46; S. C. 26 Barb. 197.)

The motion to change the place of trial must be made in the judicial district, or a county adjoining the one designated by the plaintiff in his complaint. (*Bangs v. Selden*, 13 How. Pr. 163, 375; *Chubbuck v. Morrison*, 6 id. 367; *Beardsley v. Dickerson*, 4 id. 81; *Askins v. Hearn*, 3 Ab. 185.)

On a motion by one of several defendants to have the trial in the proper county, notice of the motion must be given to the defendants who do not move. (*Mairs v. Remsen*, 3 Code Rep. 138; *Welling v. Sweet*, 1 How. Pr. 156.) The court will order a motion to stand over in order that notice may be given to such defendants as have not been served. (*Ibid.*)

The object of the demand that the trial be had in the proper county, is to allow the plaintiff an opportunity of voluntarily correcting the error by amendment, stipulation or otherwise, without the expense and delay of a motion. (*Vermont Central R. R. Co. v. Northern R. R. Co.* 6 How. Pr. 106; S. C. 1 Code Rep., N. S. 401.) If a demand is made, and the plaintiff neglects or refuses to procure the change, the

as are considered essential, are read by the complainant's counsel. After the complainant's evidence has been read, the opening counsel for the complainant makes his observations and arguments. Then the defendant's counsel go through the same process for him. The leading counsel for the complainant is then heard in reply, and concludes the argument.

Where a replication to the answer has been filed, and the cause is

defendant may move to have the place of trial changed to the proper county. (*Mairs v. Remsen*, 3 Code Rep. 138; *Moore v. Gardner*, id. 24; *Hasbrouck v. McAdam*, id. 39; S. C. 4 How. Pr. 342.) When one of the parties resides in the state, the venue in the complaint is to be fixed irrespective of the convenience of witnesses. Hence, a motion to change the place of trial to the proper county cannot be opposed on that ground. A change of the place of trial for the convenience of witnesses is properly made when the venue has been fixed in the proper county. (*Moore v. Gardner*, 3 Code Rep. 224; S. C. 5 How. Pr. 243.)

In *Hinchman v. Butler*, (7 How. Pr. 462.) a notice of motion to "change the venue, or place of trial," was held sufficient.

The denial of a motion to change the place of trial, made by one defendant, does not prejudice another defendant subsequently served with a summons in making a similar motion. (*New Jersey Zinc Co. v. Blood*, 8 Ab. 147.)

Under a general clause in a notice of motion, asking for other and further relief, the party is not entitled to costs of the motion. But when costs are asked for in the notice, costs to abide the event will be allowed, whether the motion be granted or not. (*Northrop v. Van Dusen*, 3 Code Rep. 140.)

In an action affecting the title to lands, the court may change the place of trial as a matter of right. (*Starks v. Bates*, 12 How. Pr. 465.)

The form of the affidavit of merits upon such a motion should correspond with the practice and decisions previous to the Code. Three things must distinctly appear: 1st. That the defendant has fully and fairly stated the case to his counsel, stating his name and residence; 2d. That he is advised by his counsel that he has a good and substantial defence on the merits; 3d. That he believes that he has such defence. (*Lynch v. Mosher*, 4 How. Pr. 86; S. C. 2 Code Rep. 54.) An affidavit which states that the defendant has a good and substantial defence on the merits, and that the witnesses named are material, as he is advised by his counsel, and "as he believes truly," is defective. (*Ibid.*) So of an affidavit that the defendant has stated "the facts of his defence" to his counsel, instead of "the case;" (*Richards v. Swetzer*, 1 Code Rep. 117; S. C. 3 How. Pr. 413;) or an affidavit which states that the deponent has stated "his case in this cause" to his counsel, instead of "the case," as required by Rule 29. (*Ellis v. Jones*, 6 How. Pr. 296.) But an affidavit alleging that the defendant has fully and fairly stated "the facts of this case" to his counsel, has been held sufficient. (*Jordan v. Garrison*, 6 How. Pr. 6; S. C. 1 Code Rep., N. S. 400.)

Rule 60 of the supreme court provides that, "in addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material, and may also show where the cause of action, or the defence, or both of them, arose; and those facts will be taken into consideration by the court in fixing the place for trial."

It is said by SILL, J., in *Mixer v. Kuhn*, (4 How. Pr. 409; S. C. 3 Code Rep. 106,) that the above rule does not require a defendant to disclose, in his affidavit, the matters which he intends to set up in his answer. He may do so; but if he prefers, may omit it.

Very little reliance can be placed upon an allegation of the materiality of witnesses, unless it is shown wherein they are material. But when no witnesses are shown to reside in the county where the venue is laid, the place of trial may be changed upon such an affidavit. (*The People v. Hayes*, 7 How. Pr. 248.) An affidavit specifying the county where the witnesses reside, is sufficient without stating the city, village or town. (*Bleecker v. Smith*, 37 How. 28.) The party swearing to the greater number of witnesses will not necessarily be successful where the facts which they are to establish can be as effectually presented on the trial by a lesser number. (*Jordan v. Garrison*, 6 How. Pr. 6; S. C. 1 Code Rep., N. S. 400; *Price*

heard upon pleadings and proofs, the allegations set up in the answer, and which are not responsive to the bill, must be proved, or the defendant cannot avail himself of them at the hearing. (y)

Where there are two defendants, who set up adverse claims, the course of practice is for the complainant to open; for the defendant who sets up a claim against the other then to go on, and for the other

(y) *Simpson v. Hart*, 14 John. 63.

v. Fort Edward Water Works Co. 16 How. Pr. 51; *Goodrich v. Vanderbilt*, 7 How. Pr. 467.) The number of witnesses is no longer regarded as controlling, but the character and materiality of their testimony, the nature of the action, and the probable facility which will be afforded, or delay which may be occasioned in obtaining a speedy trial, will be considered in determining the propriety of the change. (*Van Sant. Eq. Pr.* 258.) The place of trial of a transitory action should be in the county where the principal transaction between the parties occurred, and where it appears the largest number of witnesses who know anything of the facts reside. (*Jordan v. Garrison, supra.*)

The place of trial should be in the county where the witnesses reside, even though they may be required to travel a greater distance than to the court house in an adjoining county in attending court. (*The People v. Wright*, 5 How. Pr. 23; S. C. 3 Code Rep. 75.)

The place of trial may be changed on the ground of public excitement, although no effort has been made to try the cause, or even to impanel a jury, in the county where the venue is laid. (*Budge v. Northam*, 20 How. Pr. 248; *People v. Long Island R. R. Co.* 16 id. 106; S. C. 4 Park. Cr. R. 602. But see *People v. Wright*, 5 How. Pr. 23; S. C. 3 Code Rep. 75.)

Rule 59 of the supreme court provides that no order to *stay proceedings* for the purpose of moving to change the place of trial shall be granted, unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practicable day after issue joined. Such order shall not stay the plaintiff from taking any step, except subpoenaing witnesses for the trial, without a special clause to that effect. On presenting to, and filing with, the officer granting the order, an affidavit showing such facts as will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial, the officer shall revoke the order to stay proceedings, and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

When the *convenience of witnesses* is the ground of a motion to change the place of trial, it should not be made until after issue is joined. (*Hubbard v. National Protec. Ins. Co.* 11 How. Pr. 149; *Merrill v. Grinnell*, 10 id. 31; S. C. 12 N. Y. Leg. Obs. 286; *Hinchman v. Butler*, 7 How. Pr. 462; *Hartman v. Spencer*, 5 id. 135.) A demand is not necessary before making a motion to change the place of trial for the convenience of witnesses. (*Hinchman v. Butler, supra.*) Where, after demand made, the defendant served his answer and motion papers for a change of venue, (for convenience of witnesses,) the plaintiff amended his complaint, it was held that this did not deprive the defendant of the right to make his motion, although he had not answered the amended complaint, and therefore, technically, the cause was not at issue. (*Toll v. Cromwell*, 12 How. Pr. 79.)

In deciding motions of this nature courts now look beyond the affidavits of the parties, and the advice of their counsel, to the pleadings and the issues to be tried, and from the whole case, as presented by the affidavits and the pleadings, determine in which county the trial will accommodate the greatest number of witnesses whose attendance will be necessary. (*King v. Vanderbilt*, 7 How. Pr. 385.) The convenience of witnesses is the main consideration, though the dispatch or oppressive delay of suits are considerations not to be wholly overlooked. (*Ibid.*)

The court has no authority, on denying a motion to change the place of trial for the convenience of witnesses, to order the place changed for the reason that the county designated for that purpose in the complaint is not the proper county, no previous demand for such change having been made. (*Houck v. Lasher*, 17 How. Pr. 520.)

The residence of a greater number of witnesses in an adjoining state, adjacent to the county where the venue is laid, is not sufficient to retain the venue. (*Peet v.*

defendant to answer; and there is no reply between the defendants; (z) unless specially directed by the court.

Upon *plea or demurrer*, the defendant holds the affirmative, and opens the argument; and upon *appeal*, the opening argument of the appellant's counsel is first heard. Where the cause is heard upon *ex-[*318] ceptions to a *master's report*, the party excepting opens the argument. But where *both* parties except, the complainant's counsel

(z) *Walton v. Van Mater*, Halst. Dig. 175.

Billings, 2 Wend. 282; *Bank of St. Albans v. Knickerbacker*, 6 id. 541; *Brittan v. Peabody*, 4 Hill, 61, n.)

The loss of a trial or term by the plaintiff if the venue be changed, is no answer to a motion for that purpose where the defendant is not chargeable with *laches*. And even where he is so chargeable, his neglect must be such as to produce the delay, or the motion will be granted. (*Lynch v. Mosher*, 4 How. Pr. 86; *Garlock v. Dunkle*, 22 Wend. 615.)

An action to rescind a contract for the purchase of land on the ground of fraud, is not "an action for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest," within the meaning of the provisions of the Code relative to local actions, and the changing of the place of trial. (*Ely v. Lowenstein*, 9 Ab., N. S. 42.) The question to be litigated in such an action is the same as if the contract related to the sale of personal property; and the fact that the judgment may incidentally affect some right or interest of the parties in real estate, does not bring the case within the statute: (*Ibid.*) The words "for the determination in any form of such right or interest," mean the direct and specific determination, in form and substance, upon the cause of action alleged, and not an incidental effect. (*Ibid.*)

5. *Modes of trial.*

(a) *By jury.*

An issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract, on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in section 266 of the Code, or a reference be ordered, as provided in sections 270 and 271. (Code, § 253.)

Every other issue is triable by the court; which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in sections 270 and 271. (Code, § 254.)

Section 266 of the Code directs that trial by jury may be *waived* by the several parties to an issue of fact, in actions on contract, and with the assent of the court, in other actions, in the manner following: 1. By failing to appear at the trial. 2. By written consent, in person or by attorney, filed with the clerk. 3. By oral consent in open court, entered in the minutes.

Where the plaintiff fails in obtaining the relief sought for, in equity, the court is not bound to dismiss the complaint if, in case of a dismissal, the plaintiff would be remediless because the statute of limitations would be a bar to a new action; but it may, if it deems the case a proper one for trial by jury, order it to be tried at the circuit, by a jury. Thus, where the court determines that the plaintiff had no good ground on which to commence an action for the redemption of a pledge, and nothing remains but an action for the tort in improperly disposing of the pledge, for which an ample remedy exists at law, it may order the cause to be tried by a jury, at the circuit. (*Genet v. Howland*, 45 Barb. 560; S. C. 30 How. 366.)

No construction can be given to section 275 of the Code, by which a plaintiff can compel a trial by the court, by merely alleging, in his complaint, grounds for equitable relief, and, if he fails in that, secure the trial of an action for fraud, and an assessment of damages without a jury. Such a course would violate both the constitution and § 253 of the Code. (*Bradley v. Aldrich*, 40 N. Y. 504.)

Where there is an agreement to insure, and to deliver a policy, and a loss occurs before the delivery of the policy, the assured may maintain an action upon the agreement and the loss, and take judgment for payment of the money due, only. Such an action, being for the recovery of money, only, is one which the Code requires to be tried by a jury. (*Rockwell v. The Hartford Fire Ins. Co.* 4 Ab. 179.)

is first heard upon his exceptions, and then the defendant's counsel answers him, and opens the argument upon his own exceptions.

Where the cause is heard on *bill and answer*, the course of proceedings is much the same as on a hearing upon pleadings and proofs. But the answer is to be wholly read, or considered as read, and every matter set up in it, whether responsive to the bill or of pure avoidance, must be taken as true. And this rule prevails even where the defend-

In case of an issue joined upon an answer which sets up a defence amounting to a plea of *nul tiel record*, it is irregular for a judge at chambers and without a jury, to try that issue, and to find his conclusions of fact and law, and order judgment. (*Fasnacht v. Stehn*, 53 Barb. 650; S. C. 5 Ab., N. S. 338.)

If neither party could insist upon a jury trial upon the original complaint and issue, they still remain debarred from doing so, notwithstanding a supplemental complaint has been put in. Such a complaint merely grafts a new proceeding on the old action. (*Currie v. Cowles*, 9 Bosw. 642.) Where a claimant under a will produces such will, duly proven, and presumptively valid, the adverse party has no right to frame issues, to be tried by a jury, for the purpose of contesting the validity of the will, if such party has previously contested the will, unsuccessfully before a jury. (*Nichols v. Romaine*, 3 Ab. 122; S. C. 9 How. Pr. 512.) In an action for divorce on the ground of adultery, in which issues are raised by the pleadings themselves, it is not now necessary to frame issues for jury trial; but the issues joined by the pleadings may be tried. (*Parker v. Parker*, 3 Ab. 478.) It is not proper for the court to send to a sheriff's jury, for trial, an action in which there is an issue of fact. (*Dolan v. Petty*, 4 Sandf. 673.)

Where an action is commenced to recover penalties for the erection of buildings in violation of the fire laws in the city of New York, and for the removal of such buildings, but in which an injunction is not sought, the defendant is entitled to a jury trial. (*Fire Depart. v. Harrison*, 2 Hilton, 455; S. C. 9 Ab. 1; 17 How. Pr. 273; 18 id. 181.)

Where, in an action between partners, to settle co-partnership matters, it becomes evident to the court, on examination of the issues, that the several interests of the parties will, on the trial, involve much contradiction—perhaps questions of veracity—of mistake or fraud in the drawing of the papers, &c., and is manifestly an inquiry which business men, accustomed to examine facts, should decide, the court will direct the issues to be tried by a jury. (*Clark v. Brooks*, 26 How. 285.) And it is no objection to the granting of a proper application of this kind, that it is not made within ten days after issue joined, as provided by a general rule of the court. (*Ibid.*)

In an action for a specific performance, and for an injunction in the meantime, the court may render a judgment for damages, for the failure to perform, without allowing the defendant a jury trial. (*Dunnell v. Keteltas*, 16 Ab. 205; S. C. 26 How. 599, n.) Otherwise when the object of the action is the recovery of damages, and the equitable relief demanded is accessory. (*New York Ice Co. v. Northwestern Ins. Co.* 10 Ab. 35; S. C. 31 Barb. 72; 20 How. Pr. 424.)

In a case where there are several issues, and it is clear that some of them are competent to be tried by the court without a jury, an objection taken after the trial has begun, by the court, that the action is one which should have been tried by a jury, should be overruled. The rule is that if a party wishes to secure his right of trial of any of the issues by a jury, his application must be made before the commencement of the trial, so that such right may be separately passed upon by the court before the trial. Entering upon the trial without objection, or application for a jury trial, is a waiver. (*McKeon v. See*, 4 Rob. 449.) Although the right to a trial by jury, in a proper case, is absolute, and any decision denying such right would be erroneous; yet the right may be waived, and if a party enters voluntarily upon a trial by the court, without objection, he is understood to consent, thereby, to that form of trial. If he remains silent, such silence is a consent. (*Greason v. Keteltas*, 17 N. Y. 491; S. C. 19 Barb. 608; *Moffat v. Mount*, 17 Ab. 4.)

The act of 1862, (Laws of 1862, p. 748,) which authorizes the compulsory reference of claims by or against an insolvent mutual insurance company, although it denies a trial by jury, is not unconstitutional. (*Sands v. Kimbark*, 27 N. Y. 147; S. C. 33 Barb. 108.)

Proceedings by information, in the nature of a *quo warranto*, are not, as of course,

ant only avers that he believes and hopes to be able to prove such facts. (a)

No other evidence is permitted to be read, except it be matters of record to which the answer refers, and which are provable by the record itself; or documents which may be proved, *viva voce*, at the hearing. (b)

We have already examined the subject of proofs at the hearing, how-

(a) *Brinckerhoff v. Brown*, 7 John. Ch. Rep. 217. *Dale v. McEvers*, 2 Cowen, 18.
(b) 2 Dan. 627.

triable by jury. When the complaint and the nature of the case call for equitable relief, and the case comes on for trial by the court, it is too late to call for a jury after the plaintiff has opened his case, read his pleadings and rested. (*The People v. The Albany & Susquehanna R. R. Co.* 55 Barb. 344; S. C. 38 How. 228; 7 Ab., N. S. 265.)

Issues of fact, in common law actions, must be tried by a jury, unless the parties choose to waive this right. But it is for the court to say, in other cases, whether an issue of fact shall be tried by a jury, or by the court without a jury. (*Church v. Freeman*, 16 How. 294.) Upon the application of either party, upon ten days' notice, for such a trial, the court may or may not direct that the issues be tried by a jury. But if the application be denied, or if no application be made, the court still has the power at the trial, to order the whole issue, or any specific question of fact involved therein, to be tried by a jury. (*Ibid.*)

The failure of one of the parties to appear at the trial is by no means a waiver of a jury trial, under section 266, subd. 1, of the Code. (*Hendricks v. Carpenter*, 4 Rob. 655; S. C. 2 id. 625; 1 Ab., N. S. 213.) Where the defendant does not appear, the plaintiff may waive a jury trial, and take an inquest before the court in an action, at the circuit, out of its regular order on the calendar. It seems that this should be done before the jury are discharged for the circuit. (*Haines v. Davis*, 6 How. Pr. 118.)

Where a defendant excepts to the finding of facts, and to the conclusions of law, by a judge, he does not by that means waive the right to a trial by jury. Nor is he estopped from taking the ground, on appeal, that the trial by the judge, at chambers, was irregular. (*Fasnacht v. Stehn*, 53 Barb. 650; S. C. 5 Ab., N. S. 338.)

The principles of legal and equitable jurisdiction remain distinctive and undisturbed, although united in the same tribunal, under the Code. If the court is called upon by the plaintiff to exercise its jurisdiction upon principles of equity, he elects, thereby, his mode of trial. This is the rule notwithstanding the fact that he might, at law, have demanded a jury trial. (*New York & New Haven R. R. Co. v. Schuyler*, 34 N. Y. 30.)

The right to a trial by jury, in a proper case, is absolute, and any decision of the court overruling or denying such right, would be plainly erroneous. But it is a right which can be waived; and if a party who is entitled to it enters voluntarily upon a trial by the court, without objection, he would, ordinarily, be understood as consenting to that form of trial. (*Greason v. Keteltas*, 17 N. Y. 498. See *Moffat v. Mount*, 17 Ab. 4; S. C. 10 Bosw. 468; *Fire Department v. Harrison*, 9 Ab. 1; S. C. 2 Hilt. 455; 18 How. Pr. 481.) After the trial has commenced is not the proper time for determining whether there should be a jury trial, when there are several issues, some of which are clearly triable without a jury. If a party wishes to secure his right of trial of any of the issues by a jury, he should make his application beforehand, so that such right may be separately passed upon, before trial. If he waits until the trial is entered upon, before applying for a jury trial, this will be a waiver. (*McKeon v. See*, 4 Rob. 449.)

An action to recover damages for a tortious conversion of property can be tried in no other way than by a jury; unless the parties waive that mode of trial in the manner prescribed by law. (*Lewis v. Farnum*, 12 Ab. 305.)

Where, on a motion to confirm the report of a referee, in an action for divorce on the ground of adultery, it did not appear that a jury trial had been waived, and that consent to the reference had been given, in writing, and filed, as required by section 266 of the Code; it was held that the reference was irregular, and the motion was denied. (*Diddell v. Diddell*, 3 Ab. 167.)

Section 258 of the Code directs that either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or

ever, in the 3d section of the last preceding chapter; to which the reader is referred. (c)

If the complainant goes to hearing on bill and answer, and the court shall not see cause to make a decree thereupon, for want of sufficient matter confessed by the answer, the bill will be dismissed with costs.

In general, where a cause has been brought on for hearing upon bill and answer, and the complainant fails in making out his case for want of a full admission of it by the answer, the court will permit him to

(c) Ante, p. 308.

a verdict or judgment, as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will thereby be promoted.

Where the issue is such that a party is entitled, on proper demand, to have the same tried by jury, and he omits to claim such right, he cannot afterwards, on appeal, object to the mode of trying such issue. (*Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.* 1 Keyes, 72.) The objection that a cause should be tried by a jury should be taken before the commencement of the trial. (*McKeon v. See*, 4 Rob. 449.)

To prevent an inquest being taken, an affidavit of merits is necessary. (*Jones v. Russell*, 3 How. Pr. 324; S. C. 1 Code Rep. 113; *Sheldon v. Martin*, id. 81; *Dickinson v. Kimball*, id. 83; *Anderson v. Hough*, 1 Sandf. 721; S. C. 1 Code Rep. 50; 6 N. Y. Leg. Obs. 365.)

Rule 36 of the supreme court directs that inquests may be taken, in actions, out of their order on the calendar, in cases in which they were heretofore allowed, at the opening of the court, on any day after the first day of the court; provided a sufficient affidavit of merits shall not have been filed and served.

But an inquest cannot be taken after the trial of a litigated cause has been commenced. (*Nichols v. Chapman*, 9 Wend. 452.) Nor after the jury has been discharged for the circuit. (*Dickinson v. Kimball*, 1 Code Rep. 83; *Haines v. Davis*, 6 How. Pr. 118; S. C. 1 Code Rep., N. S. 407.) An inquest may be taken on the first day of the court, when the cause is regularly called upon the calendar, on that day. (*Smith v. Brown*, 1 Duer, 665.)

Rule 29 of the supreme court directs that whenever it shall be necessary, in any affidavit, to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel. When an affidavit of merits has once been filed and served, no other shall be necessary, on making a motion, and the service and filing may be shown by affidavit.

In regard to the fact of having stated the case, &c., the language of the rule should be closely followed. (*Brownell v. Marsh*, 22 Wend. 636; *Richmond v. Cowles*, 2 Hill, 359; *Brown v. St. John*, 19 Wend. 617; *Richards v. Swetzer*, 1 Code Rep. 117; S. C. 3 How. Pr. 413.) The affidavit should state that the defendant has a good and substantial defence on the merits, as he is advised by his counsel and believes. (*Swartwout v. Hoage*, 16 John 3; *Bruen v. Adams*, 3 Caines, 97; *Cannon v. Titus*, 5 John. 355.) The words "on the merits" are essential. (*Jackson v. Stiles*, 3 Caines, 98.)

When the answer sets up only a counter-claim, and there is no reply, an affidavit of merits is unnecessary. (*Potter v. Smith*, 9 How. Pr. 262.) On the part of the plaintiff, an affidavit of merits is never required. (*Regan v. Priest*, 3 Denio, 163.) One affidavit to prevent an inquest is sufficient, though the cause be several times noticed for trial and inquest, and though the venue be afterwards changed to another county. (*Prescott v. Roberts*, 6 Cowen, 46.)

When the cause is called in its order, the defendant may appear and defend, although no affidavit of merits has been filed and served. (*Starkweather v. Carswell*, 1 Wend. 77.)

Rule 38 of the supreme court provides that it shall not be necessary to call the plaintiff when the jury return to the bar to deliver their verdict; and the plaintiff shall have no right to submit to a non-suit after the jury have gone from the bar to consider of their verdict.

reply on payment of costs. Thus, where a bill was brought against three several executors of three joint factors, one of whom swore "he believed and hoped to prove" that the complainant's demand was paid; whereupon the complainant replied as to the other two, and brought the cause on upon bill and answer as to the third, it was insisted that the complainant could have no decree for thus bringing on his cause, for though the defendant had not directly sworn by his answer that the money was paid, yet as he had sworn he believed and hoped to be able

The *dismissal of a complaint* under the Code is, in all respects, identical with a *non-suit* in actions which were formerly called common law actions. Hence, a judgment dismissing the complaint is no bar to a second action for the same cause. (*Coit v. Beard*, 33 Barb. 357; S. C. 12 Ab. 463.)

Where the defendant sets up a counter-claim which is not denied, and he takes an inquest, the counter-claim must be allowed. (*Potter v. Smith*, 9 How. Pr. 262.)

If the defendant fails to appear, issues of fact only, which have been noticed for trial and placed upon the calendar, must, when reached in their order, be tried by the court and jury, unless the plaintiff elects to treat the failure of the defendant to appear as a waiver by him of a trial by jury, in which case the issues may be tried by the court. But the plaintiff cannot have the damages assessed by a sheriff's jury. (*Gibberton v. Fleischel*, 5 Duer, 652; *Dolan v. Petty*, 4 Sandf. 678.)

Although the defendant fails to appear on the trial, it is nevertheless incumbent upon the plaintiff to prove all the material allegations of the complaint which are denied in the answer, to entitle him to judgment. (*Putten v. Hazewell*, 34 Barb. 421.)

Setting aside an inquest is discretionary with the court; but an inquest should not be set aside unless the court is satisfied that the defendant has evidence which would materially reduce the amount of the recovery. (*Leighton v. Wood*, 17 Ab. 177.) The court will not open an inquest on the ground that the counsel was engaged before a referee or another court, and a material witness was absent; (*Ward v. Ruckman*, 23 How. Pr. 330; S. C. 32 id. 616. n.; *Morris v. Slatery*, 6 Ab. 74;) or where it appears that the answer was insufficient, or frivolous; (*Hunt v. Mails*, 1 Code Rep. 118;) or because the action was improperly brought in the names of husband and wife; or for a variance between the complaint and judgment and the proof; or because an amendment was allowed, by which the amount of the plaintiff's recovery was increased; (*Burger v. Baker*, 4 Ab. 11;) or where the only defence was usury. (*Morris v. Slatery*, 6 Ab. 74; *Furish v. Corlies*, 1 Daly, 274.)

A motion to open an inquest will not be entertained after a lapse of two years from the entry of judgment and notice thereof to the defendant, where the parties have resided within the jurisdiction of the court. (*Hendricks v. Carpenter*, 1 Ab., N. S. 213; S. C. 2 Rob. 625; 4 id. 665.)

After a default has been regularly taken against a defendant, it will not be opened upon a mere general affidavit of merits. The nature of the defence must be disclosed, so that the court may judge whether it is meritorious. (*McGuffigan v. Jenkins*, 1 Barb. 31; *Ferussac v. Thorn*, id. 42.)

In order to bring a cause regularly to trial, it must be in such a situation that a *final judgment* can be rendered between *all the parties*. (*Morris v. Crawford*, 16 Ab. 124.)

One of two defendants appearing by separate attorneys, and having separate and distinct defences, may bring the cause to trial as to himself, and take a judgment of dismissal by default against the plaintiff. (*Gurnes v. Hozie*, 29 Barb. 547.)

Where parties proceed to trial before a jury, without objection to the manner in which the jury was summoned or impaneled, it is too late after verdict to raise that objection. (*Dayharsh v. Enos*, 5 N. Y. 531; *Mayor, &c., of New York v. Mason*, 1 Ab. 344; S. C. 4 E. D. Smith, 142; *Hardenburgh v. Crury*, 15 How. Pr. 307.)

Only two objections to the complaint can be raised at the trial: 1. That it does not state facts constituting a cause of action; and 2. That the court has not jurisdiction. (*Winterson v. Eighth Avenue R. R. Co.* 2 Hilt. 339; *Ludington v. Taft*, 10 Barb. 447. See *Kelly v. Kelly*, 3 id. 419.)

Objections to the pleadings or proof must be taken on the trial or hearing, to be entitled to review on appeal. (*Rosebrooks v. Dinsmore*, 35 How. 138; S. C. 5 Ab.,

to prove it paid, and the complainant, by not replying, had precluded him from the benefit of his proof, what the defendant stated upon his belief must be taken to be true, and the complainant was ordered to pay the costs, and left at liberty to reply to the answer of the other defendants. (*d*)

It may also be observed here that where, after a cause has come on to

(*d*) *Barker v. Wyld*, 1 Vern. 140.

N. S. 59.) If the defect is capable of being obviated, (*Brookman v. Hamil*, 54 Barb. 209.) all objections to the pleadings should be decided before the circuit. A judge has no power to strike out pleadings on the trial. (*Smith v. Countryman*, 30 N. Y. 655.) The practice of a defendant's waiting until the plaintiff has closed the evidence in his case without objecting to the sufficiency of the complaint, and then doing so, was disapproved in *Meyer v. Fiegel*, (7 Rob. 122.) A general objection, at the trial, that the answer does not sufficiently set out the facts constituting the several defences, or either of them, is not available. (*Kerr v. Hays*, 35 N. Y. 331.)

At the trial, in all cases where the damages are unliquidated, the plaintiff has the right to open the case to the jury, and have the reply. (*Huntington v. Conkey*, 33 Barb. 218; *Hecker v. Hopkins*, 16 Ab. 301, n.; *Littlejohn v. Greeley*, 13 Ab. 41; *Fry v. Bennett*, 28 N. Y. 334.) Whenever the plaintiff has anything to prove, on the question of damages or otherwise, he has the right to begin. (*Huntington v. Conkey*, *supra*.) In other cases, where the damages are liquidated, or depend upon mere calculation, as the casting of interest, the party holding the affirmative of the issue has the right to begin. The affirmative of the issue in such cases means the affirmative in substance and not in form, and upon the whole record. (*Ibid*.) The denial of the right to begin to the party entitled to it, and claiming it at the proper time, is error for which a new trial will be granted, unless the court can see clearly that no injury or injustice resulted from the erroneous decision. (*Ibid*.) Where, in an action upon a promissory note, the answer admitted the making of the note, and set up the defence of usury, it was held that the plaintiff, being entitled, on producing the note at the trial, to have a verdict for the amount of it, without giving any evidence, unless the defence was sustained, the affirmative of the issue—the *onus probandi*—was upon the defendant to establish his defence; and that it was, therefore, his right to begin, to open his defence to the jury, and to reply. (*Ibid*.)

Where the defendant has the affirmative of all the issues, he has the right to the opening and closing argument to the jury. (*Hoxie v. Greene*, 37 How. 97; *Ayrault v. Chamberlain*, 33 Barb. 229; *Elwell v. Chamberlin*, 31 N. Y. 611.) It seems that the party who alleges the affirmative of any proposition, or of an issue of fact, must prove it; and the party who has to maintain or prove the affirmative must begin the evidence. (*Elwell v. Chamberlin*, *supra*.)

The object of opening a case to the jury is to state, briefly, the nature of the action, the substance of the pleadings, the points in issue, the facts and circumstances of the case, and the substance of the evidence to be adduced in its support. (*Ayrault v. Chamberlain*, 33 Barb. 229.) The counsel for the plaintiff, in opening, may state the nature of the defence, if it appears upon the record. But further than this he ought not to go, it seems. (*Ibid*.) Each party should be confined to a legitimate and proper opening of his own case; the plaintiff's counsel to a statement of his cause of action, and the defendant's counsel to a statement of his answer to the plaintiff's case, and the evidence he proposes to give to sustain it; and in such opening should not comment, in the way of summing up, after the English manner, upon the plaintiff's evidence, any further than is essential to a proper understanding by the jury of the defendant's evidence. (*Ibid*.)

The question as to which party shall open and close the case, it seems, should be regarded as one of practice, to be regulated by the discretion of the judge; and his decision upon it is not a subject of exception. (*Fry v. Bennett*, 28 N. Y. 334; S. C. 9 Ab. 45; 3 Bosw. 202.) Whether counsel shall be permitted to address the jury is also a matter resting in the sound discretion of the court. (*The People v. Cook*, 8 N. Y. 77.) A complaint will not be dismissed solely on the ground that the counsel, in his opening, has not stated facts sufficient to constitute a cause of action. (*Stewart v. Hamilton*, 3 Rob. 672; S. C. 18 Ab. 298; 28 How. 235.) Where the judge excludes the defence on the opening of the counsel, the question is, whether, in what

[*319] *be heard, it has been discovered that, through inadvertence, although witnesses have been examined, no replication has been filed, the court has permitted one to be filed, *nunc pro tunc*. (e) The general rule of the court, however, is as already stated, that unless a replication be filed, the complainant, if he brings the cause on to a hearing, must submit to take the answer as wholly true; because the defendant has been prevented from proving the truth thereof. (f)

(e) *Rodney v. Hare*, Mos. 296. Ante, p. 252.

(f) *Hinde*, 417.

is offered to be proved, there is any defence; and if the judge excludes the whole defence, one exception thereto is good. (*Sawyer v. Chambers*, 43 Barb. 622; S. C. 44 id. 42.)

A party has no right to object, when a cause is reached in its order on the calendar, at the circuit, that the trial should not be had before the judge who is presiding, for the reason that he had tried the cause on a former occasion. (*Fry v. Bennett*, 28 N. Y. 324; S. C. 3 Bosw. 202; 9 Ab. 45.)

A judge, at the trial, is not bound, without the request of parties, to give any instructions to the jury; and the latter are presumed to be acquainted with all the rules of law, in regard to which the parties do not require them to be instructed, or the court does not instruct them. (*Haupt v. Pohlman*, 16 Ab. 301.)

Exceptions—Case.] If an exception be taken on the trial, it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled, as provided by the rules of the court, and then stated in writing, in a case, or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed; nor need a bill of exceptions be made. If the exceptions be, in the first instance, stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court, or a judge thereof. (Code, § 264.)

The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict, and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion, if heard upon the minutes, can only be heard at the same term or circuit at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had. (Ibid.)

Rule 41 of the supreme court directs as to the making and settling of a case, exceptions, &c. Rule 42 specifies the consequences of omitting to make a case, or to propose amendments, or to give notice of settlement thereof. Rule 43 directs what exceptions shall contain, and provides that whenever amendments to a case or exceptions are proposed, the party proposing such case or exceptions shall, before submitting the same to the judge or justice for settlement, mark upon the several amendments his proposed allowance or disallowance thereof. Rule 44 directs the party making a case or exceptions to file the same within ten days after the same shall be settled, or it shall be deemed abandoned, &c.

The review in the court of appeals of a judgment entered upon the report of referees, must be upon the case and exceptions on which the cause was heard in the court below, except where, by leave of that court, or the consent of parties, one presenting only the questions of law raised is substituted. (*Johnson v. Whitlock*, 13 N. Y. 344.) The court below has power, on motion, to reform the case on which the cause was reviewed in that court, so that it shall contain only the evidence and proceedings necessary to present the questions of law raised. But that court is not authorized to change the case so as to present the facts otherwise than as found by the referees, or to insert therein exceptions not taken on the trial, or to their final decision. (Ibid.) The manner in which the decisions of referees should be excepted to and reviewed, how a case for that purpose should be prepared and settled, and what it should contain, discussed and pointed out by COMSTOCK, J. (Ibid.)

When the decision of the court or referee fails to find upon all the facts deemed material, the remedy of the unsuccessful party is to propose a finding thereon in his proposed case and exceptions. It is the duty of the judge or referee, on the settlement thereof, to find as requested, or to refuse so to find, in order that the party may have the benefit of an exception to his refusal. (*Manley v. Ins. Co. of Norf.*)

Private hearing.] Causes are not always heard in public. Wherever there are valid objections to a public hearing, the cause may be heard privately. Thus, in the *Matter of Lord Portsmouth*, (g) Lord Eldon, before going into his private room for the purpose of proceeding with the further hearing of the petition and affidavits privately, according to appointment, desired that it might be understood that it was the uniform practice in chancery, as long as the court had existed, in the case of family disputes, on the application of the counsel on both sides, to

(g) Coop. Rep. 106.

America, 1 Lans. 20; *Priest v. Price*, 37 Keyes, 222; *Casler v. Shipman*, 35 N. Y. 533.) The remedy in the supreme court, when the referee refuses to perform his duty, is by motion to the court for an order requiring him to act, and to perform his duty. (*Ibid.*)

Whenever an exception is made at the trial, the party excepting has the right to make a case presenting such exception. (*Huff v. Bennett*, 2 Sandf. 703; S. C. 2 Code Rep. 139.) A case should contain a plain and concise statement of the facts out of which the questions of law arise, and not portions of evidence set forth in detached and scattered parcels. (*Price v. Powell*, 3 N. Y. 322.) Questions withdrawn, answers excluded without objection, and testimony not necessary to raise the questions on the exceptions, should not be included in the case. (*Hoffman v. Aetna Fire Ins. Co.* 1 Rob. 501, 524; S. C. 19 Ab. 325; 32 N. Y. 405.) It is improper to insert in the bill of exceptions the charge given by the judge *in extenso*. (*Bulkeley v. Keteltas*, 4 Sandf. 450.)

Whether the defendant is entitled to have in the case a statement that it contains all the evidence depends upon whether the object of the case is to move for a new trial on the ground of a misdirection which was not the subject of an exception, or of one which was the subject. In the former case he is entitled to the statement. (*Magnus v. Trischet*, 2 Ab., N. S. 175.)

The court has full power to order a re-settlement of a bill of exceptions, and an application must be made to a justice of the court, at special term, notwithstanding an appeal is pending to the court of appeals to have the action remitted to the supreme court before making such application. (*Wilbeck v. Waine*, 8 How. Pr. 433; *Luyster v. Sniffen*, 3 id. 250; S. C. 1 Barb. 428; *Talcott v. Rosenberg*, 8 Ab., N. S. 237; *Gould v. Glass*, 19 Barb. 186.)

Under § 174 of the Code, the court may, in its discretion, allow exceptions to be filed, or a case served, after the time prescribed therefor has expired. (*Bortle v. Mellen*, 14 Ab. 228; *Sheldon v. Wood*, 14 How. Pr. 18; S. C. 6 Duer, 679; *Strong v. Hardenburgh*, 25 How. 438; *Hun v. Browne*, 1 Caines, 23. But see *Beach v. Gregory*, 3 Ab. 78; S. C. 2 id. 203.)

The only effect of omitting to make a case is to leave a party to argue his appeal on the judgment alone. A party may appeal upon the judgment-roll alone, and raise any such questions appearing on its face as might formerly have been raised on a writ of error. Errors on the trial are, of course, excluded. (*Burger v. Duverniet*, 7 Rob. 1; *Brown v. Hardie*, 5 id. 678; *Rankin v. Pine*, 4 Ab. 309; *Robinson v. Hudson River R. R. Co.* 3 id. 115; S. C. 1 Hilt. 144; *Conolly v. Conolly*, 16 How. Pr. 224.) It does not follow that because a party has omitted to make a case the appeal should be dismissed. (*Ibid.*)

A general exception to a charge, and to every part of it, when the charge involves more than a single proposition of law, and is not in all respects erroneous, presents no question for review upon appeal. (*Jones v. Osgood*, 6 N. Y. 233; *Walsh v. Kelly*, 40 N. Y. 556; *Stone v. Western Transp. Co.* 38 id. 240; *Kluender v. Lynch*, 4 Keyes, 351.) It is the duty of the counsel to point out at the time in what respect the charge does not conform to the requests. It is not the duty of the court, by comparing every portion, to see if there is a discrepancy. The party complaining must put his finger on the point of which he complains. (*Jones v. Osgood*, 6 N. Y. 233; *Taylor v. Ketchum*, 35 How. 239; S. C. 5 Rob. 507; *Keller v. N. Y. Central R. R. Co.* 24 How. 172; *Barker v. Savage*, 1 Sweeny, 288.) It is no objection to a statement in a bill of exceptions, that it is all contained in one sentence, where it is shown distinctly that each of the offers and requests was severally denied and overruled,

hear the same in the chancellor's private room; and that what was so done, was not the act of the judge but of the parties themselves, in such family cases.

But in the more recent case of *Ogle v. Brandling*, (h) it was held that the consent of both parties was not necessary to a private hearing. That case related to the custody of a young lady who was a ward of the court. And it was stated that some of the disclosures made in the affidavits,

(h) 2 Russ. & My. 688.

and that the plaintiff severally excepted to each of those decisions. (*Dunkel v. Wiles*, 11 N. Y. 420.) But an exception which states "to which charge the defendant's counsel excepted," is bad for want of particularity. (*Fitch v. Livingston*, 7 How. Pr. 410.)

Objections which might have been met and obviated if made on the trial, cannot be raised for the first time on appeal. (*Champney v. Blanchard*, 39 N. Y. 111; *Walker v. Gilbert*, 2 Daly, 80; *Meyer v. Fiegel*, 7 Rob. 122; S. C. 34 How. 434; *Matthews v. Duryee*, 4 Keyes, 525; *Hazard v. Spears*, id. 469; *Rosebrooks v. Dinsmore*, 5 Ab., N. S. 59; S. C. 36 How. 133; *City of Brooklyn v. Brooklyn City R. R.* Co. 8 Ab., N. S. 356; *Draper v. Stowenel*, 38 N. Y. 219; *Forrest v. Havens*, id. 469; *Hoxie v. Allen*, id. 175; *Doyle v. Mulrein*, 7 Ab., N. S. 258, 263; *Phillips v. Terry*, 5 Ab., N. S. 327; S. C. 3 Keyes, 313.)

But a general objection to the admissibility of evidence is sufficient, where the objection could not have been obviated at the trial, had the specific grounds of objection been pointed out. (*Merritt v. Seaman*, 6 N. Y. 168; *Newton v. Harris*, id. 345; *Brookman v. Hamill*, 54 Barb. 209; *Pepper v. Haight*, 20 id. 429, 437; *Levin v. Russell*, 42 N. Y. 251; *Lawrence v. Barker*, 5 Wend. 301; *Tift v. Tift*, 4 Denio, 175.)

A stipulation between parties that the plaintiff's counsel shall be considered as having duly excepted to the finding and decision of a judge, will not be regarded by the appellate court as equivalent to an exception. (*Stephens v. Reynolds*, 6 N. Y. 454.) There can be no authority for reviewing on appeal a decision to which no exception has been taken. (*Brewer v. Irish*, 12 How. Pr. 481.) Therefore, although the report of a referee is made, by statute, a part of the record, the court cannot review errors appearing on the face of the record where no exceptions have been taken. (*Ibid.*) In a case where no questions of fact arise upon the evidence, and no interlocutory questions of law are raised on the trial, the decision of the referees will disclose all the facts; and there will be nothing to which an exception can be taken, except their conclusions of law, or their decision upon those facts. This decision is a proper subject of exception, and no bill of exceptions or case is necessary. (*Ibid.*)

Where, in order to move for a new trial, or for the purpose of a review by appeal, a party has made and served a case, the adverse party will not be allowed to make and serve a new case as an amendment by way of substitution. (*Stuart v. Binsse*, 3 Bosw. 657; S. C. 4 id. 616.)

After a case or exceptions has been settled, it is filed with the clerk, and becomes a record of the court, and may, in the further progress of the action, be taken, *prima facie*, as evidence of the facts therein appearing. (*Bergen v. Ackles*, 21 How. Pr. 314; id. 317.)

Where judgment by default has been taken at a general term, dismissing an appeal for not serving copies of a case in due time, the default will be opened, where the appellant shows that the action, and all the proceedings therein, were wholly neglected by the counsel. (*Elston v. Schilling*, 7 Rob. 74.) The application for relief should be made to the special term. (*Ibid.*)

Exceptions to conclusions of law must be served within the time fixed by the Code, unless included in a case served within that time; otherwise they will be too late. A simple extension of time to make a case does not, *per se*, extend the time to take exceptions. (*Hatch v. Fogerty*, 7 Rob. 488; S. C. 40 How. 492; 10 Ab., N. S. 147.) A mere general statement, following the conclusions of law in the case, that the party excepted to each of them separately, is all that is necessary. (*Ib.*)

Verdict.] A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. (Code, § 260.)

were of so distressing a kind as to render it a proper case to be heard in private. The opposite party would not consent to this. The lord

The rendering of a general verdict by the jury, and its reception by the court, without objection either by the judge or the parties, is good, notwithstanding the failure of the jury to find upon certain special questions of fact upon which the court directed them to find. (*Moss v. Priest*, 1 Rob. 632; S. C. 19 Ab. 314.)

A special verdict should state all the facts, otherwise a new trial will be ordered. (*Eisemann v. Swan*, 6 Bosw. 669.) It should find facts, and not the mere evidence of facts, so as to leave nothing for the court to determine, except questions of law. (*Langley v. Warner*, 3 N. Y. 327; *Sisson v. Barrett*, 2 id. 406; *Hill v. Covill*, 1 id. 522.) It is not necessary, however, that it should contain facts admitted by the pleadings. (*Barto v. Himrod*, 8 N. Y. 483.)

The requisites of a special verdict under the Code are the same as prior to its enactment. (*Williams v. Willis*, 7 Ab. 90.)

If, in the finding of a jury, special matter follows, or is followed, by general matter, the verdict will be judged according to the special matter. (*Fraschieris v. Henriques*, 6 Ab., N. S. 251.)

In actions other than for the recovery of money only, or specific real property, the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes. (Code, § 261.)

It has been decided by the supreme court that title 8, chapter 3, of the Code, (which contains sections 260 and 261,) does not apply to the trial of issues in an equity action, but only to the trial in common law actions. (*Hatch v. Peugnet*, 64 Barb. 189.)

The submission of special questions of fact to the jury, in addition to the issues generally, is purely a matter of discretion with the court, and may be withdrawn from their consideration at any time before they give their finding thereon. (*Taylor v. Ketchum*, 5 Rob. 507; S. C. 35 How. 289.)

In case of mistake, the jury may correct their verdict, after it has been pronounced, before it has been received and recorded; and for the same reason, the court may send them out again, to reconsider it. (*Wells v. Cox*, 1 Daly, 515; *Blackley v. Sheldon*, 7 John. 32; *Moss v. Priest*, 19 Ab. 314; S. C. 1 Rob. 632.)

Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly. (Code, § 262.)

When there is only one issue, and the intention of the jury to find for the plaintiff is manifest, the court will, in case of a mistake by them, correct their verdict by making it conform to their finding, and give judgment upon it accordingly. (*Wells v. Cox*, 1 Daly, 515.) Thus, where the court charged the jury that if their finding was in favor of the plaintiff, the amount due to him was \$616.21, and the jury found a verdict for the plaintiff, but, forgetting the amount given by the court, returned a sealed verdict for the plaintiff "for the whole amount claimed, and interest," it was held that the court could, on motion, correct the verdict by inserting in it the sum stated in the charge. (Ibid. See *Moss v. Priest*, 19 Ab. 314; S. C. 1 Rob. 632.)

Where a complaint contains special counts, as well as the common count for goods sold, and there is a general verdict for the plaintiff, and it appears that the action upon the common count is barred by a former suit, the judge may permit the verdict to be entered upon the special counts; provided all the evidence is applicable to them. (*Baker v. Rand*, 13 Barb. 152.)

Section 264 of the Code requires the verdict to be entered by the clerk, in his minutes, and directs as to what the entry shall contain. It also authorizes the judge who tries the cause, in his discretion, to entertain a motion, to be made upon his minutes, to set aside the verdict, and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages. But such motion, if heard upon the minutes, can only be heard at the same term or circuit at which the trial is had.

It has been held that an order, made by a judge, at the circuit, refusing a new trial, upon his minutes, is not, in the case of a trial of special issues in an equity action, appealable. The defeated party must wait until the trial of the action at special term; or at least until after a motion at special term, for a new trial, has been had. (*Hatch v. Peugnet*, 64 Barb. 189.) Such a case is not within § 264 of the Code, because it is not the trial of a cause, as provided in that section. (Ibid.)

chancellor said he would direct the case to be heard in private, notwithstanding that one of the parties withheld his consent; that he

When the judgment is for the recovery of money, *interest* from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto. (Code, § 310.)

When, upon a trial, the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at the general term; and in that case, the application for judgment must be made at the general term. (Code, § 265.)

To order a verdict for the plaintiff, subject to the opinion of the court, in a case where, on the trial, the defendant objected to certain evidence offered by the plaintiff, and excepted to the ruling of the justice, admitting it, and to the order for such verdict, is error, since the defendant is thereby deprived of the opportunity of having his exceptions considered. (*Briggs v. Merrill*, 58 Barb. 389.) A verdict can be taken subject to the opinion of the court at general term only for the reason that the case tried presents questions of law, and nothing else. Consequently, there being no dispute as to them, the case made for the general term should present the facts, and not the evidence establishing them. (*The People v. Ransom*, 56 Barb. 514.)

Where the defendants counsel, before the jury rendered their verdict, objected to its being received, on the ground that the jury had sent, while in their room, for an annuity table, which was sent to them by the court, without the consent of either of the parties; which objection was urged on appeal; but no motion was made to set aside the verdict for irregularity; it was held that the objection was not presented in an available form. (*Schappner v. Second Avenue R. R. Co.* 55 Barb. 497.)

When there is a conclusion of law arising from plain facts, the judge may, and it is his duty to, direct a verdict according to such conclusion. (*Deems v. Crook*, 1 Edm. 95.)

It is error to refuse to direct a verdict, or to instruct the jury that upon the facts proved, the plaintiff cannot recover, in a case where a finding contrary to the direction asked for would be set aside as being against evidence. (*Shirley v. Vail*, 38 How. 406.) When there is evidence of facts tending to sustain the defence, they should be submitted to the jury; and it is error for the court to direct a verdict for the plaintiff. (*DeWolf v. Crandall*, 1 Sweeney, 556.)

The verdict of a jury, expressly finding upon a question of fact controverted on the trial, and fairly submitted to them, is conclusive. (*Ward v. Perrin*, 54 Barb. 89.)

As to NEW TRIALS, see *post*, Book II, Chap. III, and Notes.

(b) *By the court.*

An issue of law must be tried by the court, unless it be referred, as provided in sections 270 and 271. (Code, § 253.)

Every other issue is triable by the court; which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury; or may refer it, as provided in sections 270 and 271. (Code, § 254.)

The court may, in the exercise of a sound discretion, on the trial of issues of fact, in an equity case, submit to the jury additional issues, arising upon the proofs and material to the final determination. (*Farmers' & Mechanics' Bank of Genesee v. Joslyn*, 37 N. Y. 353; S. C. 4 Trans. Ap. 308.)

All actions wherein equitable relief is sought may be tried by the court. (*McCarty v. Edwards*, 24 How. 236; *McMahon v. Allen*, 10 id. 384; *Hill v. McCarthy*, 3 Code Rep. 49.)

Proceedings in the nature of a *quo warranto* are not, as a matter of course, triable by jury. Where the complaint, and the nature of the case, call for equitable relief, and the case comes on for trial by the court, it is too late to call for a jury, after the plaintiff's counsel has opened his case, read the pleadings and rested. (*The People v. Albany & Susquehanna R. R. Co.* 55 Barb. 314; S. C. 7 Ab., N. S. 265; 33 How. 228.)

It has sometimes been supposed that it lies with the parties to determine whether an issue or specific question of fact shall be tried by a jury, but this is error. The court has the right, in every case embraced in section 254 of the Code, to have the aid of a jury, upon the trial, and to submit to its determination any question of fact which may be deemed by it expedient. (*Church v. Freeman*, 16 How. Pr. 294. See *Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.* 1 Keyes, 72.)

An action to charge the separate estate of a married woman is purely equitable, and should be tried at a special term, without a jury. (*Chesborough v. House*, 5 Duer, 125; *Hill v. McCarthy*, 3 Code Rep. 49.) An equity action, even when certain

would act on that as on similar occasions, upon the responsibility of the counsel, who gave him the assurance that a private hearing was proper.

issues have been submitted to a jury, is to be tried by the court; and chapter 4 of title 8 of the Code must apply. (*Hutch v. Peugnet*, 64 Barb. 189, 196; *Clark v. Brooks*, 2 Ab., N. S. 385.)

In an action to set aside an assignment executed for the benefit of creditors, the question whether a withholding and conversion, by the assignor, of a portion of the assigned property without the knowledge of the assignee, vitiated the assignment, is a proper question for the determination of the court. There is no occasion for the intervention of a jury. (*Wilson v. Forsyth*, 16 How. Pr. 443. See *Draper v. Day*, 11 id. 439.)

The Code, by expressly permitting, even where a long account is involved, (§ 271, subd. 1,) the referee to be confined to passing upon a specific question of fact involved in the issue, and by allowing an account to be taken as a separate matter, for the information of the court, (id. subd. 2,) not only authorizes, but requires, that neither party shall be deprived of the benefit of a trial before a court, or a jury, as to matters not involved in the account. (*Wheeler v. Falconer*, 7 Rob. 45, 48.)

Section 267 of the Code directs that upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately. And upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly, four days thereafter. If, upon motion, by either party, to a general or special term of the court, it shall be made to appear that the decision is unreasonably delayed, the court may make an order absolute for a new trial, unless the decision shall be filed by a time to be specified in the order. The costs of the former trial shall abide the event of the new trial.

Section 268 provides for the taking of exceptions, to decisions on matters of law arising upon a trial by the court, within ten days after notice in writing of the judgment, or to the decision filed under § 267; or if a party desires a review, upon the evidence appearing on the trial, either of the questions of fact or of law, for the making of a case or exceptions, in like manner as upon a trial by jury.

Where a case has been tried before a judge, his findings upon questions of fact are conclusive, the same as are the findings of a jury, or referee, upon those questions. (*Ritter v. Cushman*, 35 How. 286; S. C. 7 Rob. 294. See *Davis v. Allen*, 3 N. Y. 168; *Hoogland v. Wight*, 7 Bosw. 394; S. C. 20 How. Pr. 70.) If there are no findings of fact, the appellant is not entitled to be heard, on appeal. (*Leland v. Cameron*, 31 N. Y. 115; *Doty v. Carolus*, id. 548; *Bridger v. Weeks*, 30 id. 328.)

It has been held that the provision of section 267, which requires the judge by whom a cause is tried, without a jury, to file his decision in writing within twenty days after the trial, is simply directory, and its non-observance furnishes no ground for the reversal of the judgment. (*Stewart v. Slater*, 6 Duer, 83.) Where there is no pretence of merits, or that the action was not correctly decided, the omission to file the decision in writing may be disregarded, under § 176 of the Code. (*Lewis v. Jones*, 13 Ab. 427.) When a motion is made to set aside a judgment for irregularity in this respect, it must clearly appear, on the moving papers, that no decision has in fact been filed. (Ibid.) The decision required by that section should embrace a distinct determination of the material issues raised by the pleadings. It is not a compliance with the law to direct that a certain judgment be entered. (*Burger v. Baker*, 4 Ab. 11.) Yet a judge is not bound to state, in his decision, all the facts in the case, as is necessary in a special verdict. His duty is fulfilled if he determines all the issues which, in his judgment, are material. (*Attorney General v. Mayor, &c., of New York*, 12 N. Y. Leg. Obs. 17.)

A judge, after he has heard a cause, must render a decision. He cannot, after the hearing before himself, order it to be retried before a jury. (*O'Brien v. Bous*, 4 Bosw. 663.)

The judge holding the court at which issues of fact are tried, must determine the whole case. (*Van Valen v. Lapham*, 13 How. Pr. 240; S. C. 5 Duer, 689.)

Where there is a mixed finding of law and fact, a general exception to the decision will not raise the question as to whether the fact found is sustained by the evidence. (*People ex rel. Martin v. Albright*, 14 Ab. 305; S. C. 23 How. 306.)

Hearing cause out of its order.] Although it is a general rule that causes come on to be heard according as they stand upon the calendar, yet they are sometimes heard out of their ordinary course. In some

The only authority needed for entering the judgment is the decision of the judge. (*Loeschigk v. Addison*, 3 Rob. 331; *Chamberlain v. Dempsey*, 14 Ab. 241; 9 Bosw. 212.) Where the plaintiff has a judgment subject to an accounting, he cannot enter his judgment, until the accounting has been had. (*McMahon v. Allen*, 27 Barb. 335; S. C. 7 Ab. 1.)

Where a party feels aggrieved by the finding of the judge, the proper remedy is not an exception, but a motion before the judge that the finding be corrected. If the party omits to have the finding corrected, even in a proper case it cannot be considered on an appeal from the judgment. (*Sharp v. Wright*, 35 Barb. 236; *Niles v. Price*, 23 How. 473; *People ex rel. Martin v. Albright*, 14 Ab. 305; S. C. 23 How. 306.) Where the judgment is substantially correct, the court, on appeal, will make the proper modifications, and affirm the judgment. (*Casler v. Shipman*, 35 N. Y. 535; *Buntin v. Orient Mu. Ins. Co.* 2 Keyes, 667; S. C. 8 Bosw. 448.)

Where the issues of fact are tried by the court without a jury, the judgment which is entered upon the decision must not contain any provisions not embraced in such decision. (*Loeschigk v. Addison*, 19 Ab. 169; S. C. 3 Rob. 331.) Questions of fact are open to examination only upon appeal to the general term of the court in which the trial took place. (*Rice v. Isham*, 1 Keyes, 44.)

A judgment will be reversed unless the statement of facts supports the conclusion of law. (*Chamberlain v. Dempsey*, 14 Ab. 241; S. C. 9 Bosw. 212.) If the judge fails to specify the relief granted, or the determination of the action, this irregularity may be taken advantage of on appeal. (*Ibid.*) No fact is, or can be, implied from the conclusions of law. They follow as the result of the facts separately stated. (*Tomlinson v. Mayor, &c., of New York*, 23 How. 455.) Yet it has been held that it is not error to omit to state even material facts in the decision, because the court, on appeal, will presume the facts necessary to sustain a verdict. (*McKeon v. See*, 4 Rob. 449.) And where a judgment, after a trial by the court, comes up for review without any finding of facts, nothing will be presumed against the correctness of the decision; but the presumption will always be in favor of the decision rendered. (*Viele v. Troy & Boston R. R. Co.* 20 N. Y. 184.)

In an action tried by the court without a jury, there can be no review of the trial or decision before judgment. (*People v. Albany & Susquehanna R. R. Co.* 39 How. 39; S. C. 57 Barb. 204; 8 Ab., N. S. 122.)

Exceptions to findings of fact, or to refusals to pass upon them, are unnecessary. Questions as to the necessity or propriety of passing upon facts should be determined upon an application to have such as are material, and as to which there is evidence, passed upon by the judge in settling the case. (*Hatch v. Fogerty*, 7 Rob. 488; S. C. 40 How. 492; 10 Ab., N. S. 147.)

A general exception to all the findings, both of law and fact, except certain ones specified, does not bring up for review an objection to the allowance of interest on the plaintiff's account for too long a period. To avail anything, the exception should point out the precise objection, so that the plaintiffs may have their election to remit the excess. (*Graham v. Chrystal*, 37 How. 279; S. C. 2 Keyes, 21.)

An exception "to all and every the conclusions of law in the decision and judgment contained, to wit:" the substance of each conclusion of law being set forth in the language, not of the finding, but of the judgment, is sufficient, since it points out with sufficient certainty the matter excepted to. (*Spaulding v. Strang*, 38 N. Y. 9; S. C. 37 id. 135.)

(c) *Before what court or judge.*

All issues of fact triable by a jury, or by the court, must be tried before a single judge. Issues of fact in the supreme court must be tried at a circuit court when the trial is by jury; otherwise at a circuit court or special term, as the court may by its rules prescribe. Issues of law must be tried at a circuit court or special term, and shall, unless the court otherwise direct, have preference on the calendar. (Code, § 255.)

In case of a trial by the court without a jury, it cannot properly be had before several judges in succession, so as, after being in part decided by one, to be taken up at a subsequent term and completed by another. An action cannot thus be tried and determined by piece-meal. (*Belmont v. Ponvert*, 3 Rob. 693.)

raises a cause noticed for hearing will be advanced, on an application to the court, on sufficient cause being shown. (i)

Hearing two causes together.] In cross suits, and also in other suits,

(i) *Hoyle v. Livesey*, 1 Mer. 381.

Under the Code of 1849, an issue of law on demurrer might be brought on to argument at a special term held in a different county in the district from that indicated in the complaint as the place of trial, without first applying to the court to change the place of trial. (*Ward v. Davis*, 6 How. Pr. 274.) Since this decision the legislature has altered the 252d section of the Code, so as to leave no doubt that an issue of law may be brought to trial at any general term in the district. (Id. 276, note.)

(d) *By referees.*

Reference, when ordered. All or any of the issues in the action, whether of fact or of law, or both, may be referred upon the written consent of the parties. (Code, § 270.)

Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases: 1. Where the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or, 2. Where the taking of an account shall be necessary for the information of the court before judgment, or for carrying a judgment or order into effect; or, 3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action. (Code, § 271.)

Reference by consent. It has been held that upon the written consent of the parties the county court has jurisdiction to order a reference in a case appealed from a justice's court where there is an issue of fact joined. (*Hyland v. Loomis*, 48 Barb. 126. See, also, *People ex rel. Blanchard v. Judges of Washington Com. Pleas*, 20 John. 363; *Flower v. Allen*, 5 Cowen, 634.)

A written consent is necessary to refer issues in all cases in which the court may not compel a reference; and hence, a consent in writing is just as necessary to a valid reference, under the Code, as to a valid reference under the statutes relating to the reference of claims against executors and administrators. (*Bucklin v. Chapin*, 35 How. 155, 160.) The consent to refer may be written by the parties, or their attorneys, or by the clerk entering their consent in the minutes of the court, or by the referees entering the same in their minutes, such consent being made before them. (*Leacycroft v. Fowler*, 7 How. Pr. 259; *Waterman v. Waterman*, 37 How. 36; *Bucklin v. Chapin*, 53 Barb. 488; S. C. 35 How. 155.) The parties also may waive by their acts any further writing than the entry on the minutes of the referee, if more were otherwise necessary. (Ibid.) Where the counsel for both parties, at the circuit, orally agree to refer a cause not referable under § 271, and the court makes the order, and appoints a referee who proceeds with the hearing, neither party can set aside the reference on the ground that a written consent was not obtained, because the agreement of the parties, made in the presence of the court, waived a written consent, and made the reference valid and binding. (*Keator v. Ulster & Delaware Plank Road Co.* 7 How. Pr. 41. See, also, *Baker v. Braman*, 6 Hill, 47; *Lee v. Tiltonson*, 24 Wend. 337; *People v. Murray*, 5 Hill, 468; *Embury v. Conner*, 3 N. Y. 511.)

The retainer of counsel to make a motion in a case, confers upon him sufficient authority to bind his client by consenting to a reference. (*Tiffany v. Lord*, 40 How. 481.)

Proceeding upon a reference is a waiver of all objections to the order of reference on the ground of irregularity. (*Garcie v. Sheldon*, 3 Barb. 232; *Bucklin v. Chapin*, 53 Barb. 488; S. C. 35 How. 155.)

The written consent required by § 270 of the Code, to refer an action for divorce, is sufficiently made and the statute complied with when an order of reference is drawn by the attorney for one of the parties, and submitted to and approved by the attorney of the other party, which recites as follows: "Upon the consent of the attorneys for each of the above parties, given in open court, it is ordered that this action be, and the same is, hereby referred," &c. (*Waterman v. Waterman*, 37 How. 36.) But in *Simmons v. Simmons*, (3 Rob. 642.) it was held that the court was not at liberty to divest itself of its obligations as guardian of the rights of married wo-

where there are two causes between the same parties, involving the same point in dispute, and where it is material that both causes should be heard together, if both are set down for hearing, but stand at a dis-

men so far as to delegate the trial to others; and that an order of reference "to try and determine the issues" in an action for divorce, could not be granted, even by consent.

Where the parties to an action consented in writing to an order of reference of all the issues therein to three referees, and at the same time entered into a stipulation, annexed to such consent, signed by themselves and their attorneys, whereby they prescribed and limited evidence to be introduced before such referees on such reference; fixed the time for rendering their report, made it final, provided for entering judgment thereon in the usual manner, and waived any right of appeal from such judgment; but provided that the authority of two of the referees named should cease in case the report was not "rendered" within a given time after certain evidence was introduced, and the third should proceed as sole referee, and "render" a report on the same evidence within a certain time after such termination of the authority of his associates. *Held*, 1. That notwithstanding such stipulation contained a provision that the same should be annexed to and form a part of the judgment-roll, yet that by the consent that the order of reference should be entered in the usual form, and by its entry, the court retained jurisdiction, and did not lose it in consequence of such stipulation, particularly where the parties proceeded on the trial before such referees without any objection. 2. That the mere waiver of the right of appeal neither enlarged nor diminished the powers of the referees, and did not, by itself, convert such reference into an arbitration. 3. That two of the referees having made a report in favor of the defendants, the latter were entitled to enter judgment thereon, if made within the time fixed in the stipulation. 4. That the terms of the stipulation, as to "rendering" a report, were satisfied by its being made and delivered to the successful party, for the purpose of enabling him to enter judgment in the usual way. (*Healy v. Gilman*, 6 Rob. 479.)

In an action referable only by consent, a stipulation was signed by the attorneys of both parties, allowing the action to be referred to M. An order being made on the defendant's motion, referring the cause to J., it was held that the plaintiff had a right to disregard the order entirely, and proceed to trial or inquest, as if no consent to a reference had been given. (*Haner v. Bliss*, 7 How. Pr. 246.)

An action for a divorce on the ground of adultery is referable by consent. (*People v. McGinnis*, 1 Park. Cr. Rep. 387.) Where the answer denies the adultery, a referee cannot be appointed to take testimony. There must be a feigned issue. (2 R. S. 145, § 40; *Whale v. Whale*, 1 Code Rep. 115.) But by § 72 of the Code, feigned issues are abolished, and an order for the trial of questions of fact distinctly and plainly stated is substituted.

The practice established by the Code does not allow of a reference to take the evidence and report it to the court with the opinion of the referee merely; nor of any reference, except for a trial of the issue, in a case where an issue has been joined. It is only in cases where no issue has been joined, or where some interlocutory question is involved, that a reference to take and report evidence is now allowable. (*Waterman v. Waterman*, 37 How. 36.)

Compulsory reference. Courts have no power compulsorily to refer an action which is not founded on contract, and which does not involve the examination of a long account. (*Townsend v. Hendricks*, 40 How. 143. But see *Batchelor v. Albany City Fire Ins. Co.* 6 Ab., N. S. 240.) Section 271 of the Code must be construed in connection with section 2 of article 1 of the constitution, and is limited to actions on contract. Where the action, from its nature, is not referable, the answer cannot make it so. But should a counter-claim require examination, a reference as to that can be ordered, after trial of the issues. (*Ibid.*)

In an action to recover the value of personal property sold, although the account consists of a large number of items, the court cannot grant an order of reference, if the defendant denies that the property was sold to him, and offers to stipulate that at the trial he will not dispute or question the items of such claim, either as to their number, character, value or price, and demands a trial by jury. (*Seigel v. Heid*, 36 How. 506.)

If it can be made to appear that the trial of any one of the issues will involve the examination of a long account, although the determination of some other issue may render it unnecessary to try the first named issue at all, a reference may be ordered.

*tance from each other, the court will permit the cause which [*320] stands last. to be advanced, or that which stands first to be adjourned, so that both may come on at the same time; and likewise, if it be

As to whether the whole of the issues shall be referred, or the taking of the account merely; and whether the account shall be taken before the trial of the other issues, or after; are matters in the discretion of the court at special term, to be governed by the peculiar circumstances of each case. (*Whittaker v. Desposse*, 7 Bosw. 678; *Batchelor v. Albany City Ins. Co.* 37 How. 339; S. C. 6 Ab., N. S. 240.)

An action which involves the examination of an account between the parties, in the ordinary acceptance of that term, is in its nature referable; and whether it may be referred depends upon whether the account is or is not a long one, which is to be ascertained by the judge to whom the application for the reference is made. And with his finding or conclusion upon that point an appellate tribunal will not interfere, unless he certifies that the point is one of sufficient importance or doubt to warrant a review. (*Turner v. Taylor*, 2 Daly, 278.) To authorize a compulsory reference on the ground that an account is involved, it must be directly in issue, or there must be no question remaining to be determined, except the adjustment of the items of such account. It is not sufficient that it may have to be examined collaterally for the purpose of establishing some one of the issues in the action. (Ib.)

It seems that although the defendant proves that it was his intention to apply for a jury trial, this fact, of itself, will furnish no ground of obligation to granting an order that the cause be referred. (*Goodyear v. Brooks*, 4 Rob. 632; S. C. 2 Ab., N. S. 296; 30 How. 443.) The power conferred by section 272 was intended more for the convenience of the court than as conferring a right on the parties. (Ibid.)

An action to set aside a fraudulent conveyance, on the ground that the defendant was insolvent when it was made, is not to be referred without consent; notwithstanding the examination of a long account may be indirectly involved. (*Bushnell v. Eastman*, 2 Ab., N. S. 411.)

Five items do not constitute a long account. A bill of particulars is not an account, in the sense of the statute authorizing a reference where the examination of a long account is involved. (*Dickinson v. Mitchell*, 19 Ab. 286.) Seven items, under one date, all but two of them small, have been held not to constitute a long account. (*Harris v. Mead*, 16 Ab. 257.) As to what does constitute a long account, see *Swift v. Wells*, 2 How. Pr. 79; *Miller v. Hooker*, id. 171; *McCullough v. Brodie*, 13 id. 316; S. C. 6 Duer, 659; *Dewey v. Field*, 13 How. Pr. 437; *Stewart v. Ellwell*, 3 Code R. 139; *Sheldon v. Wood*, 1 Code Rep., N. S. 118; S. C. 3 Sandf. 739.

The Code does not give an absolute right to have all the issues in an action referred, merely because a long account is involved. (*Wheeler v. Falconer*, 7 Rob. 45; *Cameron v. Freeman*, 18 How. Pr. 310; S. C. 10 Ab. 333.) The right to move, at a trial term, for an order of reference, can only exist when the cause is on the calendar ready for trial, and the object is to prevent its being tried. It is not necessary that a formal order should be entered, upon every such application, but the decision thereon is equally binding, whether an order is entered or not. (Ibid.) Where the necessity for looking into the account depends upon the decision of some other issue in the action, that issue must be tried, before a reference will be ordered. (*Graham v. Gohling*, 7 How. Pr. 260.)

In an action under a statute, to recover damages from a city or county, sustained by the plaintiff from the acts of a mob, or by a riot, a reference will not be ordered, without consent of the parties. (*Ross v. Mayor, &c., of New York*, 2 Ab., N. S. 266; S. C. 32 How. 164.)

If the examination of a long account is involved in an action for breach of a contract to repair, it may be referred. (*Hatch v. Wolfe*, 1 Ab., N. S. 77; S. C. 30 How. 65.) Though the issues in an action are such that it may prove that the examination of a long account will be important, collaterally, this does not render the action referable without the consent of the parties. The issues must be such as to involve, directly, such examination. (*Cameron v. Freeman*, 10 Ab. 333; S. C. 18 How. Pr. 310.) The Code, by expressly permitting the referee to be confined to passing upon a specific question of fact involved in the issue, even where a long account is also involved, and by allowing such account to be taken as a separate matter, for the information of the court, (§ 271, subd. 2.) not only authorizes, but requires, that neither party shall be deprived of the benefit of a trial before the court, or a jury, as to matters not involved in the account and embraced in the issues. (*Wheeler v. Falconer*, 7 Rob. 45, 48.) Although the Code blends equity and common law jurisdiction

necessary, the depositions taken in one cause to be read in the other—an order for that purpose, having been previously obtained. (*k*)

Depositions and bill in cross suit.] The court will also order depo-

(*k*) *Nevil v. Johnson*, 2 Vern. 447. *Wilford v. Beasley*, 3 Atk. 501, 503. *Prac. Reg.* 172.

together, section 271 does not give an absolute right to refer all the issues in the Code, merely because a long account is involved. A referee has no power to adjust equities between the parties, or to order anything but the payment of money, and yet his decision is to be the judgment of the court. The necessity of taking an account ought not, therefore, to take with it, for trial before a referee, all other matters in an action involving such equities. (*Ib.*)

Compulsory references should be rigorously confined to cases involving the examination of a *bona fide* account, in an action on contract, and which should also be literally and truly a long account. (*Sharp v. Mayor, &c., of New York*, 18 How. Pr. 213; *S. C.* 31 Barb. 578; 19 How. Pr. 193.) The constitutional provision, that the right of "trial by jury, in all cases in which it has been heretofore used, shall be inviolate forever," cannot be too faithfully preserved; and any act of the legislature, tampering with it, should be very strictly construed. (18 How. Pr. 216, per CLERKE, J.)

A compulsory reference should not be ordered where the action can be tried in a reasonable time by the court; since the additional time and expense necessary in a trial before a referee, may, in some cases, amount to a denial of justice. (*Godfrey v. Williamsburgh City Fire Ins. Co.* 12 Ab., N. S. 250.) The power to order a reference, in a case where no fraud was involved, and a mere ascertainment of damages was required, existed before the constitution of 1846, and was not taken away by that instrument. (*Ibid.*)

No referee should proceed a step in the exercise of his duties, without a certified copy of the rule or order appointing him, in his hands. This is his commission, and without it he should not proceed to act. (*Bonner v. McPhail*, 31 Barb. 106.) The power of a referee to administer a judicial oath can only be derived from an order of the court appointing such referee. A memorandum, "referred to K. L. M.," made by the judge, on his calendar, at the circuit, is not sufficient to constitute an order. An entry, at least, in the minutes of the court is required for that purpose. Some action of the court, shown by its records, is necessary. (*Ibid.*) An order of reference, made after the report of the referee is filed, with the consent of both parties that it be entered *nunc pro tunc*, will not relate back, so as to give to an extra-judicial oath the effect of an oath legally administered, on which a charge of perjury can be sustained. (*Ibid.*)

Although the parties may agree upon a suitable person for a referee, the court must be satisfied that the selection made by the parties is a proper one; and the appointment must be made by the court. (*Litchfield v. Burwell*, 5 How. Pr. 341; *S. C.* 1 Code Rep., N. S. 42; 9 N. Y. Leg. Obs. 182. But see *Whalen v. The Board of Supervisors of the County of Albany*, 6 How. Pr. 278.) In *Scudder v. Snow*, (29 How. 95,) it was held that a *chamber order*, naming a referee, is invalid, unless supported by an order of the court made at special term. But that when there has been a trial before the referee, upon the merits, the decision of the court, authorizing a reference, may be entered *nunc pro tunc*, in order to support the judgment. In *Whalen v. The Board of Supervisors of the County of Albany*, (6 How. Pr. 278,) it is held that a written stipulation, by the parties, to refer a cause to a referee "to hear and report thereon," is sufficient to confer jurisdiction, and sustain the judgment, although the referee may not have been sworn, or a rule of court entered, upon his appointment. That the court will order a rule to be entered *nunc pro tunc*, if necessary. And that where the parties appear and argue the cause before the referee, without objection, it is a waiver of such defects.

And in *Ludington v. Taft*. (10 Barb. 447,) it is decided that where parties have, by stipulation, appointed a person as referee, to take the evidence and report thereon, as though he had been appointed by order of court, no objection can be taken to his report, on the ground that no preliminary decree, that the parties account, had been made.

Where, on a motion to confirm the report of a referee, in an action for divorce on the ground of adultery, it did not appear by the moving papers that a jury trial had been waived, and that consent to the reference had been given, in *writing*, and *filed*, as required by section 266 of the Code; it was held that the reference was irregular, and the motion was denied. (*Diddell v. Diddell*, 3 Ab. 167.)

sitions in a cross suit to be read, on the account directed in the original suit, though the cross bill is dismissed. (*l*) And a cross bill for discovery, taken *pro confesso*, will be ordered, on motion, to be read on the hearing of the original cause. (*m*)

(*l*) *Lubiere v. Genou*, 2 Ves. 579.

(*m*) *Corey v. Gerteken*, 2 Mad. 43.

If the action is not in readiness for trial, it is not referable; and the objection should be taken on the motion to refer. (*Hawkins v. Avery*, 32 Barb. 551; *Wheeler v. Falconer*, 7 Rob. 45. 48.) Such objection is, in substance, for the want of parties; and that objection must be taken by answer or demurrer. (*Ibid.*)

A cause cannot be tried before a jury, in part, and a verdict taken, and partly by a referee afterwards to be appointed. In a proper case, where the propriety of a reference is disclosed on the trial, the action may probably be withdrawn from the jury, but should be withdrawn altogether. (*Buchanan v. Cheseborough*, 5 Duer, 238.)

When the trial of a cause is moved, at the circuit, if the judge is satisfied, from an inspection of the *pleadings*, that the trial of the issues of fact will require the examination of a long account; or if, after a trial of a cause, before a jury, has been commenced at the circuit, it appears, by the *evidence*, that the trial will require the examination of such an account, the judge, of his own motion, may direct a reference of the issues, to a referee, to hear and determine. (*Holmes v. Bennett*, 28 How. 239.) And the court can direct a reference of any referable action, on the motion of either party, whenever it is satisfied by *legal evidence*. (*Ibid.*)

Upon the application of either party, upon a notice of ten days, for a trial by jury, the court may or may not direct that the issues be tried by a jury. But if the application be denied, or if no application be made, the court still has the power, at the trial, to order the whole issue, or any specific question of fact involved therein, to be tried by a jury. (*Church v. Freeman*, 16 How. Pr. 294; *O'Brien v. Bowes*, 10 Ab. 106; S. C. 4 Bosw. 657. See, also, *Goodyear v. Brooks*, 4 Rob. 682; S. C. 2 Ab., N. S. 296.)

The want of notice of motion for the appointment of a referee is not cured by the fact that the opposite party has moved to vacate the order made on the motion, nor by his having appealed from the order. (*McLean v. Tompkins*, 18 Ab. 24.)

A motion for a reference will be denied where it clearly appears that substantial questions of law will arise on the trial, although the plaintiffs show that it will require the examination of a long account on their part. (*Ives v. Vandewater*, 1 How. Pr. 168.) When a motion to refer a cause is opposed on the ground that difficult questions of law will arise, the opposing affidavit must set forth what such questions are, in order that the court may be enabled to judge whether they are questions of real difficulty. (*Dewey v. Field*, 13 How. Pr. 437.) Where a cause involves the examination of a long account, it is no objection to a motion for a reference that it has been tried by a jury; (*Brown v. Bradshaw*, 1 Duer, 635;) otherwise if it has been once tried by a referee. (*Stouwenel v. Stevens*, 2 Daly, 319.)

An application to set aside an assessment for a local improvement, on the ground of fraud or irregularity, does not admit of a reference. The proceeding is statutory, and must be construed strictly. There is no law which allows a judge, in a proceeding out of court, to refer it. The whole law of references applies to matters pending in the court. (*The People ex rel. Geery v. Brennan*, 45 Barb. 344.)

Chapter 412 of the Laws of 1862, which provides for a reference in matters of controversy between the members and stockholders of a mutual insurance company which has become insolvent and a receiver of such company, is constitutional. (*Sands v. Kimbark*, 27 N. Y. 147; S. C. 39 Barb. 108; *Sands v. Tillinghast*, 24 How. Pr. 435.)

In an action to open stated accounts, and for an accounting, it is premature to apply for a reference before the question of the right to an accounting has been determined. Until then it does not appear that any examination of the accounts will be required. (*Mitchell v. Stewart*, 3 Ab., N. S. 250.)

Under the Revised Statutes, (2 R. S. 89,) claims against executors and administrators may be referred. (*Coe v. Coe*, 37 Barb. 232.)

The reference to a referee to take and state an account between the parties in an action for the dissolution of a joint stock company, and for an accounting among the associates, under subdivision 2 of section 271 of the Code, is the reference of the former courts of equity, such as was always made to a master in cases of accounting. And the practice of the court of chancery, in respect to references of that nature, is

Objecting to jurisdiction.] If a defendant puts in his answer, and goes to hearing without objecting to the jurisdiction of the court, on the ground that the complainant has a perfect remedy at law, it is too late to make the objection at the hearing. (*n*)

(*n*) *Le Roy v. Platt*, 4 Paige, 77.

still in force in regard to proceedings before referees. (*Ketchum v. Clark*, 22 Barb. 319.) Hence, where no objections are made before a referee as to the mode of proceeding, and no exceptions are taken to his report, both parties are concluded by the report, and neither is entitled to raise any question in respect to the details of the account on the hearing of the cause upon the referee's report and the proofs. (*Ibid.*)

In an action by a purchaser of land, in which the only relief specifically demanded was that the vendor be compelled to perform the agreement by conveying, it appeared that the defendant had never been able to perform his agreement. Held, that the court could not order a reference to ascertain the plaintiff's damages for the breach of the agreement, the defendant having a right to have that question tried by a jury. (*Stevenson v. Buxton*, 15 Ab. 352.)

It is not necessary that referees should fix the time and place of hearing in writing. (*Stephens v. Strong*, 8 How. Pr. 339.) When the time and place for the hearing is actually fixed by the referees, (by parol or otherwise,) and the attorney gives the adverse party notice of the hearing, such adverse party is in fault if he fails to attend; and in his absence the referee may proceed upon the motion of the party giving the notice. If the plaintiff neglects to appear, the referee may proceed, and make his report in favor of the defendant, and may non-suit the plaintiff. (*Ibid.*)

Where an issue of fact is formed by the pleadings in an action to set aside an assignment for the benefit of creditors for fraud, and the examination of a long account is not necessary, it must be tried by the court, unless ordered to be tried by a jury, or referred by consent of parties. It is not a referable cause by compulsion under the Code. (*Draper v. Day*, 11 How. Pr. 439.)

In a case where the reference may be ended by notice from either party, the notice must be from the attorney, and not from the party. (*Halsey v. Carter*, 6 Rob. 535.)

Rule 87 of the supreme court directs that when an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer, the court to which application is made for judgment shall order a reference to take proof of all the material facts charged in the complaint. But the court shall in no case order the reference to a referee nominated by either party.

Referees, how chosen; who may be. In all cases of reference, the parties as to whom issues are formed in the action, (except when the defendant is an infant or an absentee,) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who shall be free from exception. No person shall be appointed referee to whom all parties in the action shall object, except in actions for divorce. And no judge or justice of any court shall sit as referee in any action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate. (Code, § 273.)

It has been held that a referee can in no case be nominated by a party, unless all the parties agree upon a suitable person. And no such agreement can be made where an infant or an absentee is a party, nor where a divorce is sought by or against a married woman. The agreement, when allowed, must be evidenced in writing, signed by the parties or their attorneys. The referee's name should not be inserted in any proposed order, unless accompanied by such agreement. (Per ROOSEVELT, J., 13 How. Pr. 346.)

In an action brought to obtain a divorce or separation, or to declare a marriage contract void, the court shall in no case order a reference to take proof of the facts to a referee nominated by either party. (Rule 87, Supreme Court.)

Proceedings on the trial; power and duty of referee. Section 272 of the Code directs that the trial by referees shall be conducted in the same manner, and on similar notice, as a trial by the court. They shall have the same power to grant adjournments, and to allow amendments to any pleadings, and to the summons, as the court upon such trial, upon the same terms, and with the like effect. They shall have the same power to preserve order and punish all violation thereof upon such trial, and

Objection for want of parties.] The proper time for taking an objection for want of parties, is upon opening the pleadings, and before the merits are discussed; (o) but it frequently happens that after a cause

(o) *Jones v. Jones*, 3 Atk. 111. *Darwent v. Walton*, 2 Atk. 510.

to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance, or refusal to be sworn or testify, as is possessed by the court.

Rule 39 of the supreme court provides that on a hearing before referees the plaintiff may submit to a non-suit or dismissal of his complaint, or may be non-suited, or his complaint be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision. In which case the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

A referee is required to take a prescribed oath before entering upon his duty. Yet if no such oath be taken, and the parties, without objection duly raised, proceed with the trial, they will be held to have waived all objection to the want of an oath by the referee. (*Keator v. Ulster & Delaware Plank Road Co.* 7 How. Pr. 41.)

A referee to whom the whole cause is referred has power, and is required in cases falling under § 306 of the Code, to decide the question of costs. His power, in this respect, is the same as that of a judge of the supreme court at special term. (*Graves v. Blanchard*, 4 How. Pr. 300.)

The city court of Brooklyn being a court of special and limited jurisdiction, a referee appointed by it has no power to try a cause in the city of New York. (*Bonner v. McPhail*, 31 Barb. 106.)

A referee has power to allow a *re-argument* before making his report, even after he has made up his mind. (*Litch v. Brotherson*, 16 Ab. 384; S. C. 25 How. 407.) In an action for *divorce*, it is his duty to find not only the fact of adultery, but also as to all the other material facts, such as the connivance of the plaintiff, &c. (*Myers v. Myers*, 41 Barb. 114. See, also, *Dodge v. Dodge*, 7 Paige, 589; *Pugsley v. Pugsley*, 9 id. 589; *Arbogast v. Arbogast*, 8 How. Pr. 297.) A referee has power to act and report on the whole issue, both of law and fact, where the order refers the cause without limitation. (*Renoul v. Harris*, 1 Code Rep. 125; *Graves v. Blanchard*, 4 How. Pr. 303; S. C. 3 Code Rep. 25.) Under section 272 of the Code, he has the same power of amendment upon the trial as the court in a like case has. (*Patchin v. Peck*, 33 N. Y. 39, 41; *Woodruff v. Dickie*, 5 Rob. 619; S. C. 31 How. 164; *Woodsey v. Trustees of Rondout*, 2 Keyes, 603; *Dunnigan v. Crummey*, 44 Barb. 528.) And where it is within the discretion of a referee to allow an amendment, such discretion cannot be reviewed. (*Melvin v. Wood*, 3 Keyes, 583; S. C. 4 Ab., N. S. 438; *Woodruff v. Husson*, 32 Barb. 537.) Where the amendment proposed to be made in an answer contemplates a new defence *pro tanto*, a referee has no jurisdiction over the motion, and the amendment, if granted, would be irregular. (*Woodruff v. Husson*, *supra*.) Where a pleading alleges that an assignment was in writing, and for a certain sum, it is within the power of a referee to permit an amendment of the pleading by alleging that such assignment was by parol, and intended as security for an uncertain sum. (*Hoyt v. Hoyt*, 8 Bosw. 511.) A referee may grant an amendment of the complaint, not introducing a new cause of action distinct from that under which the plaintiff first sought to recover, or may disregard an immaterial variance between the complaint and the proof. (*Dunnigan v. Crummey*, 44 Barb. 528.) It is not erroneous for a referee to refuse to allow the defendant to serve an amended answer to the complaint as amended, where the defendant does not show that he was misled, or disclose facts showing wherein he was misled, but merely states it as his opinion, and that of his counsel, that an amendment of the answer, and further evidence, will be necessary. (*Ibid*.)

In *Secor v. Law*, (9 Bosw. 163; S. C. affirmed, 3 Keyes, 525,) the complaint, as originally framed, set up three separate causes of action, but after the proofs were closed upon the trial, and the cause submitted, the referee permitted an amendment thereto by adding a statement of a fourth cause of action, (demanding the same sums as were demanded in the original complaint,) in which it was alleged that the defendant having claimed damages for delay in the work, the parties, on an accounting of all these claims, including such last mentioned claim, found a specified balance due, which the defendant promised to pay. Held that the amendment was within the discretion of the referee, and properly permitted. It was also held that the de-

has been gone into, and thoroughly heard, the court has felt itself compelled to let it stand over for the purpose of amendment. (*p*)

(*p*) *Id. ib.*

fendant, by amending his answer, and taking issue on such new cause of action, waived all objections to the propriety of permitting the amendment.

Referees now possess all the powers of the court in regard to amendments of pleadings, and their allowance or disallowance of an amendment can only be reviewed, if at all, in the manner other decisions of the same kind, made by the court, are reviewed, viz: on appeal. (*Woodruff v. Dickie*, 5 Rob. 619; S. C. 31 How. 164.) Neither at common law, nor under any statute previous to the Code, did the courts ever claim the power to allow an amendment to an existing pleading by the insertion of a new and different cause of action or defence. (*Ibid.*) The Code (§ 173) does not extend the power of the court over amendments setting forth a new cause of action or defence. (*Ibid.*)

The power of a referee extends to allowing a new bill of particulars to be substituted for the one annexed to the complaint. (*Melvin v. Wood*, 3 Keyes, 533; S. C. 4 Ab., N. S. 438; 3 Trans. Ap. 297.)

Where a new cause of action or defence is added to the pleadings by an amendment which the referee allows during the trial, the aggrieved party may seek relief by taking an exception to the ruling of the referee, and appealing to the general term after judgment. He may also, before judgment, move to have the order set aside. (*Ford v. Ford*, 53 Barb. 525; S. C. 35 How. 321.)

A party examined before a referee may be by him adjudged guilty of a contempt. (*Heardt v. Wetmore*, 2 Rob. 697.) It is a contempt if counsel advises a witness not to answer a proper question; and the witness is also guilty of contempt if he refuses to answer it. He does so at his peril. (*Ibid.*) But a referee cannot punish for a contempt, and therefore has no power to strike out a party's pleading because he refuses to testify when duly subpoenaed. (*Bonesteel v. Lynde*, 8 How. Pr. 226.)

A referee has power to dismiss a complaint for not stating facts sufficient to constitute a cause of action. (*Coffin v. Reynolds*, 37 N. Y. 640; S. C. 5 Trans. Ap. 74.)

Where the order of reference is simply that the referee "take and state an account," he is a mere substitute for a master under the old chancery practice, and he must be governed by the rules that governed that practice. But if the whole issue be referred, then the Code confers upon him complete jurisdiction over the cause, as much so as any judge would possess at special term, for its trial. The mode of conducting the trial, therefore, must be within the discretion of the referee, so far as relates to all questions within the ordinary discretion of a judge on the trial of a cause. No exception lies to the decision of a referee, so far as it relates to the mode of proceeding. (*Palmer v. Palmer*, 13 How. Pr. 363, 365. See, also, *Ketchum v. Clark*, 22 Barb. 319; *Elmore v. Thomas*, 7 Ab. 70.)

It is the business of a referee appointed to take evidence, to take all that is offered, and leave it to the court, on the hearing of the matter, to determine what is or is not competent. (*Scott v. Williams*, 23 How. 393.)

Referees are, as to matters of fact, merely a substitute for a jury, whose decision upon questions of fact cannot be reversed upon a writ of error, although the court in which the original action is pending may set aside the report as against the weight of evidence, or grant a new trial upon newly discovered facts, as justice may seem to require. Although referees have come to a wrong conclusion upon a mere matter of fact, the court of appeals has no jurisdiction to reverse a judgment of the supreme court for that reason. (*Davis v. Allen*, 3 N. Y. 163, 173.) The court of appeals cannot review a mere question of fact. The conclusions of fact must be found by the referee, or the court of original jurisdiction, and stated in the record, so as to leave nothing for the court of appeals to pass upon except pure questions of law. (*Esterly v. Cole*, 3 N. Y. 502.)

After a referee has rendered his decision and made his report, he has no further authority over interlocutory questions which have arisen during the trial. (*Allen v. Way*, 3 Code Rep. 243.)

In the matter of adjournments referees are allowed a reasonable discretion; and if they unreasonably refuse one, the report may be set aside. (*Forbes v. Frary*, 2 John. Cas. 224.) They may adjourn for a reasonable time on their own motion, without the consent of parties. The only limitation in the statute in respect to such adjournments is, that they shall "be necessary." (*Ex parte v. Rutter*, 3 Hill, 464.) Of this necessity the referees are to judge, though the court may inquire into the matter

The objection for want of parties ought to proceed from the defendant; for it has been decided that the complainant, bringing his cause to a hearing without proper parties, cannot put it off without the consent of the defendant. (q) Cases of exception may occur; where, for

(q) *Innes v. Jackson*, 16 Ves. 356.

for the purpose of seeing that the power is not exercised oppressively, and that no unreasonable delay takes place. (Per BRONSON, J.; *Ibid.*) The fact that on a trial before a referee adjournments were not formally made from one hearing to the time of another, does not render the proceedings irregular if both parties gave all the testimony they desired, and submitted the cause on such testimony. (*The Accessory Transit Co. v. Garrison*, 9 Ab 141; S. C. 18 How. Pr. 1.) A motion on a trial pending before a referee, on the ground that a material witness is absent, will not be heard by the court. Such questions must be decided by the referee; and if he commits an error, the court will correct it, on motion to set aside his report. (*Langley v. Hickman*, 1 Sandf. 681.) The absence of counsel on a pleasure voyage is not sufficient reason for granting an adjournment. (*Forrest v. Forrest*, 3 Bosw. 650.) For good cause shown a referee has power to postpone a hearing; and he may impose such terms as are usually imposed by courts upon putting off trials. (*Sickles v. Fort*, 12 Wend. 199.)

Where it is certain that the party could not have been misled, a variance between the pleadings and the proof may, under the provisions of the Code, be disregarded, without amendment, by a referee as well as by a judge. (*Harmony v. Bingham*, 1 Duer, 210; S. C. 12 N. Y. 99.) When there is a variance between the pleadings and the proof, the referee should not dismiss the complaint, but should, if the evidence is sufficient, render a decision, and allow the court, in its discretion, to amend the pleadings, under § 173 of the Code. (*Hart v. Hudson*, 6 Duer, 295.) The name of a party is not properly a part of a pleading, and cannot, therefore, be stricken out by a referee. (*Billings v. Baker*, 6 Ab. 213.)

A matter clearly within the discretion of the referee, will not be interfered with by the court until after he has made his report. (*Schermerhorn v. Develin*, 1 Code Rep. 28; *Langley v. Hickman*, 1 Sandf. 681.)

A referee to whom all the issues in an action have been referred, has no authority to order the production of books by either party, where there is no provision to that effect in the order of reference. This power is limited to the court, or a justice thereof, whether exercised under the Code or the Revised Statutes. (*Frazer v. Phelps*, 3 Sandf. 741; S. C. 1 Code Rep., N. S. 214.) In an action at law the court will not insert, in the order of reference, a power enabling the referee to compel the production of books and papers. (*North v. Platt*, 7 Rob. 207.)

A referee has no power to strike out the pleading of a party for the reason that being ordered to produce books and papers, he refuses to do so. (*Bonesteel v. Lynde*, 8 How. Pr. 226, 352.)

After the plaintiffs have closed their case, they are not entitled to open it and introduce evidence which is not rebutting, though competent and proper to make out their case in the first instance. The referees have the right, in their discretion, to admit or exclude such evidence, and their decision is not subject to review on appeal. (*Fielden v. Lahens*, 6 Ab., N. S. 341.)

A referee has power, on the trial of a cause, to compel a witness to submit a memorandum used by him in giving his testimony to the inspection of counsel; and if he declines to do so, or to strike out the testimony of such witness on his refusal to submit it, on the ground of want of power, that is an error for which the judgment entered on his report will be reversed. (*Peck v. Lake*, 3 Laus 136.)

In an action for a divorce, an order will not be granted referring the action to a referee "to try and determine" the issues therein, though the attorneys for the respective parties sign a stipulation consenting to such order. (*Simmons v. Simmons*, 3 Rob. 642.) The court ought not, in any case, to delegate to others the power to hear and determine the issues in actions of that nature. (*Ibid.*)

The judicial functions of a referee end when he has delivered his report. After that he performs a mere ministerial duty in certifying what took place on the trial, and what he in fact did decide in disposing of the case. (*Lefter v. Field*, 33 How. 385.) When a referee has made his decision and submitted his report, he is *functus officio*, and cannot again act without being set in motion by the court. The court then has power to appoint a new referee. (*Trufant v. Merrill*, 37 How. 531; S. C. 1 Sweeney, 462; 6 Ab., N. S. 462.)

instance, the complainant was not aware of the existence of persons whose claims could touch the interests of those who were upon the record; but that ought to be clearly established. And the complainant ought to apply as soon as he has obtained that knowledge. (r)

(r) Id. ib.

The proper judgment to be rendered by a referee, in a case where the plaintiff neglects to appear, is a dismissal of the complaint—not an absolute judgment as upon a verdict; the judgment no more to be an absolute bar, in such a case, than in that of a non-suit upon the trial. (*Salter v. Malcom*, 1 Duer, 596.)

Changing referee. It is not sufficient ground for changing the referee, in an action for a divorce, that he was referee in a former action between the same parties, and in that action decided in favor of the plaintiff. (*Clark v. Clark*, 7 Rob. 62.) Where, in a cause referable only by consent, the attorney of one of the parties consents to refer to a person named, the court cannot substitute a new referee without the same consent. (*Billings v. Vanderbeck*, 15 How. Pr. 295; S. C. 6 Ab. 213.) When a new trial is granted, on appeal from a judgment entered on the report of a referee, the action should be re-tried before a new referee. (*Schermerhorn v. Van Alen*, 13 How. Pr. 82.) When an action has been referred, and tried by the referee upon the facts, and a report made by him, if a new trial is ordered, it is not, ordinarily, proper to send it back to the same referee. (*Sharp v. Mayor, &c., of New York*, 31 Barb. 578; S. C. 19 How. Pr. 193.) The general practice is, to vacate the order of reference, on granting a new trial, on the application of either party, and to refer it to a new referee, if the cause is referable, or to retain it in court, if it is not. (*Ibid.*) Whether a referee shall be retained or removed when a new trial is ordered, is a question addressed to the discretion of the court, and from the decision thereon no appeal lies, it seems. (*Ibid.*) When an action is referable only on consent, and the court sees fit to take it from the referee appointed therein, it cannot supply the vacancy. Hence, the case must go back upon the calendar, or be deemed and treated as an arbitration. (*Ibid.*)

When a new trial is ordered, a new referee will be appointed on the same grounds and for the same reasons which require a new jury to re-try a cause in which a verdict has been had and a new trial ordered. (*Terwilliger v. Wheeler*, 35 Barb. 620.)

After a party has given notice and proceeded with the trial before a referee, it is altogether too late for him to apply for the appointment of a new one. (*Billings v. Vanderbeck*, 15 How. Pr. 295.) Where the decision of a referee is reversed entirely on questions of law, there is no reason why he cannot render a fair and impartial finding on the law as it is declared by the court; and no grounds exist for substituting a new referee in such a case. (*Ibid.*) But where the decision is reversed on the facts, viz: for the reason that the finding was against the weight of evidence, then it is proper to send the action to a new referee. (*Ibid.*)

During the trial of a cause before a referee, and after testimony had been taken, the court allowed an amendment of the pleadings by striking out the name of one of the defendants. Held, that the hearing must be continued before the same referee, and all the testimony already taken, applicable to the new state of the pleadings, must be deemed evidence in the action. (*Turner v. Hillerline*, 14 How. Pr. 231. See *Beardsley v. Stover*, 7 id. 295; *Brittingham v. Stevens*, 1 Hall, 379.)

In *Forrest v. Forrest*, (3 Bosw. 650,) where the referee unreasonably delayed the proceedings, another person was appointed by the court in his place.

It is not a sufficient reason for removing a referee that he occupies the same office with the plaintiff's attorney, when that fact was known to the defendant at the time of his consenting to the reference. (*Perry v. Moore*, 2 E. D. Smith, 32; S. C. 3 Code Rep. 221.)

When a referee has made his decision and submitted his report, he is *functus officio*. The court then has power to appoint a new referee. (*Trufant v. Merrill*, 37 How. 531; S. C. 6 Ab., N. S. 462; 1 Sweeney, 462.)

Report of referee. The Code requires referees to state the facts found, and the conclusions of law, separately; and their decision must be given, and may be excepted to, and reviewed in like manner and with like effect in all respects as in cases of appeal under section 265; and they may in like manner settle a case or exceptions. The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had

An objection at the hearing, for want of a particular party, may be obviated by the complainant's waiving the relief he is entitled to against such party. (s) And where the evident consequence of the establish-

(s) *Pawlet v. The Bishop of Lincoln*, 2 Atk. 296.

been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict. (Code, § 272.)

Rule 39 of the supreme court directs that upon a trial by referees, they shall, in their decision and final report, state the facts found by them, and their conclusions of law, separately, a copy of which shall be served with notice of the judgment, and the time within which exceptions may be taken to the report shall be computed from the time of such service.

In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them, and the report of the referee shall be filed with the testimony, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding, and the said report shall become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after the service of notice of the filing the same. If exceptions are filed and served within that time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. (Ibid.)

A referee before whom all the issues in an action are tried, must, when he is required, insert in his report his *findings* of facts and conclusions of law. The facts so required to be found should be those forming part of the issues presented by the pleadings, and not merely those evidentiary of them. (*Lane v. Borst*, 5 Rob. 609.) Where the court considers that a party has a right to have certain questions specially passed upon in the report, the referee may be directed to amend his report by inserting his findings upon them. (Ibid.)

But a referee is not bound to find upon any other facts than those which enter into and form the basis of the judgment to be entered upon his report. He is not required to negative, in express terms, any other facts. Facts not found are necessarily negatived by implication. (*Sermont v. Baetjer*, 49 Barb. 362, 364; *Nelson v. Ingersoll*, 27 How. 1; *Patterson v. Graves*, 11 id. 91; *Manley v. Ins. Co. of North America*, 1 Lans. 20; *Ingraham v. Gilbert*, 20 Barb. 151.) The facts and conclusions of law must be stated separately. (*Otis v. Spencer*, 16 N. Y. 610; *Johnson v. Whitlock*, 13 id. 344; S. C. 12 How. Pr. 571; *Hunt v. Bloomer*, id. 567; S. C. 13 N. Y. 341.) If the referee fails to comply with this requirement of the Code and of Rule 39, his report will be set aside for irregularity; and if the facts found by him, and stated in his report, do not warrant his conclusions of law, the judgment rendered by him will be reversed, provided the proper exceptions are taken. (*Leffler v. Field*, 33 How. 385; S. C. 50 Barb. 407.) The provision in section 268 of the Code, that the judge or referee, in settling the case, must briefly specify the facts found by him, and his conclusions of law, means nothing more than that his findings be inserted in the case in such form as to allow the review of the questions decided by him. (Ibid.) It is not intended by this section of the Code, after a referee has decided a case, and made and delivered his report, to reinvest him with new judicial authority to reconsider or review the case, and make any new findings of law or fact therein in matter of substance, to sustain or impeach his judgment, his judicial functions being determined when he has delivered his report. (Ibid.; *Nelson v. Ingersoll*, 27 How. 3; *Voorhies v. Voorhies*, 50 Barb. 119; S. C. 39 N. Y. 463.)

Where the referee found that the defendant had been absent from the state at different times, at least one year in the aggregate, it was held that this was not a sufficient finding of absence to warrant a judgment against the defendant, who relied upon the statute of limitations as a defence. (*Hickok v. Bliss*, 34 Barb. 321.)

The finding of a referee upon conflicting evidence, on a question of fact, is conclusive, and cannot be disturbed. (*Goodrich v. Thompson*, 4 Rob. 75; *Woodruff v. McGrath*, 32 N. Y. 255; *Hartford & New Haven R. R. Co. v. New York & New Haven R. R. Co.* 3 Rob. 411. See, also, *Hoogland v. Wight*, 7 Bosw. 394; S. C. 20 How. Pr. 70; *Ball v. Loomis*, 29 N. Y. 412; *Dorton v. Lewis*, 9 How. Pr. 1; *Esterly v. Cole*, 1 Barb. 235; *Watkins v. Stevens*, 4 id. 168; *Baker v. Martin*, 3 id. 634; *Cady v. Allen*, 22 id. 396; *Sinclair v. Tallmadge*, 35 id. 602; *Watson v. Campbell*, 23 id. 421; *Hayes v. Symonds*, 9 id. 260; *Monell v. Marshall*, 25 How. Pr. 425; *Niles v. Price*, 23 id. 473; *Train v. Brown*, 21 id. 93; S. C. 12 Ab. 217; *Van Ness v. Bush*,

ment of the rights asserted by the bill, might be the giving to the complainant a claim against other persons who are not parties to the suit, the complainant, by waiving that claim, may avoid the necessity of

22 How. Pr. 481; S. C. 14 Ab. 33; *Foster v. Coleman*, 1 E. D. Smith, 85; *Davis v. McCreedy*, 4 id. 565; *Mazetti v. N. Y. & Harlem Railroad Co.* 3 id. 98; *Dows v. Montgomery*, 5 Rob. 445.)

But the report may be set aside as being against evidence. (*Butler v. Truslow*, 55 Barb. 293; *Smith v. Schanck*, 18 id. 346. See *Ruhl v. Phillips*, 2 Daly, 45.)

Nothing should be contained in the case on appeal, except such evidence, findings and exceptions as are expressly allowed by the referee. (*Leffler v. Field*, 33 How. 385.) The decision of a referee in the allowance or disallowance of findings or amendments in the case, is not the subject of exception, and any error committed by him in the settlement of the case, cannot be reviewed or corrected in that way. Upon such questions the decision of a referee is final and conclusive, and cannot be reviewed on appeal. (*Ibid.*) An exception cannot be taken to the report on the ground that the referee refused to find upon a question of fact not contained in the issues in the action. (*Willsie v. Eaddie*, 4 Ab., N. S. 393.)

In an action upon a contract, it is sufficient if the referee finds that there has been a performance, without setting forth the particular acts done by way of performance. (*Sermont v. Baetjer*, 49 Barb. 362.)

If a party deems it necessary to have a fact found one way or the other, he must apply to the court for such a finding. A refusal to find one way or the other, and an exception to such refusal, presents no point for review in the court of appeals. (*Priest v. Price*, 3 Keyes, 222. See *Brooks v. Van Every*, id. 27.)

Where the referee, in his report, refers argumentatively, and in a general way, to the facts found by him, and to the conclusions of law based on such facts, together with the evidence set out at length, this is not such a statement of the facts found by him, and his conclusions of law thereon, as is contemplated by the statute. (*Mills v. Thursby*, 12 How. Pr. 417; *Doke v. Peck*, 1 Code Rep. 54; *Deming v. Port*, id. 121; *Sisson v. Barrett*, 2 N. Y. 406.) The report must contain the referee's findings of fact and conclusions of law, and before these are filed no judgment should be entered upon the report. (*Roberts v. Carter*, 28 Barb. 462; S. C. 17 How. Pr. 524.) The proper practice when the report is too general is to move that a further report be made. (*Tulman v. Keane*, 1 Ab., N. S. 23; *Wright v. Sanders*, 28 How. 395.)

The action abates upon the death of a sole defendant, and the report of a referee, made after that time, is a nullity. (*Kissam v. Hamilton*, 20 How. Pr. 369, 377.) But upon the death of one of several plaintiffs, and the substitution of his successor in interest pending a reference, the order of reference is not superseded, nor the prior proceedings invalidated. (*Moore v. Hamilton*, 48 Barb. 120, 125.) If a sole plaintiff dies after the making of a report by the referee, judgment may be entered thereon. (*Seranton v. Baxter*, 3 Sandf. 660; S. C. 1 Code Rep., N. S. 88.)

A referee has no power to alter his report after he has signed and delivered it. There is no time afterwards, when parties may request, *ex parte* or otherwise, that he shall modify it. (*Shearman v. Justice*, 22 How. Pr. 241; *Niles v. Price*, 23 id. 473; *Coope v. Bowles*, 42 Barb. 83; S. C. 28 How. 10; 18 Ab. 442; *Voorhies v. Voorhies*, 50 Barb. 119; S. C. 39 N. Y. 463; *Trufant v. Merrill*, 37 How. 531; S. C. 6 Ab., N. S. 462.) After his report is made, he can settle the form of the case, and the findings of fact and conclusions of law; but he has no power to settle the decree, and direct its entry by the clerk. (*Coope v. Bowles*, *supra*.) Until his decision is signed by him, and the report filed, or delivered for that purpose, he may change or modify it to any extent, in conformity with his better judgment, and he may open the cause for a further hearing, and receive evidence upon any question on which he may desire new or additional light. But referees should be careful not to expose themselves to applications for their decisions from either party, by advising them in respect to their conclusions in advance of the delivery of their report. Should the power of referees in such instances be abused, the court would apply a remedy, after the report should be made, on the fact of such abuse being shown. (*Ayrault v. Sackett*, 17 How. Pr. 471, 507.) Where the trial had been regularly gone through with, the parties had been fully heard by their counsel, the referee had taken the case and held it under consideration as long as he desired, had deliberately come to a conclusion, written an opinion, and announced his decision to the parties, but had not drawn up and signed a formal report thereon, it was held that the referee had not lost authority and control over the case. (S. C. 17 How. Pr. 507; 9 Abb. 154, n.)

*making those persons parties. This, however, cannot be done [*321] to the prejudice of others. (1)

In some cases the defect of parties has been cured at the hearing, by the undertaking of the complainant to give full effect to the utmost

(1) Mitf. Pl. 146.

Signing the report, together with notice of the fact to the party entitled to it, are the acts which preclude his opening the case for further evidence or consideration, and close his judicial authority therein. (Ibid.)

Unless so ordered, a referee to whom issues have been referred should not report the evidence offered on the hearing, but the facts found from such evidence. (*Patterson v. Graves*, 11 How. Pr. 91.)

Where a referee, in his report of the issues tried before him, wholly omits to state any findings of facts, the report, and the judgment entered thereon, and all subsequent proceedings, are irregular, unless the defeated party chooses to waive the irregularity. (*Wright v. Sanders*, 28 How. 395. See, also, *Church v. Erben*, 4 Sandf. 691; *Van Steenburgh v. Hoffman*, 6 How. Pr. 492; *Doke v. Peck*, 1 Code Rep. 54; *Deming v. Post*, id. 121; *Tilman v. Keane*, 1 Ab., N. S. 23.) In such a case the one who desires to have the decision reviewed may apply for an order that the report be corrected. If such order is obtained, and fails of its object, the report will be set aside. (*Peck v. Yorks*, 14 How. Pr. 416. See *Lakin v. New York & Erie R. R. Co.* 11 id. 412.)

In order that an objection may be founded upon the omission of the referee to find one way or the other upon a particular issue of fact, he must be specifically requested to do so, and an exception should be duly taken if he refuses. (*Grant v. Morse*, 22 N. Y. 323.)

Where the report of a referee is clearly and entirely against evidence, a judgment entered upon it will be reversed. (*Butler v. Truslow*, 55 Barb. 294.)

A judgment entered upon the report of a referee, on a ground not presented in the pleadings or proceedings, nor taken on the trial, cannot be maintained on that ground. If the plaintiffs seek to recover on such new ground, they should amend their complaint, or at least disclose their intention before the trial closes. (*Commercial Bank of Albany v. Ten Eyck*, 50 Barb. 9; *Wiltzie v. Eaddie*, 4 Ab., N. S. 393.) Where a referee in his report entirely ignores the principal, if not the only issue in the case, and no judgment can be properly rendered until such issue is decided, the judgment entered upon his report will be reversed, and a new trial ordered. (*Collins v. Clark*, 54 Barb. 184.)

Where a party neglects to take up the report after it has been made in his favor by the referee, the other party cannot, by payment of the fees, take it up. If the referee does deliver it to the party against whom it is made, and he refuses to file it, he may be compelled to do so by motion, or the referee must make and deliver a new report. (*Richards v. Allen*, 11 N. Y. Leg. Obs. 159.) After the cause has been decided by the referee, the order of reference will not be vacated because he refuses to deliver his report except on payment of a sum exceeding his legal fees. The party against whom the report has been rendered is entitled to an order requiring that the prevailing party take up the report and enter judgment, or that, in default thereof, the defeated party be allowed to do so. (*Richmond v. Hamilton*, 9 Ab. 71, n.)

It is improper for a referee to deliver to each party what purports to be the original of his report, even if one is the duplicate of the other. (*Currie v. Coules*, 7 Rob. 3.)

Time for making. Section 273 of the Code directs that the referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted, and in default thereof, and before the report is delivered, either party may serve notice upon the opposite party that he elects to end the reference; and thereupon the action shall proceed as though no reference had been ordered, and the referees shall not, in such case, be entitled to any fees.

It has been held that this section does not apply to a case of reference under the approval of the surrogate, where an executor or administrator doubts the justice of a claim. (*Goddard v. Porter*, 17 Ab. 374.)

The time within which a referee must render his report may be *extended*, either by the oral consent of the parties, or by an order of the court, or a judge. (*Livingston v. Gidney*, 25 How. Pr. 1.) If no extension of time has been obtained, a report made more than sixty days after the cause was subnitted is invalid. (*Niles v. Maynard*, 28 How. 390. See, also, *Thesselin v. Rossett*, 3 Ab., N. S. 54.)

rights which the absent party could have claimed; those rights being such as could not affect the interest of the defendants. (*u*)

As a decree, made in the absence of proper parties, may be reversed, and at all events will not bind those who are absent or those claiming

(*u*) *Harvey v. Cooke*, 4 Russ. 35.

If neither party takes any action which denotes their intention of proceeding with the trial in the event of the referee not making his report within the time required by statute, the right to disregard the report will be waived. That is to say, after a report has been made, although not within the prescribed time, the parties cannot proceed as if no reference had been ordered, if they have not in some way objected to the delay. (*Mantles v. Myle*, 25 How. 409; *Livingston v. Gidney*, 25 id. 1; *Foster v. Bryan*, 16 Ab. 396; S. C. 26 How. 164.)

While the case remains in the hands of the referees, *sub judice*, any delay made by them in making or delivering their report, is not to be deemed the delay of the court. (*Kissam v. Hamilton*, 20 How. Pr. 369.) A report signed and delivered by the referee after the death of a party, cannot have effect given to it by relation back. (*Ibid.*)

A referee's report in a case which has been pending fifteen years, and which has been three times tried, the third trial lasting several years, will not be set aside on account of the referee's mere neglect to make it within sixty days after the final submission; but the court will exercise its discretionary power by enlarging the time for making such report. (*Halsey v. Carter*, 6 Rob. 535.)

A notice of election to end a reference, under section 273 of the Code, must be subscribed by and in the name of the attorney of the party electing, if he has appeared by attorney, and if not, by or in the name of the party himself. (*Lincoln v. Lincoln*, 6 Rob. 525.)

Amending. When a referee has made and delivered his report, his jurisdiction is determined by that act, and he cannot afterwards, on the settlement of the case, make any new or other findings of fact or law, either to sustain or overthrow his report. (*Voorhies v. Voorhies*, 50 Barb. 119, 123; S. C. 39 N. Y. 463; *Nelson v. Ingersoll*, 27 How. 3; *Leffler v. Field*, 33 id. 385. But see *Juliaud v. Grant*, 34 id. 132.)

If a report does not pass upon all the issues presented, the court, at special term, will send it back for completion. This is the rule when no exceptions have been taken; but if there have been, it will leave the appellate court to dispose of them. (*Brown v. New York Central Railroad Co.* 26 How. 32, 573, n.)

Where an order is made that a referee make a further report, it is not irregular because it does not specify the points upon which the amendment is desired. (*Union Bank v. Mott*, 13 Ab. 247.)

When a report of referees is set aside on motion, and is sent back to the referees for revision and correction, if the referees go beyond correcting the errors complained of, on the motion to set aside the report and re-open the case as to other items, they are bound to hear additional testimony, if offered. (*Goulard v. Castillon*, 12 Barb. 126.)

When a report is defective the court may, of its own motion, although no objection to it is raised by the parties, send the case back for a further report. (*Snook v. Fries*, 19 Barb. 313.) When a report is recommitted to the referee, the order should direct that he find how the fact, not fully reported, was, upon the evidence. (*Manley v. Ins. Co. of North America*, 1 Laus. 20.)

When the court considers that a party has a right to have certain questions specially passed upon in the report, the referee may be directed to amend his report by inserting his findings upon them. (*Lane v. Borst*, 5 Rob. 609.)

For a failure of the referee to state, specifically, the facts found by him, the remedy is not by motion to set aside the report on the ground of irregularity, but by motion to send the case back to him for a further finding. (*Van Slyke v. Hyatt*, 9 Ab., N. S. 58; S. C. aff'd, 46 N. Y. 259.)

Confirmation of. In all cases where a report is required for the purpose of enabling the court to make some discretionary order or decree thereon, it requires confirmation. (*Griffing v. Slate*, 5 How. Pr. 205; S. C. 3 Code Rep. 213. See *McMahon v. Allen*, 27 Barb. 335; S. C. 7 Ab. 1.) When the rule for confirmation is entered by default at a special term, the merits of such order cannot come under review upon appeal. (*Swarthout v. Curtis*, 5 How. Pr. 194.)

It seems that a report which determines the whole issue need not be confirmed

under them, (*v*) great care should be taken on the part of the complainant to have the necessary parties before the court, and that previously to his bringing the cause on for hearing; because he cannot then apply for leave to add parties without the consent of the defendant. (*w*)

(*v*) Prac. Reg. 299.

(*w*) 1 Dan. 90.

(*Renoul v. Harris*, 1 Code Rep. 125; S. C. 2 Sandf. 641; 2 Code Rep. 71.) A report may be confirmed in part. (*Midgeley v. Slocomb*, 2 Ab., N. S. 275; S. C. 32 How 423.)

In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the report of the referee shall become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after the service of notice of filing the same. (Rule 39, Supreme Court.)

In order to carry a judgment into effect where a reference is made of a collateral matter, the report of the referee must be confirmed at a special term. (*Belmont v. Smith*, 1 Duer, 675; S. C. 11 N. Y. Leg. Obs. 216.)

Setting aside. Every court possessing authority to appoint referees has the inherent right to review their proceedings, and is the only appropriate tribunal for that purpose. No appeal, therefore, will lie from the judgment of an inferior court, for errors committed by referees, unless that court has first refused to correct them. (*Goulard v. Castillon*, 12 Barb. 126.)

Where a referee, after having made a report which has been set aside, makes a second report upon the same evidence, which contains the same findings as the first, a judgment entered thereon in favor of the same party will be set aside summarily on appeal. (*Bellows v. Folsom*, 4 Rob. 43.)

The application to set aside the report of a referee must be made before the final judgment has been entered. (*Rathbone v. Comstock*, 1 John. 138; *Shepherd v. Case*, 1 John. Cas. 245.)

A special report of the evidence must be obtained from the referee, as the basis of a motion to set aside the report. The affidavit of the party cannot be received in its stead. (*Belmont v. Smith*, 1 Duer, 675; S. C. 11 N. Y. Leg. Obs. 216.) When exceptions are filed to a report, and it is sought to have the report set aside, the motion must be heard, not as a calendar cause, but as a non-enumerated motion. (*Ibid.*) In *Patterson v. Graves*, (11 How. Pr. 91.) where it was sought to have the report of a referee set aside for irregularity, although it was claimed that a substantial right was involved, it was held that a delay of nearly seven months was fatal to the motion.

On the trial of a cause, a referee takes the place of a jury as well as of the court. Hence, if it appears that a report of a referee, upon questions of fact, has been, even in the slightest degree, affected by any influence exercised by the successful party, it will be set aside for irregularity. (*Dorton v. Lewis*, 9 How. Pr. 1; *Yale v. Gwinnits*, 4 id. 253; *Koosa v. Saugerties, &c., Turnpike Road Co.* 12 id. 297.) A referee, when a cause is entrusted to him, should not only avoid all improper influences, but even "the appearance of evil;" and whether satisfied with his decision or not, no one should be left to question its entire fairness. (*Ibid.*)

The court will not disturb the finding of referees any more than the verdict of a jury on a difference of opinion upon the weight of evidence. But if there is an absence of evidence, or so great a preponderance of evidence against the finding as to indicate prejudice, partiality or corruption, the court will interfere. (*Vansteenburg v. Hoffman*, 15 Barb. 30; *Green v. Brown*, 3 id. 119; *Quackenbush v. Ehle*, 5 id. 469; *Eaton v. Benton*, 2 Hill, 576; 3 id. 256; 2 Wend. 356.) A report may be set aside as being against evidence. (*Butler v. Truslow*, 55 Barb. 293; *Smith v. Schanck*, 18 id. 346. See *Kuhl v. Phillips*, 2 Daly, 45.)

A motion to set aside the report of a referee is analogous to a motion for a new trial. It may be made in like cases, and is governed by the same rules. (*Morgan v. Bruce*, 1 Code Rep., N. S. 364.) The court may, on motion, set aside a report where it is clear that an improper measure of damages has been adopted by the referee. (*Dean v. Roessler*, 1 Hilt. 420; *Krom v. Schoonmaker*, 3 Barb. 647; *Eastman v. Mayor, &c., of New York*, 5 Rob. 389.)

It is only when the decision of a referee is unsupported by evidence, or is palpably against the weight of evidence, that it will be disturbed. (*Lincoln v. Lincoln*, 6 Rob 525.)

Not only may the defendant raise the objection at the hearing, for want of parties, but the court itself may raise the objection when determining the cause.

Ordering cause to stand over, to add parties.] It appears formerly to have been considered that where a bill wanted proper parties, it was in the power of the court either to dismiss it without prejudice to the complainant's right to file a new bill, or to give leave to amend; (x) but it seems that a decree of the Master of the Rolls dismissing a bill for want of parties, was afterwards reversed for that reason; and that a decree of the same nature in the court of Exchequer was likewise reversed in the House of Lords, and that since that time causes have never been dismissed for want of parties, but are only ordered to stand over on paying the costs; in order to give the complainant an opportunity to make the proper parties. (y)

(x) *Stafford v. The City of London*, 1 P. Wms. 428.

(y) *Anon.* 2 Atk. 14. *Colt v. Lasnier*, 9 Cowen. 320. *O'Brien v. Heeney*, 2 Edw. 242. *Van Epps v. Van Densen*, 4 Paige, 64. *Jones v. Jones*, 3 Atk. 111. *Green v. Poole*, 5 Bro. P. C. 504. 1 Dan. 389.

Judgment on. Section 272 of the Code provides that judgment may be entered upon the report of a referee in the same manner as if the action had been tried by the court. (See § 267.)

Actual knowledge of the entry of judgment by the opposite party, or his attorney, will not supersede the required written notice. Nothing short of a written notice of the judgment, served upon the opposite party, or his attorney, will limit the time for appealing. A copy of the report should also be served on the judgment debtor. (*Staring v. Jones*, 13 How. Pr. 423; Rule 39, Supreme Court.) A judgment based upon grounds not presented in the pleadings or disclosed at the trial, cannot be maintained. (*Commercial Bank of Albany v. Ten Eyck*, 50 Barb. 9.)

Where the report of the referee is in favor of the plaintiff, but he states that an accounting must be had before final judgment can be rendered, an order will be entered referring the case back to the referee to take and state the account, and until such accounting has been had no judgment can be entered. (*McMahon v. Allen*, 27 Barb. 335; S. C. 7 Ab. 1; *Lawrence v. Farmers' Loan & Trust Co.* 15 How. Pr. 57; S. C. 6 Duer, 689.)

It is irregular as against a non-answering defendant in a foreclosure suit, to combine in one reference the trial of the issues between the plaintiff and the defendants who appear and answer, with the inquiry as to the amount due, and to enter judgment, as of course, upon the report without application to the court for judgment against the non-answering defendant. (*Crane v. Bradford*, 4 Ab. 193.)

The death of the sole plaintiff, after a referee has reported in favor of the defendant, will be no bar to the entry of judgment against him on the report. (*Scranton v. Baxter*, 3 Sandf. 660; S. C. 1 Code Rep., N. S. 88; *Burhans v. Burhans*, 10 Wend. 601; *Ehle v. Moyer*, 8 How. Pr. 244.)

Where matters in controversy between the receiver of a corporation and other parties are referred, pursuant to 2 R. v. St. 45, §§ 19, 25, no judgment rendered by the referee can be entered, even by the special direction of the court. The statute does not contain any direction for a judgment, and it is not warranted by the general powers of the court. (*Matter of Austin*, 44 Barb. 434.)

Judgment upon the report of a referee is to be entered in form as if pronounced by the court, before one of its justices, at special term. (*Hancock v. Hancock*, 22 N. Y. 568.)

Where the form of the judgment has been settled and entered without an order of the court, it is an irregularity, and the remedy is by motion to set it aside. (*Coops v. Bowles*, 18 Ab. 442; S. C. 42 Barb. 87; 28 How. Pr. 10.)

But if the objection for want of parties is distinctly taken by the defendant, by plea, demurrer, or answer, and the complainant, notwithstanding, goes to hearing without amending his bill by bringing in the necessary parties, the court, in its discretion, may refuse to permit the cause to stand over, and may dismiss the bill with costs. (*z*)

And where the objection for want of parties is not taken in the answer, or by demurrer or plea, costs will in no case be allowed. (*a*)

*An order allowing the cause to stand over is a relaxation on [*322] the part of the court, and is always considered as made by consent. Therefore, it cannot be appealed from. (*b*)

If a cause comes on again after it has been put off by the court for want of formal parties, an objection for want of other parties, which might have been made in the first instance, comes too late. (*c*)

Where a cause is directed to stand over for the purpose of adding parties, and the complainant neglects to proceed under the order, the defendant may move to dismiss the bill for want of prosecution. (*d*)

Ordering cause to stand over to supply proofs.] Leave will also be given by the court, at the hearing, for the cause to stand over for the purpose of supplying defects in the testimony, under special circumstances. Thus, a cause has been allowed to stand over to enable a party to procure an instrument to be stamped, without which it could not be received in evidence. (*e*) So, where in a suit by the complainant as administrator, the letters of administration were produced, but the death of the intestate was not proved, the testimony was held insufficient, but liberty was given to file interrogatories to establish the death of the intestate. (*f*) And an order for this purpose has been granted on a bill to appoint a trustee to carry a will into execution, where the proof of one of the witnesses to the will being abroad was defective; (*g*) to prove an instrument mentioned in the pleadings and not sufficiently established; (*h*) where the execution of a will was proved, but the witnesses had not been examined as to the sanity of the testator; (*i*) in a case where additional proof was necessary because an infant heir against whom the suit had been revived was held not bound by the admission of his ancestor; (*k*) and where the loss of a deed was not sufficiently proved to let in secondary evidence; but this was under special circumstances, and the order was granted with reluctance. (*l*)

(*z*) *Van Epps v. Van Densen*, 4 Paige, 64.

(*a*) *Mitchell v. Bailey*, 3 Mad. 61. *Colt v. Lasnier*, *supra*. But see *Hill v. Kirwan*, Jacob, 163.

(*b*) *Beresford v. Adair*, 2 Cox's Ca. 156.

(*c*) *Jones v. Jones*, 3 Atk. 217.

(*d*) *Mitchell v. Lowndes*, 2 Cox's Ca. 15.

(*e*) *Huddleston v. Briscoe*, 11 Ves. 595.

(*f*) *Moons v. De Bernales*, 1 Russ. 301.

(*g*) *Wood v. Stane*, 8 Price, 613.

(*h*) *Ore v. Johnson*, *Seaton's Decrees*, 363.

(*i*) *Abrahams v. Winshup*, 1 Russ. 526.

And where a written agreement set out in the bill was admitted by the answer of one defendant, but was not admitted by the other defendants, who claimed through him, and the complainant's counsel, under a misapprehension of the law, closed the proofs and brought the cause [*323] *to a hearing without making formal proof of the written agreement; and the objection being taken at the hearing that the agreement should have been proved as against those defendants who had not admitted its execution, it was held that the court might suspend the argument and give the complainant an opportunity to prove the agreement in the usual way before an examiner. (m)

Default at the hearing.] If the cause is noticed for hearing on the part of the defendant, and the complainant fails to appear, to argue on his part, or does not furnish the necessary papers, the bill may be dismissed with costs. (7)

If noticed on the part of the complainant, and the defendant does not appear at the hearing and furnish the necessary papers on his part, the complainant may have such decree as he is entitled to by the case made by his bill.

If, upon an appeal, the appellant does not appear and furnish the necessary papers when it is his duty to furnish them, the adverse party, if he has noticed the cause for hearing, may have the decree or order appealed from affirmed, with costs, by default. And if the respondent does not appear, the appellant may be heard *ex parte*.

Where the respondent has elected to furnish the papers for the court upon the hearing of an appeal, if he does not appear and furnish the

(k) Cartwright v. Cartwright, Dick. 545.

(l) Cox v. Allingham, Jacob, 337.

(m) Desplaces v. Goris, 5 Paige, 252; and see Hall v. Latting, 9 Paige, 383.

(7) There is no provision in the Code for taking a complaint as confessed, for want of an appearance in the action, nor for compelling an appearance by the defendant. But on default of a party to *appear at the trial*, the practice is as follows: If the defendant has noticed the cause, and the *plaintiff* fails to appear, the defendant's counsel may read proof of his notice of trial, and take a judgment for the dismissal of the complaint, with costs. If the plaintiff has noticed the cause for trial, and the *defendant* fails to appear, the plaintiff's counsel may read proof of service of his notice, and produce his witnesses to prove the material allegations of the complaint which are denied in the answer. (Van Sant. Eq. Pr. 141.) The case will then stand the same as upon an application for judgment on a complaint to which there has been no answer or demurrer. If the taking of an account, or the proof of any fact, be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account, or hear the proof, or may, in its discretion, order a reference for that purpose. (Ib.)

If the defendant has set up a counter-claim, to which there is no reply, the counter-claim is deemed admitted, even though the defendant makes default, and fails to appear on the trial; and the court, in the exercise of its admitted power to dispose of the whole case, will render judgment for only so much of the cause of action as is not answered by the counter-claim. But if the matter so set up do not really constitute a counter-claim, the court will disregard it. (*Van Valen v. Lapham*, 13 How. Pr. 246.)

necessary papers, his default may be entered. And the adverse party may then furnish the papers and be heard *ex parte*; either at the same term or the next term of the court, or on any motion day previous to the next term. (*n*)

Dismissing bill at the hearing.] If the bill is dismissed at the hearing, upon a mere defect of form in the pleadings, and not upon the merits of the case, it should be dismissed without prejudice to the complainant's right to institute a new suit, if he thinks proper to do so. (*o*) Unless the dismissal is accompanied with such a direction, it may be pleaded in bar to a new suit. (*p*) A direction of this kind will also be inserted where a bill is dismissed in consequence of facts not having been properly put in issue; (*q*) or where the agreement for the specific performance of which the bill was filed turns out, upon the evidence, to be different from that actually proved; (*r*) or where it appears clear that the complainant in a bill for specific performance, is entitled to *compensation, although he is precluded, by the form of his [*324] bill, from insisting upon it. (*s*)

Whether a bill for a specific performance be dismissed without prejudice to the complainant's right to bring an *action at law*, or not, he is still considered by the court of equity, as at liberty to bring his action at law, upon the contract; unless the court thinks proper specifically to restrain him, by injunction, from so doing. (*t*)

The court will, sometimes, not only acknowledge the complainant's right to bring an action upon an agreement, although it dismisses his bill, but it will, in express terms, give him leave to bring his action upon the agreement. (*u*)

In general, when a bill is ordered to be dismissed upon a contingent event, the rule is that such orders are not conclusive unless the words "without further order" are added; and that where such words are omitted, the defendant must apply for and obtain an absolute order of dismissal. (*v*) In this respect, however, the rule acted upon, where an order is made for a cause to stand over for a limited time, with liberty to the complainant to add parties, and in default thereof that the bill should stand dismissed with costs, &c., is different; for it seems that in such cases the bill is actually out of court, without further order; because the defendant has it not in his power to set it down again in a

(*n*) Rule 96.

(*o*) *Croster v. Acer*, 7 Paige, 137.

(*p*) *Mitf. Pl.* 194.

(*q*) *McNeil v. Cahill*, 2 Bligh, 263.

(*r*) *Woolam v. Hearn*, 7 Ves. 222. *Lyndsay v. Lynch*, 2 Sch. & Lef. 1.

(*s*) *Stevens v. Guppy*, 3 Russ. 171.

(*t*) *Mortlock v. Buller*, 10 Ves. 292. *McNamara v. Arthur*, 2 Ball & B. 349.

(*u*) *Edwards v. Hookin*, *Seaton on Decrees*, 382.

(*v*) *Cator v. Dewar*, *Seaton on Decrees*, 357. *Stevens v. Praed*, 2 Cox, 376.

fit state to be heard ; inasmuch as he is not the person to add the parties. (*w*)

Retaining bill, with liberty to bring an action.] The court will, in some cases, notwithstanding it decrees a dismissal of the bill, reserve to the complainant the right to bring an action at law. And it not unfrequently happens that the court, instead of making a decree for an immediate dismissal of the bill, will direct it to be retained for twelve months, with liberty to the complainant, in the meantime, to proceed at law, as he shall be advised. In which case it forms a part of the decree, that if the complainant shall not proceed at law, and go to trial within the time limited, his bill is from thenceforth to stand dismissed with costs, &c.; but that in case the complainant shall proceed at law and go to trial within the time specified, the court reserves the consideration of the costs of the suit, and of all further directions, until the master shall have made his report. (*x*)

The cases in which the court retains the bill, with liberty to the complainant to proceed at law, are those in which it is necessary to establish his right at law, in order to found the equitable relief; (*y*) and the practice cannot be made use of to enable the complainant to try whether he has any claim at law; and if he fails there, to come into this court and try to raise an equity. (*z*) And although in one case (*a*) Lord Thurlow appears to have expressed an opinion that the court, by retaining the bill for a year, has admitted the complainant's right to equitable relief, yet the better opinion seems to be that such is not the necessary consequence, and that the court may ultimately determine against the complainant, although the bill has been retained. (*b*)

In decrees of this description, latterly, further directions are only reserved in the event of the trial taking place. (*c*) In cases, however, where default is made in bringing the action, the bill will not be out of court unless the decree expressly directs that upon default the bill is to stand dismissed "without further order." (*d*)

(*w*) Id. ib. 2 Dan. 641.

(*x*) Seaton on Decrees, 356. 2 Dan. 639.

(*y*) Walton v. Law, 6 Ves. 150.

(*z*) Id. ib.

(*a*) Duke of Leeds v. Corporation of New Radnor, 2 Bro. C. C. 518.

(*b*) 2 Dan. 640. Seaton on Decrees, 357. Harwood v. Oglander, 6 Ves. 225.

(*c*) Id. ib. Seaton on Decrees, 357. Stevens v. Praed, 2 Cox, 376.

(*d*) Seaton on Decrees, 357.

*CHAPTER XII.

[*326]

DECREE. (1)

Sect. 1. NATURE, USES, AND KINDS.

2. FORM OF.

3. DRAWING UP, SETTLING, ENTERING, AND ENROLLING.

4. DOCKETING AND DISCHARGING.

5. RECTIFYING DECREE.

I. BEFORE ENROLMENT.

*On Petition or Motion.**Rehearing.**By Supplemental Bill in the Nature of a Bill of Review.*

II. AFTER ENROLMENT.

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6. DECREES PRO CONFESSO.

7. DECREES BY DEFAULT.

8. DECREES BY CONSENT.

SECTION I.

NATURE, USES, AND KINDS OF DECREES.

A DECREE is a sentence or order of the court, corresponding to the *judgment* of a court of law, pronounced after the hearing or submission of the cause; by which the rights of the parties to the suit are determined and settled according to equity and good conscience. (2)

Decrees are of two kinds—*interlocutory* and *final*.

(1) In the Code of Procedure the word "*decree*" is not used; the term "*judgment*" being substituted in its place, as regards actions both of an equitable and a legal nature.

(2) WHAT IS A JUDGMENT.

✓ A judgment is the final determination of the rights of the parties in the action. (Code, § 245.)

The word "*judgment*" as used in §§ 11, 245, 268 and 348 of the Code, means precisely the same thing, in all the different actions. (*Lawrence v. The Farmers' Loan & Trust Co.*, 15 How. Pr. 57, 62; *S. C.* 6 Duer, 689; *Hollister Bank of Buffalo v. Vail*, 15 N. Y. 594.)

No judgment can now be considered as final, which expressly reserves any question whatever for future consideration and determination by the court. (*Belmont v. Powers*, 3 Rob. 693.) A determination in writing, entered as a judgment, in which

1st. *Interlocutory Decrees.* (3)

An interlocutory decree is properly a decree pronounced for the purpose of ascertaining matter of law or fact preparatory to a final

not only the question of costs is expressly reserved, but which contemplates and provides for further action by the court, upon the coming in of the report of a referee appointed by it, is not the final judgment of the court, but is at most an order; and will be vacated and set aside, on motion, so far as it purports finally to adjudicate and determine the rights of the parties. (Ibid.) But so much of it as *orders* a reference may be permitted to stand, so as to save to the parties the trouble and expense of a re-examination of the witnesses upon questions which they have already answered. (Ibid.) No judgment can now be considered as final which expressly reserves any question whatever for future consideration and determination by the court. Yet a judgment may be final, although it makes no provision in regard to the costs of the action; for the court will be assumed to have intended that each party should bear his own charges and expenses. (Ibid.)

A discontinuance is a final determination of the rights of the parties in an action, within the meaning of the above section. (*Crockett v. Smith*, 14 Ab. 62.) A judgment rendered in an action to foreclose a mortgage, directing a sale of the premises, &c., in the usual form, is a final judgment. (*Morris v. Morange*, 38 N. Y. 172; S. C. 4 Ab., N. S. 451; 6 Trans. Ap. 1.)

The judgment of a sister state can have no greater effect here, than belongs to it in the state where it was rendered. (*Suydam v. Barber*, 18 N. Y. 468.)

An order or decree of the court entered after trial, on a reference, that the plaintiff have judgment for a certain sum against the defendant, reserving no further questions between the plaintiff and defendant, is to be deemed a final judgment, and not merely an order. (*Gray v. Cook*, 24 How. Pr. 432.)

Where certain facts—such as the quantity and kind of goods, character of debts and amount of the proceeds—are necessary to be either proved on the trial, or left for determination by a referee, the court may, in the meantime, render a contingent judgment, dependent upon the amount which the referee shall find to be due. (*Kempe v. Bridge*, 2 Rob. 459.)

An order of a county court dismissing an appeal from a judgment of a justice's court, is a judgment within § 245. (*Pearson v. Lovejoy*, 53 Barb. 407; S. C. 35 How. 193.)

The dismissal of a complaint, on motion, at a special term, for want of prosecution, is a judgment in the action in favor of the defendant. (*Tillspangh v. Dick*, 8 How. Pr. 33. See *Robbins v. Wells*, 26 id. 15; S. C. 18 Ab. 191.)

A dismissal of the complaint is equivalent to judgment as in case of non-suit under the former practice, and is a substitute for it. (*Holmes v. Stocum*, 6 How. Pr. 218.)

The final decree of a court of equity takes effect when it is *made and declared by the court*; and the record, when made up, is only evidence of the decree, and simply proves it, without adding anything to its validity. (*Butler v. Lee*, 33 How. 251.)

(3) The only judgment authorized or permitted by the Code, is a "final determination of the rights of the parties to the action." There can now be no such thing as an interlocutory judgment. (*Belmont v. Pouvert*, 3 Rob. 696.) In their remarks upon § 245, the codifiers say: "To avoid the confusion incident to the use of the word judgment, in two senses, one as interlocutory, and the other as final, we have thought it better to use it only in the latter sense, and to designate all other written directions of a court or judge, as orders." (Rep. of Comrs. to the Legislature, Feb. 1848, p. 182.)

But in *Smith v. Lewis*, (1 Daly, 452,) it is decided by the New York common pleas that if in equitable actions, all the questions in controversy between the parties have been determined upon the hearing, and what remains is merely the machinery set in motion by the court to carry its decision into effect, its decision is final. But if anything is left, involving future litigation, the determination upon which might affect the ultimate adjustment of the rights of the parties, the decision, decree, or order made is merely interlocutory.

A judgment of the court of highest resort is not a final judgment in the cause where it orders a new trial. (*Young v. Brush*, 28 N. Y. 667; S. C. 18 Ab. 171.)

When it is necessary to make another application to the court, and another order is necessary to give the parties the full and entire benefit of the judgment of the court, the *decree* which is the ground of the application, cannot be regarded as *final*, and consequently, no appeal can be taken from it. (*Butler v. Lee*, 33 How. 251.)

*decree. (a) Therefore, when it happens that some material [*327] circumstance or fact necessary to be made known to the court is either not stated in the pleadings, or is so imperfectly ascertained by them that the court is unable to determine *finally* between the parties; and therefore, a reference to, or an inquiry before, a master, or a trial of the facts before a jury upon a feigned issue, becomes necessary, the decree entered for that purpose is an interlocutory decree. The court, in the meantime, suspends its final decree until, by the master's report, or the verdict of the jury, it is enabled to decide *finally*. (b)

It very seldom happens that a first decree can be final, or conclude the cause. Thus, if any matter of fact is strongly controverted, the court is so sensible of the deficiency of trial by written evidence, that it will not bind the parties thereby, but will direct a feigned issue. (c) Where, also, the object of the suit is a commission for the partition of lands, or to settle their boundaries, the first decree is generally interlocutory; the further directions being reserved till after the commission has been returned.

But the most usual ground for not making a perfect decree, in the first instance, is the necessity which frequently exists for a reference to a master of the court to make inquiries, or to take accounts, or sell estates and adjust other matters which are necessary to be disposed of, before a final decision can be made upon the subject matter of the suit. (d)

There are some cases in which it is a rule of the court not to make any decree whatever until certain preliminary inquiries have been made by a master. This rule is invariably acted upon in suits for the specific performance of contracts. And the court will not permit the question whether a good title can be made or not, to be argued before it in the first instance; even though the objections to the title are stated, and the questions arising upon them are properly raised by the pleadings. (e) But the purchaser may deprive himself of this right, by his manner of pleading, (f) or by acts *in pais*—such as taking possession of the estate, or exercising acts of ownership over it. (g) But such acts will not preclude the purchaser from his right to investigate the title, unless the court is satisfied, from them, that he intended to waive, and has actually waived it. (h)

*The interlocutory decree for a reference as to the title of a [*328]

(a) Seaton on Decrees, 2. 1 Newl. Ch. Pr. 322.

(b) 1 Harr. Ch. Pr. 420.

(c) Id. ib. Hinde, 429.

(d) 2 Dan. 632.

(e) Id. ib. Jenkins v. Hiles, 6 Vesey, 646.

(f) Jenkins v. Hiles, *supra*.

(g) Fleetwood v. Green, 15 Ves. 594. 1 Mad. 310. 4 Bro. C. C. 494.

(h) Burroughs v. Oakley, 3 Swanst. 159.

vendor, directs an inquiry whether he can make a good title at the time of the reference, not whether he could make a good title at the time of entering into the contract. *(i)* And, under such a reference, it has been held that if the vendor can show a good title at any time before the master's report, it will entitle him to a decree; *(k)* and even after the report, if the vendor can satisfy the court that he can make a good title by clearing up the objections reported by the master, the court will make a decree in his favor. *(l)*

The decree for a reference of title, on a bill for a specific performance, should contain a declaration that the contract ought to be specifically performed. *(m)* The court will also, in many cases, make an interlocutory decree for a reference to a master to inquire what persons are interested in the subject matter of the suit. Thus, in all cases relating to the distribution of the estate of an intestate, the court will, before making any decree affecting the estate, or even ordering an account of it to be taken, direct a master to inquire and report who were the next of kin of the intestate at the time of his decease, and whether any of them are living or dead, and if dead, who are their personal representatives. *(n)*

An inquiry of this nature is always directed, in cases where any part of the property in question devolves upon the next of kin; whether it be upon a total, or upon a partial or constructive intestacy. And, latterly, it has been the practice, in all cases where the next of kin are concerned, to confine the decree, in the first instance, to an inquiry as to the next of kin, and to reserve all further directions. *(o)*

The same course is generally pursued in other cases, where there is a fund distributable among persons constituting a particular class consisting of numerous individuals; as in the case of a bequest to the cousins of a testator, &c. In such cases, as well as in that of intestacy, the court will, before it directs any steps to be taken, either towards a distribution, or for ascertaining the amount of the fund, satisfy itself, by a previous reference to the master, that all the individuals constituting the class amongst whom the fund is distributable, are parties to the proceeding. *(p)*

It will also adopt the same course of proceeding where the property [*329] is distributable between one of two or more classes of individuals. And where the complainant has filed his bill in the character

(i) Langford v. Pitt, 2 P. Wms. 630.

(k) Mortlock v. Buller, 10 Ves. 292, 315. Hepburn v. Dunlap, 1 Wheat. 179

(l) Paton v. Rogers, Mad. & Geld. 256.

(m) Mole v. Smith, Jacob, 495.

(n) 2 Dan. 636.

(o) Id. ib. Seaton on Decrees, 73.

(p) Id. ib.

of an individual belonging to a particular class, the court has directed a preliminary inquiry whether he is or is not within that class. Thus, where the complainants filed their bill in the character of next of kin, an inquiry was directed as to whether they did or did not come within that description. (*q*) And even where the complainant claimed as heir at law of a person deceased, through a great number of descents, and in support of his claim had examined witnesses to prove that he filled that character, the Master of the Rolls, before he would hear the cause, directed the master to inquire who was the heir at law of the deceased. (*r*)

A decree empowering an executor to sell the lands of his testator, for the payment of debts, and to report his proceedings in execution thereof to the court, is not final, but an interlocutory decree. (*s*) So a decree declaring the rights of the parties merely, and directing an account in conformity therewith, but reserving the consequential directions, and the question of costs, until the coming in of the report, is an interlocutory decree. (*t*) So if a decree for the foreclosure of a mortgage merely decides or declares the rights of the complainant by virtue of his bond and mortgage, and refers it to a master to compute and ascertain the amount due to him; reserving all questions and directions until the coming in and confirmation of the master's report, it is an interlocutory decree merely; as the complainant cannot obtain the benefit of his suit until he brings the cause on to be heard again upon the equity reserved, and for further directions as to a sale of the mortgaged premises and the payment of his debt and costs out of the proceeds of such sale. (*u*)

In the case of *Travis v. Waters*, (*v*) a similar principle was laid down by the court for the correction of errors. The bill was filed for a specific performance of an agreement for the sale of land and for an account of payments, &c. The court of chancery had decreed a conveyance in fee of part of the premises to be executed by the respondent, and referred it to a master to take an account of the quantity of land to be conveyed, and of the payments, and to ascertain the balance, if any, due to the respondent; on the payment of which the respondent was to execute the conveyance. And the question of costs was reserved until the *coming in of the master's report. The court for the correc- [*330] tion of errors held this to be but an interlocutory decree; although it

(*q*) *John v. Jones*. Seaton on Decrees, 72.

(*r*) *Cogan v. Stephens*, cited 2 Dan. Pr. 637.

(*s*) *Goodwin v. Miller*, 2 Munt. 42.

(*t*) *Kane v. Whittick*, 8 Wend. 219. *Johnson v. Everett*, 9 Paige, 636.

(*u*) *Johnson v. Everett*, *supra*.

(*v*) 12 John. 500.

settled the main point in controversy between the parties, to wit, that the complainant was entitled to a specific performance upon the payment of the balance due; but it left other material questions unsettled, viz. the quantity of land to be conveyed, and the balance due; and the reference to the master was for the purpose of investigating and settling those points. (*w*)

And it is said by Judge Spencer, in *Jacques v. The Methodist Episcopal Church*, (*x*) that no case can be found in which a decree directing a reference to a master, or a feigned issue, for the purpose of ascertaining any material fact in the case, has been held to be a final decree.

2. Final Decree.

A decree is *final* when all the facts and circumstances material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained, on both sides, that the court is enabled, upon a full consideration of the case made out and relied upon by each party, *finally* to determine between them, according to equity and good conscience. (*y*) In other words, when a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court; so that it will not be necessary to bring the cause again before the court, for its final decision, it is a final decree. (*z*) And a decree may be final, although it directs a reference to a master; if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report—to give the parties the full and entire benefit of the previous decision of the court. (*a*)

Of this nature is a decree directing land to be conveyed, and appointing a commissioner to convey it; (*b*) a decree ascertaining the amount due, directing a sale, and giving costs; (*c*) or upon a bill for a specific performance, a decree made on the coming in of a master's report by which the quantity of land to be conveyed, and the balance of money to be paid are ascertained—directing that a conveyance be executed, on such balance being tendered. (*d*)

[*331] *Of this nature also is a decree dismissing the complainant's

(*w*) See also *Jacques v. Meth. Epis. Church*, 17 John. 558.

(*x*) 17 John. 558.

(*y*) Per Sutherland, J., *Kane v. Whittick*, 8 Wend. 224. 1 Har. Ch. Pr. 420

(*z*) *Mills v. Hoag*, 7 Paige, 18. 2 Dan. 175, 638.

(*a*) *Id. ib.* *Quackenbush v. Leonard*, in Chan. Feb. 21, 1843.

(*b*) *Larue v. Larue*, 2 Little, 261.

(*c*) *Field v. Ross*, 1 Monro. 137.

(*d*) *Travis v. Waters*, 1 John. Ch. Rep. 85.

bill; which may be pleaded in bar to a new suit, unless it is accompanied with a direction that the dismissal is to be without prejudice to the complainant's right to file another bill. (*e*) Directions of this sort are inserted where the dismissal is occasioned by any slip or mistake in the pleadings or in the proof. Thus, formerly, where a bill was dismissed for want of parties, it was expressed to be without prejudice. (*f*) And so where a bill was dismissed in consequence of facts not having been properly put in issue; (*g*) or of the agreement for the specific performance of which the bill was filed, turning out, upon the evidence, to be different from that actually proved. (*h*) So where, in a suit for specific performance, the complainant had precluded himself by the frame of his bill, from insisting upon compensation, although it was clear that he was entitled to it, the court ordered the bill to be dismissed without prejudice. (*i*)

A decretal order upon which an execution may be taken out is a final decree. (*k*) So is a decree disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties, and awarding costs; although it appoints a commissioner to sell part of the subject, and account for and pay the proceeds to the parties, with liberty to them to apply to the court to add other or substitute new commissioners, or for a partition of the subject to be sold, in kind. (*l*)

A decree also which settles the rights of the parties and disposes of the general costs of the cause, and which contains the consequential directions for carrying the decree into effect, upon the coming in and confirmation of the report of a master to whom a reference is directed, to ascertain the amount to be paid, is substantially a final decree. (*m*)

And when a decree is made as to one of several defendants whose interests are not at all connected with each other, with a direction for the payment of the costs as to that defendant, such decree is final, as to him; although the cause may be still pending in court as to the rest. (*n*)

A decree upon a bill of interpleader, that the bill is properly filed, is a final decree. It is the only decree which the complainant is interested in obtaining. (*o*)

(*e*) 2 Dan. 175, 638.

(*f*) Scaton on Decrees, 382.

(*g*) McNeil v. Cahill, 2 Bligh, 263.

(*h*) Woollan v. Hearn, 7 Ves. 222. Lyndsay v. Lynch, 2 Sch. & Lef. 1.

(*i*) Stevens v. Guppy, 3 Russ. 171.

(*k*) Haskell v. Raoul, 1 McCord's Ch. R. 32.

(*l*) Harvey v. Branson, 1 Leigh, 103.

(*m*) Taylor v. Read, 4 Paige, 561.

(*n*) Royall's adm'r's v. Johnson, 1 Rand. 421.

(*o*) Atkinson v. Manks, 1 Cowen, 691.

[*332] **Decree requiring a further order to complete it.*] It is to be observed that there are many cases of decrees, which, although they are final in their nature, require the confirmation of a further order of the court before they can be acted upon. Of this nature are decrees in suits against infants, in which, save in certain excepted cases, a day is given to the infant to show cause against it, after he attains the age of twenty-one. (*p*) In England, where a decree for a partition is made, and some of the parties are infants, the decree does not direct a conveyance by any of the parties till all the infants shall have attained the age of twenty-one, and have had an opportunity of showing cause against the decree. In the meantime the decree only extends so far as to make the partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made. (*q*) But in this state, when a sale is ordered, in a partition suit, the provisions of the statute are so ample and decisive as to dispense with the necessity of giving the infant a day. (*r*)

The most ordinary case in which a further order is necessary, to complete the decree, is that of a decree for a foreclosure of a mortgage.

In the case of *Lowther v. Andover*, (*s*) which was a bill filed on behalf of a purchaser, for the specific performance of an agreement for the sale of an estate, a decree was made directing the master to appoint a time and place for the payment of the principal money, interest, and costs; and it was directed that, in default of payment, the bill was to be dismissed with costs to be taxed, &c. This, although a final decree, required a subsequent order of the court to complete it.

Reservation of liberty to apply.] Although it is the usual practice of the court, in making a decree, to make a complete decree upon all the points connected with the case, so as to make a final disposition thereof, yet it sometimes happens that a decision upon all the points cannot be pronounced until a future period. Thus, for instance, the interest of a fund may belong to a person for life, and after his death, the fund may be distributable amongst a particular class of individuals. Now, although the persons who form that class, as well as the tenant for life, must be, and in general are, before the court at the time when the decree is pronounced, the court will not, at that time, take upon itself to declare their interests in the fund; because it is a rule never to declare rights which are not immediately to be acted upon, lest events [*333] *should occur, before the time of acting upon them, which may

(*p*) *Tuckfield v. Buller*, 1 Dick. 241. *Hubble v. Read*, id. 242. 2 Dan. 642.

(*q*) 1 Dan. 225.

(*r*) *Harris v. Youman*, 1 Hoff. Rep. 183.

(*s*) 1 Bro. C. C. 397.

create an alteration in those rights. All that the court does, therefore, under such circumstances, is to decree the interest of the fund to be paid to the person entitled to the dividends, during his life, and to declare that, upon his death, the parties interested in the fund are to be at liberty to apply to the court as they may be advised.

The same kind of liberty is also given in any other case in which it may seem necessary. And the effect of it is not to alter the final nature of the decree. A decree with such a liberty reserved is still a final decree; and when signed and enrolled, may be pleaded in bar to another suit for the same matter. The effect of it is, however, to permit persons having an interest under it, to apply to the court touching such interest, in a summary way, either by petition or motion, without the necessity of again setting the cause down. (*t*)

It may be as well to observe, in this place, that applications under such a reservation in a decree as has just been mentioned, may be made either by motion or petition; except in cases where the object is to have money paid out of court—in which case the application should be by petition; (*u*) unless indeed where the title to the fund is clear, as where the money has been carried over to the separate account of the party; (*v*) or where the application extends only to the payment of interest; in which cases, it seems, it may be made upon motion. (*w*) But although applications of this nature may be made by motion as well as petition, generally speaking, motions which have for their object to give effect to decrees and orders should be confined to cases where the order which is to be made upon the motion, arises out of recent proceedings concerning which there can be no doubt. (*x*)

The distinction between a final and interlocutory decree is, in practice, rather a nice one; and we have therefore dwelt the longer upon it. It is also a question of considerable importance to parties, with reference to the time for appealing—a longer time being allowed for appealing from a final than from an interlocutory decree.

Who bound by.] It is not our purpose, in this place, to enter, with much particularity, into the inquiries who are bound by, or who may take advantage of, the decree which is pronounced by the court. But *it may be useful to observe that it is a general rule, that all who [*334] are parties to a decree are bound by it; (*y*) and none others. (*z*)

(*t*) 2 Dan. 641.

(*u*) Anon., 4 Mad. 228.

(*v*) Heathcote v. Edwards, Jac. 504.

(*w*) 4 Mad. 228.

(*x*) Lord Shipbrooke v. Lord Hinchinbrook, 13 Ves. 393.

(*y*) Young v. Henderson, 4 Hayw. 189.

(*z*) Brown v. Wyncoop, 2 Blackf. 230. Canby v. Ridgway, Halst. Dig. 175. 1 Beat. 187. 2 Ham. 404.

If any thing is prayed against an infant, the decree, in general, gives him a day to show cause against the same within a certain time after he comes of age. The words of such a decree, are: "And this decree is to be binding on the infant, unless he shall, within six months after he shall have attained the age of twenty-one years, being served with process for that purpose, show unto this court good cause to the contrary." (a) If the infant shows no cause within the time specified, the decree is made absolute against him. (b) On the infant's coming of age and before the decree is made absolute, he may put in a new answer, and make another defence, and examine witnesses. (c) And the putting in of a new answer after the infant comes of age, is good cause why the decree should not be made absolute against him. (d)

But an infant who is aggrieved by a decree is not obliged to wait until he is of age, before he seeks redress, but may apply for that purpose as soon as he is advised. Neither is he bound to proceed by way of a re-hearing, or bill of review, but may impeach the former decree by an original bill; in which it will be enough for him to say the decree was obtained by fraud and collusion, or that no day was given him to show cause against it. (e) And it seems that, provided there is a foundation for it upon the merits, an infant, before he comes of age, is entitled to apply to the court to put in a better answer. (f)

It has been said that all decrees against infants give six months after they come of age, to show cause. (g)

In another case, (h) it is laid down, by Lord Hardwick, that a day to show cause is not given, except where a conveyance by the infant is directed, either in form or substance. But in a case before the late assistant vice-chancellor of the first circuit, (i) his honor considered the rule as being broader than Lord Hardwick stated it in the case last referred to, and that, in general, independent of statutory provisions, the [*335] *infant must have his day wherever his inheritance is affected; whether he is decreed to execute a conveyance or not. That the exceptions in this state are decrees of foreclosure and for a sale in partition; and that these exceptions grow out of statutory provisions, and the constant course of the court.

(a) 1 Newl. Ch. Pr. 501.

(b) Gillb. For. Rom. 160.

(c) Fountain v. Caine, 1 P. Wms. 504. Napier v. Effingham, 2 id. 401. Bennett v. Lee, 2

Atk. 531

(d) Napier v. Lady Howard, Mos. 68.

(e) Richmond v. Tayleur, 1 P. Wms. 736, note.

(f) Bennett v. Lee 2 Atk. 528, 531.

(g) Napier v. Effingham, 2 P. Wins. 401. Eyre v. The Countess of Shaftsbury, 2 P. Wms. 120.

(h) Sheffield v. Duchess of Buckingham, 1 West, 64.

(i) Harris v. Youman, 1 Hoff. Ch. Rep. 175. See also Price v. Carver, 3 My. & Craig, 161. In Mills v. Dennis, 3 John. Ch. Rep. 146. and Winston v. Campbell, 4 Hen. & Munf. 477, it was held that a decree of sale against an infant is valid, unless he be directed to join in the deed.

The question whether, in a decree for strict foreclosure against an infant mortgagor, day should be given to the infant to show cause, was also discussed in that case, but not decided.

The above remarks apply only to infant defendants; for it is to be observed that an infant complainant is as much bound by a decree as a person of full age. (*k*)

And although it is a general rule that an infant defendant is not bound by a decree, if when he arrives of age he can show error in it; yet it seems that where a decree is obviously for his benefit, his rights may be absolutely bound by it. (*l*)

In the case of a *feme covert*, where a bill is brought against her and her husband, during coverture, and where he merely claims in her right, and dies, and the right survives to her, it seems that the wife may file a new answer, and make a new defence, and draw into question the validity of the decree obtained against her during coverture, and reverse it if there be just cause for it. (*m*) But if she, before her marriage, or her ancestors, mortgage lands, and the equity of redemption comes to her, upon a bill brought by the mortgagee to foreclose, the married woman is liable to be absolutely foreclosed, though during coverture; and shall have no day given her, or her heirs, to redeem, after the coverture shall be determined. (*n*)

Who may take advantage of.] With respect to the persons who may have the benefit of a decree, it may be proper to observe, that a party to a suit may sometimes have the benefit of a decree, without appearing at the hearing. Thus, where a decree, in a suit by a residuary legatee against the trustees and executors, and against other residuary legatees who were out of the jurisdiction of the court, directed the usual accounts, the court ordered, upon the application of the last named persons, though still abroad, (they submitting to be bound by the decree,) that they should be at liberty to enter their appearance, and should have the same benefit of the decree as if they had put in their answer, and had appeared at the hearing. (*o*) And *in another [*336] case a bill had been filed by two persons, together with another person of the name of M. R., stated in the bill as a spinster; the cause being heard and a decree made, it appeared that M. R. was married at the time the bill was filed. On an affidavit by the solicitor of M. R. that her marriage took place previously to the filing of the bill, but that he

(*k*) Gregory v. Molesworth. 3 Atk. 626. Williamson v. Johnston, 4 Monro, 255. Jameson v. Moseley, id. 416.

(*l*) Brown v. Armistead. 6 Rand. 594.

(*m*) Gillb. For. Rom. 161.

(*n*) Mallack v. Galton. 3 P. Wms. 352.

(*o*) Bannister v. Way, 2 Dick. 686.

was ignorant of the same, until after the decree, and that, to the best of his belief, the husband was not cognizant of any of the proceedings until after the decree, the court directed, (it being consented to by the defendants,) that on the husband's undertaking to abide by the proceedings in the cause, and to be liable to the costs, he should be at liberty to go before the master and act upon the decree, as if he had been named a party upon the record. (*p*)

And the court will sometimes order that the complainant, in one suit, shall be at liberty to prosecute a decree obtained in another but similar suit, if the complainant in the latter delay prosecuting the decree. (*q*) So, in a creditor's suit, if, after a decree is obtained, the complainant dies, another creditor may obtain an order for liberty to file a supplemental bill, if the representatives of the deceased complainant do not revive within a limited time. (*r*) And a creditor coming in under a decree is permitted to prosecute the same, on account of delay, though only interested in the first part of the decree, and not in the whole of it, as the complainant was. (*s*)

In a creditor's suit also, residuary legatees, upon motion, obtained an order that they should be at liberty to go before the master in taking the accounts; although they were not parties. (*t*) And leave has been given, upon petition, to the purchaser of the interest of a party, to attend the master in making the inquiry directed by the decree. (*u*)

So, if a complainant is entitled to relief against both defendants, and one ought to indemnify the other defendant, who is decreed to pay the complainant, the court often gives liberty to that defendant to prosecute the decree against the other; as where the surety pays money, the principal must indemnify the surety, and the court will make the decree over. (*v*)

Decretal orders.] It may be useful to state in this place the distinction between *decrees* and *decretal orders*; inasmuch as those terms are often confounded with each other.

[*337] *A decree, as has been before remarked, is the order of the court made upon the hearing. A decretal order is an order in the nature of a decree, made upon *motion* or *petition*, either before or after the hearing. The order which has been before referred to, (*w*) as being made upon motion before hearing, in suits for the specific performance

(*p*) *Farrar v. Wyatt*, 5 Mad. 549.

(*q*) *Torin v. Fawke*, 1 Dick. 235. *Sheppard v. Messider*, 2 id. 797. *Sims v. Ridge*, 3 Mer. 458.

(*r*) *Dixon v. Wyatt*, 4 Mad. 392.

(*s*) *Edmunds v. Acland*, 5 Mad. 31. 1 Newl. Ch. Pr. 505.

(*t*) 1 Newl. Pr. 506.

(*u*) *Toosey v. Burchell*, Jac. 159.

(*v*) *Walker v. Preswick*, 2 Ves. 622.

(*w*) *Aute*, p. 327, 328.

of contracts, for a reference to a master to inquire into the vendor's title, &c. is a decretal order. Orders made upon petitions addressed to the court in a summary manner, either on behalf of infants, or under the authority of acts of the legislature, also come under the denomination of decretal orders; as do also those orders which are made upon petitions presented under the authority of decrees, which although final with regard to the persons having the immediate interest in the property, in the hands of the court, reserve a right to parties who, upon the determination of the immediate interest, shall be interested in the property, to apply to the court touching the same, as they shall be advised. (x)

SECTION II.

FORM OF DECREES. (4)

Decrees, in general, consist of three parts: 1. The caption and title: 2. The recitals; and 3. The ordering part; to which may sometimes

(x) 2 Dan. 637.

(4) FORM, VALIDITY AND EFFECT OF JUDGMENT.

Section 274 of the Code directs that judgment may be given for or against one or more of several plaintiff's, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves; and it may grant to the defendant any affirmative relief to which he may be entitled.

In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. (Ib.)

The court may also dismiss the complaint with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. (Ib.)

In an action brought by or against a married woman, judgment may be given against her, as well for costs as damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise. And in any proceeding to enforce such judgment, the supreme court shall have jurisdiction, though the amount be less than \$100. (Ib.)

The judgment must specify clearly the relief granted, or other determination of the action. (Code, § 280.)

In an action by judgment creditors, to set aside a fraudulent transfer of goods and debts, made by the judgment debtor, the character of the debts, the quantity and kind of goods, as well as the amount of the proceeds, should either be proved on the trial, or determined by a referee. The court will, in the meantime, render a *contingent* judgment, dependent upon the amount found to be due. (*Kaupe v. Bridge*, 2 Rob. 459.)

If all the defendants have been served, judgment may be taken against any or either of them, severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone. (Code, § 136, subd. 3.)

Although the forms of action were abolished by the Code, the principles by which the different forms of action were previously governed, still remain, and now, as

be added 4. The declaratory part ; which, when made use of, generally precedes the ordering part. (*y*)

(*y*) 2 Dan. 663.

much as formerly, control in determining the rights of parties. In pleading, a party is now to state the facts on which he relies to sustain a recovery, and if issue be taken thereon, he will be entitled to just such a judgment as the facts established will by the rules of law warrant, without regard to the form or name of his action. (*Eldridge v. Adams*, 54 Barb. 417.)

After the court, at general term, has, on a careful and deliberate review of a case upon its merits, pronounced its judgment thereon, and made its award of costs, the rights of the parties are fixed, as to all the questions passed upon by the court, subject only to review by the court of appeals. In all other respects, such judgment is final and conclusive. (*Sheldon v. Williams*, 52 Barb. 183.)

A judgment of foreclosure entered in 1870, upon a mortgage made in 1860, which adjudicates that there is due the plaintiff a certain number of "dollars," and directs that amount to be paid her out of the proceeds of the sale, means dollars in that currency which is legal tender at the date of the judgment, even though the mortgage may have been payable in coin. (*Lillie v. Sherman*, 39 How. 287.)

In an action against one who guarantees the performance by the obligors of the condition of a bond to pay and satisfy of record a certain mortgage, and in case of their default, agrees to pay and satisfy it himself, the judgment should not be that the defendant pay absolutely to the plaintiff the amount due on such mortgage, but that he pay and satisfy it, or cause it to be paid and satisfied within a specified time, or in the event of his not doing so, then that he pay the amount to the plaintiff. (*Farnham v. Mallory*, 5 Ab., N. S. 380 ; S. C. 3 Keyes, 527 ; 3 Trans. Ap. 171.)

Upon a trial by the court of an action in which the complaint asks only equitable relief, the court cannot, on finding that the plaintiff is not entitled to any equitable relief, order an assessment of damages and a judgment for the plaintiff, upon facts appearing on the trial which would warrant an action for damages. (*Bradley v. Al-drich*, 40 N. Y. 504.) Section 275 of the Code, relieves a plaintiff from any technical objection that he has not prayed for the precise relief to which it may on the trial appear that he is entitled, but the relief to be granted must still be consistent with the case made by the complaint. (Ib.)

The omission to insert in the record of a judgment, the appointment of a guardian *ad litem*, for an infant defendant will not render such judgment void, if prior to the entry of judgment and before the time to answer expired, a guardian was actually appointed, and notice of appearance given by an attorney for him. Such notice of appearance will be deemed to have been authorized by such guardian. (*Graham v. Pinckney*, 7 Rob. 147.)

A judgment duly rendered will protect a party acting under it, though it be subsequently reversed for error ; but one which is voidable for irregularity, when set aside, is treated as void from the beginning, and will not justify acts previously done under it. (*Simpson v. Hornbeck*, 3 Lans. 53.)

Unless a judgment has in fact been rendered, by a justice of the peace, the filing and docketing of a transcript of one purporting to have been rendered by him, in the county clerk's office, is a mere nullity, and does not make it a valid judgment of the county court, and the party to be affected by it may show that fact, in order to defeat the judgment so docketed. (*Stephens v. Santee*, 51 Barb. 532.)

In an action upon a judgment entered in the usual form against two persons jointly, the liability at law will be regarded as joint only. (*Stahl v. Stahl*, 2 Lans. 60.)

Although an entry of judgment upon a remittitur from the court of appeals, with the costs inserted therein as adjusted, in the absence of the attorney of the unsuccessful party, is irregular, the whole judgment is not void for irregularity in inserting such costs. (*Lawrence v. Bank of the Republic*, 6 Rob. 497 ; S. C. 31 How. 502 ; 33 N. Y. 320.)

State courts are not bound by the rule laid down in 7 *Wallace*, 258, as to the form of judgment in actions on contracts payable in coin ; but judgment may be expressed in currency. (*Grund v. Pendergast*, 58 Barb. 216.) Gold coin is not merchandise, but one kind of money ; and in an action to recover for its loss, the judgment should be for gold, and not for its value in currency. (*Kellogg v. Sweeny*, 46 N. Y. 291.)

In considering the validity, in this state, of the decree of a court of competent jurisdiction in a sister state, the determination of that court as to the *status* of the parties, (if they were actually within that state at the time of the suit,) and on the

Caption and title.] The decree commences with a caption, in this form: At a court of chancery held for the state of New York, at the

question whether they were domiciled so far as necessary to give jurisdiction there, for the purposes of such decree, cannot be questioned collaterally, in our own courts. (*Kinnier v. Kinnier*, 45 N. Y. 535.) A judgment of another state in favor of the plaintiff for alimony, is not valid, against a defendant who never resided in the state where the judgment was obtained, nor appeared in the action, nor was served with process, except by publication in a newspaper of a notice which never came to his knowledge until after the rendition of the judgment and the sale of his property by virtue thereof. (*Phelps v. Baker*, 60 Barb. 107.)

A judgment rendered by a court that has not obtained jurisdiction of the subject matter to which it relates, and of the persons to be bound thereby, is utterly void. (*Ib.*)

Parties cannot, by agreement, convert a judgment into a personal mortgage, or a bill of sale, or give it any greater effect than the law gives to it. A parol agreement therefore, that a judgment shall be a lien upon all the debtor's personal property, will not be enforced in equity, even as against subsequent assignees who assented to the arrangement. (*Lanning v. Carpenter*, 48 N. Y. 408.)

If a judgment exceeds two folios in length, it must be distinctly numbered and marked at each folio, in the margin thereof. (Rule 26, Supreme Court.)

1. *For and against, what parties.*] A judgment must be correct in respect to the names of the parties, otherwise it will be invalid. Thus, it has been held that a judgment and execution against *Freeman Hildreth* will not authorize a sale of the property of *Truman Hildreth*; although the latter may be the individual intended. (*Farnham v. Hildreth*, 32 Barb. 277.)

A judgment against an individual as a defendant, by a name which is not his, in contemplation of law, cannot be enforced against him. Nor will a judgment in an action in which the defendant is denominated, in all the proceedings therein, by a different name from that of a particular existing individual, be of any avail against the latter, even if entered up against him by his real name, although process was served upon him when the name of the defendant in such process was not his; because, unless he actually appeared in such action, no jurisdiction over him was obtained therein, by the service of such process. (*Moulton v. De MaCarty*, 6 Rob. 470.)

The Code has, in sections 136 and 274, modified the general common law rule that in an action upon an alleged joint contract, the plaintiff must recover against all the defendants, or be defeated in the action. (*Brunskill v. James*, 11 N. Y. 294.) Under § 274, a judgment may be entered against one or more of several defendants whenever a several judgment upon the facts of the case would be proper, irrespective of the character of the complaint, and whether it alleges a joint or a several liability. (*Harrington v. Higham*, 15 Barb. 524.) The true criterion now is, whether a separate action might have been maintained. If it could, a several or separate judgment is proper. (*Ib.*)

In an action brought against several defendants as joint debtors, where the summons is served upon only one, and he alone appears, the plaintiff, if entitled to judgment, may enter it against all the defendants who are jointly indebted, as provided by § 163 of the Code, to be enforced against their joint property and the separate property of the defendant served. (*Northern Bank of Kentucky v. Wright*, 5 Rob. 604.)

The general object of § 274 was to leave the court at liberty to apply the rules which formerly prevailed in the court of chancery, to actions under the Code. Having abolished the distinction between actions at law and suits in equity, such a provision or power in the court became quite necessary to the due administration of justice in actions founded upon principles of equity. (*Merrifield v. Cooley*, 4 How. Pr. 272.) The rules of law in force at the passage of the Code, in regard to actions at law still prevail, and apply to actions under the Code, which are based upon legal as distinguished from equitable proceedings; and in like manner those equitable principles which were in force under the old regime, are still applicable to actions founded upon those principles, excepting where the Code, in express terms, provides otherwise. (*Id.* 274.) The Code allows a several judgment to be entered whenever a several suit might have been brought. (*Parker v. Jackson*, 16 Barb. 33.) When an action is brought against a partner, upon a note signed with the partnership name, and one of the defendants is discharged by the jury, on the ground that the note was given in renewal of a note made by another firm, of which he was not a member,

city of —, [or town of —,] on the — day of —, 1843; President B. H. W. Chancellor, [or J. W. Vice-Chancellor of the —

and that the name of his firm was signed to the note in suit without his authority, a judgment may be entered in his favor, and against his co-defendant. (Ib.)

When there are joint defendants, any judgment in favor of either party, alone, is irregular, until the other is out of the action as a defendant, and the issues against him are disposed of. Until then, such defendant has a right to appear at every trial of the issues. (*Brown v. Richardson*, 4 Rob. 603.)

Where there cannot be a joint judgment for damages against all the defendants, separate judgments may be pronounced. The power to do so is in express terms, given by the Code, (§§ 118, 274,) and is constantly exercised by the courts, even in actions at law. (*Gillilan v. Norton*, 6 Rob. 546; S. C. 33 How. 378.) And when a court of equity has acquired jurisdiction of the subject matter of the action, it may make complete reparation to the parties. (Id.)

A joint action against several defendants may be brought to recover rent reserved upon the several pieces of land held by them in severalty, and a several judgment against them may be rendered for their respective proportions of the rent, where an apportionment of the whole rent claimed is necessary. (*Van Rensselaer v. Layman*, 39 How. 9.)

In an action against partners, a separate judgment may be entered against those who are found liable, while the plaintiff is non-suited as to those who are not liable. (*Fielden v. Luhens*, 6 Ab., N. S. 341; S. C. 9 Bosw. 436.)

Section 136 of the Code does not alter any fundamental principle of law, as to the joint liability of joint contractors, but was intended to alter the common law on a point of practice merely. It does not permit a separate judgment to be entered against one of two or more defendants proved to be joint contractors, and, therefore, jointly liable, even though that defendant should be the only one served, or who appears, while the others remain on the record as defendants. (*Niles v. Battershall*, 2 Rob. 146; S. C. 27 How. 381; 18 Ab. 161.)

Where two defendants were sued on a joint liability, and one answered, and the other made default, and on the trial, judgment was entered against both defendants, it was held that the plaintiff was regular; that the Code does not require, in such a case, an affidavit of no answer having been received from the defendant making default. (*Catlin v. Billings*, 13 How. Pr. 511; S. C. 4 Ab. 248.) Where such joint liability exists, the defendant who makes default is liable with the other defendant for the costs of the defence interposed by the latter. (Ib.)

At common law, the judgment against an executor was never general, as against one personally liable, but was always special, and there is nothing in the Revised Statute, or in the Code, to dispense with the necessity of these special forms of judgment. (*Mills v. Thursby*, 12 How. Pr. 385.) The judgment should not be against the executors personally; it should be against them as executors, to be levied out of certain assets. (Ib.; *Bank of Cooperstown v. Corties*, 1 Ab., N. S. 412.) When the judgment is for costs and disbursements, and there is no direction that the executor shall pay the costs personally, they can only be collected out of the assets in his hands. (*Dodge v. Crandall*, 30 N. Y. 294.)

The defence of coverture, pleaded and established by one of the makers of a joint note, in an action thereon against both, does not destroy the right of action against the other defendant, but judgment may be rendered against him, alone. (*McGuire v. Johnson*, 2 Lans. 305.)

In an equitable action, by a legatee of a sum of money against two devisees of real estate, to recover a legacy charged by the will upon such real estate, one-half upon the share of each, a judgment directing each defendant to pay an equal share of such legacy, with costs, or, in default thereof, that the real estate be sold to satisfy the same, is proper. (*Larkin v. Mann*, 53 Barb. 267.)

In a joint action by several plaintiffs against several defendants, to compel an accounting as to the profits of a business conducted by the parties, under an agree- ment entitling each of the plaintiffs to a certain share, the judgment may properly be several in respect to the amounts to be paid to each of them. (*Taylor v. Root*, 4 Keyes, 335.)

In an action to rescind a contract for the sale of land, on the ground of mistake or fraud, if the plaintiff fails to establish such mistake or fraud, the court has power to decree a specific performance of the contract, in favor of the defendant, and should do so, where he has asked for such relief, and no sufficient reason why it should not be enforced is shown. (*Masterston v. Beers*, 1 Sweeny, 406; S. C. 6 Rob. 368.)

circuit.] (z) This caption should always state truly the place where the court was held when the decree was made. (a) And where it is

(z) Rule 10.

(a) Rule 98.

2. *Affirmative relief to defendant*] It has been seen that section 274 of the Code, the court may grant to the defendant any affirmative relief to which he may be entitled.

And it has been held that on a trial without a jury, the court may, in giving judgment, doubtless give such relief. (*Cythe v. La Fontain*, 51 Barb. 195.) But the affirmative relief which the court is authorized by § 274 to grant to a defendant is affirmative relief against the plaintiff, only; not against a co-defendant. (*Mechanics' & Traders' Savings Institution v. Roberts*, 1 Ab. 381.) Although, under § 122 of the Code, the court may determine any controversy between the parties before it, yet where neither of the defendants, in his answer, demands of the court any relief, as against the others, but each merely asks that the complaint be dismissed, as to him, it is too late to demand any more, on appeal. (*Garvey v. Jarvis*, 54 Barb. 179.) A judgment now must, as before the Code, be based upon the pleadings; and is not to be given in favor of a defendant for a cause of action which he has not set up by way of defence, or counter-claim. (Ib.; *Wright v. Delafield*, 25 N. Y. 266.) In *The Mayor, &c., of New York v. Wood*, (4 Ab., N. S. 332.) which was an action brought to annul an executory contract for a lease, on the ground of fraud, and the defendant set up a counter-claim for rent, it was held that the cause of action being unsustained, the defendant might have judgment for his rent.

In *Wright v. Delafield*, (25 N. Y. 266.) the complaint sought to restrain the prosecution of actions pending against the plaintiff, on notes given upon the purchase of land, and prayed that the defendant might make a good title and convey. There was a pure defence, which prevailed, and the court, without any cross-bill or counter-claim, asking for affirmative relief, gave an affirmative judgment in favor of the defendants. Held, that the defendants, having successfully defended the action, were entitled to have the complaint dismissed, with costs; but the court had no power to render any other judgment.

In an action on an award, the defendant may put in an answer alleging facts adequate to vacate the award, and demand an affirmative judgment to that effect. In this respect, such an action is like other actions under the Code; the defendant is not driven to a cross-action for that purpose. (*Knowlton v. Mickles*, 29 Barb. 465.)

In *McNamara v. McNamara*, (9 Ab. 18; S. C. 2 Hilt. 547,) which was an action by wife against husband for divorce on the ground of cruel and inhuman treatment, the charge was not substantiated, but on the contrary, the defendant alleged and proved that the plaintiff had been guilty of such conduct as rendered it unsafe and improper for him to cohabit with her. It was held that under the provision of § 274 of the Code, allowing a defendant affirmative relief, a judgment for a divorce *a mensa et thoro* could be granted in favor of the husband; he having demanded it, in his answer.

When a defendant claims affirmative relief, the duty of bringing the cause to trial devolves upon him, unless the plaintiff himself brings it on by notice. (*Roy v. Thompson*, 8 How. Pr. 253.) Otherwise, only a dismissal of the complaint can be had. (Ib.)

In *Cythe v. La Fontain*, (51 Barb. 186, 194,) it is said that where it appears to the court that a defendant is entitled to affirmative relief, he may have it, although he has not expressly claimed it in his answer. That a defect in a complaint or answer is aided by proving the facts material to the cause of action or defense, and that when the ground of defence may be clearly understood by the answer, and the parties go to trial, and actually try the very question on which their rights depend, objections to the answer, on account of a defective statement of facts, will be disregarded, on appeal; or an amendment allowed.

3. *Against one or more of several defendants.*] In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. (Code, § 274.)

If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them, or any of them, alone. (Code, § 136, sub. 3.)

Under § 274, a judgment may be entered against one or more of several defendants,

material to either party, (b) or unless otherwise directed by the court, (c) it should correspond with the time of the actual entry of such decree.

(b) *Whitney v. Belden*, 4 Paige, 140.

(c) *Barclay v. Brown*, 6 Paige, 245.

whenever a several judgment, upon the facts of the case, would be proper, irrespective of the character of the complaint, and whether it alleges a joint or several liability. (*Harington v. Higham*, 15 Barb. 524; *Parker v. Jackson*, 16 id. 38; *Crandall v. Beach*, 7 How. Pr. 271; *Merrifield v. Cooley*, 4 How. Pr. 272.) The true criterion now is, whether a separate action might have been maintained. If it could, a several or separate judgment is proper. (Ib.)

An action against two defendants, upon a joint and several contract, as joint, cannot be made one upon it as several, unless one of the defendants is stricken from the record as a party, or has a defence personal to himself. A several appeal by one defendant will not divide the action into two. (*Brown v. Richardson*, 4 Rob. 603.)

Section 136 does not alter any fundamental principle of law, as to the joint liability of joint contractors; but was intended to alter the common law on a point of practice, only. The legislature intended, by that section to change the former rule of practice by which, if any number of persons or joint contractors were sued, it was necessary to prove and establish an entire case against all the defendants; or the action would fail; so that the plaintiff might recover against so many of the defendants against whom he could prove a joint contract, and a consequent joint liability. (*Niles v. Battershall*, 2 Rob. 146; S. C. 27 How. 381; 18 Ab. 161.) That section does not permit a separate judgment to be entered against one or two or more defendants proved to be joint contractors, and therefore jointly liable; even though that defendant should be the only one served, or who appears, while the others remain on the record as defendants. (Ibid. See also, *Marquat v. Marquat*, 12 N. Y. 342; *Brumskill v. James*, 11 N. Y. 294; *Parker v. Jackson*, 16 Barb. 33; *Clafin v. Butterly*, 5 Duer, 327; S. C. 2 Ab. 446.)

A plaintiff is not obliged, in an action against several, as joint contractors, to establish the contract against all of them, in order to recover against any of them. (*Clafin v. Butterly*, 5 Duer, 327.) When two persons are sued together, on a contract which, on its face, is their joint contract, but which at all times was, in legal effect, the contract of only one of them, a judgment may be rendered against the latter, in favor of the plaintiff, and against the plaintiff, in favor of the other defendant. (Ib.)

A judgment being a final determination of the rights of the parties, there can be but one judgment; unless the court should think it proper to render judgment against one or more defendants, and allow the action to proceed against the others. (*Bacon v. Comstock*, 11 How. Pr. 197.) But in order to obtain such a judgment, the plaintiff must apply to the court, even in case of the default of one of the defendants. (Ib.)

Where several defendants are sued, upon a joint liability, and some defend, while others fail to answer, the defence put in prevents the plaintiff from taking any judgment against either of the defendants, until it has been disposed of, on the trial. (*Catlin v. Latson*, 4 Ab. 248; S. C. 13 How. Pr. 511, *sub nom. Catlin v. Billings*.)

In an action against husband and wife, where the plaintiff, in his complaint, demanded judgment that the defendants execute a mortgage upon the real estate of the wife, to secure him for money alleged to have been advanced upon their promise to give such security, and for general relief; and the plaintiff, on the trial, failed to prove a case entitling him to the relief specifically demanded; but proved that the husband was liable to him for the money advanced; it was held that the court might give judgment against the husband, for the amount, and dismiss the complaint, as to the wife. (*Marquat v. Marquat*, 11 N. Y. 336.)

4. *Dismissal of complaint.*] This subject has been already considered, *ante*, p. 159, note (20).

5. *Against married women.*] Under sections 274 and 287 of the Code, as amended in 1862, relative to actions against married women, it is only the cause of action against, or liability of, a married woman defendant that is to be tried in the action against her. The determination of the mode of satisfying the amount recovered is to be postponed until the execution. The judgment does not cease to be *in rem.*, although formally *in personam*. It is only to be enforced against a particular kind of property. (*Baldwin v. Kimmel*, 1 Rob. 109; S. C. 16 Ab. 353.) In all cases of a judgment against a married woman, it should be expressly stated, therein, that the amount is "to be levied or collected out of her separate estate, and not otherwise;" and the execution should follow the judgment, in its terms. (Ibid; Code, § 287.) In *Thompson v. Sargent*, (15 Ab. 452,) however, it is held that the provision of § 287 of

And where a decree is entered *nunc pro tunc*, as of a previous date, or otherwise, it should appear by some entry in the minutes of decrees, or *in the minutes of proceedings in the cause, or in both, at [*338] what time the decree was actually entered. (*d*)

The caption is followed by the title of the cause. And it is to be observed that the parties, both complainant and defendant, should have the same titles in the decree as they have in the bill; (*e*) thus, if either party is described in the bill as executor or administrator, the decree must be accordingly.

Recitals.] Formerly decrees contained recitals of the pleadings in the cause. This practice, however, has been abolished, as tending to too great prolixity. In stating the evidence read in the cause, also, the present practice is merely to state it generally, without specifying the particular depositions which have been made use of.

Our form of recital is as follows: "This cause having heretofore (or, *this day*, as the case may be,) been brought on to be heard upon the pleadings filed and proof taken therein: and the said pleadings and proofs having been read, and Mr. A. and Mr. B. of counsel for the complainant, and Mr. C. of counsel for the defendant, (*T.*, and *Mr. E.* of counsel for the defendant *F.*, &c.) having been heard, and the court having duly considered the said pleadings, proofs, and arguments, it is declared and adjudged," &c. &c.

It is not necessary to state in a decree that all the preliminary steps towards maturing the cause for hearing were taken; it being intended, where the cause is set for hearing, that it was done regularly; unless the party attempting to impugn the decree shows the contrary. (*f*)

(*d*) *Barclay v. Brown*, 6 Paige. 245.

(*e*) *Curs. Canc.* 158.

(*f*) *Quarrier v. Carter's rep's*, 4 Hen. & Munf. 242.

the Code that an execution against a married woman shall direct the levy and collection of the amount against her from her separate property, and not otherwise, is directory, merely.

A mere absolute judgment *in personam*, against a married woman, recovered prior to 1862 is not sufficient to entitle the creditor to sue her thereon, and recover a judgment against her separate property. The creditor, in such action on the judgment, must also establish, at least, that the original cause of action was such as to entitle the plaintiff to a judgment against her separate estate. (*Baldwin v. Kimmel, supra.*)

6. *Against infants.*] In a judgment against an infant, a day is usually given him to show cause against the judgment, after he comes of age, as follows: "And this judgment is to be binding on the said A. B., unless he shall, within six months after he shall have attained the age of twenty-one years, being served with process for that purpose, show unto this court good cause to the contrary." (*Van Sant. Eq. Pr.* 582; 1 Newl. Ch. Pr. 501.) This was the customary equity practice, and the omission of it is error in the decree. (*Seaton on Decrees*, 266.)

7. *When it takes effect.*] The final decree of a court of equity takes effect when it is made and declared by the court. The record, when made up, is only evidence of the decree, and simply proves it, without adding any thing to its validity. It is not necessary even to enrol it, except in those cases where it is required to be enrolled as preliminary to some further action which the statute authorizes to be taken upon it only after enrolment. (*Butler v. Lee*, 33 How. 251.)

Ordering part.] The ordering or mandatory part of the decree contains the specific directions of the court upon the matter before it. These directions, it is obvious, must depend upon the nature of the particular case which is the subject of the decree. Where the decree is merely interlocutory, and directs an issue, or an inquiry to be made, or account to be taken before a master, it usually contains a reservation of the further matters to be decided, and generally, also, of the costs of the suit till after the event of the issue or reference shall be known.

The mandatory clause commences as follows: "It is therefore ordered, adjudged, and decreed, and this court, in virtue of the power therein vested, doth order, adjudge, and decree," &c.

The reservation of further directions is not confined to the first decree, but will be repeated in every decree in which it may be necessary [*339] *to direct a reference to a master. (g) It is also to be observed, that after such a reservation, the court will not interfere upon the matter reserved, in a summary way; but the cause must be set down for hearing. (h)

The statute requires all decrees for any debt, damages, or costs, to be rendered in dollars and cents. (i)

Declaratory part.] Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree should be prefaced by such a declaration. (k) This, however, is not absolutely necessary, and the omission of it will not invalidate the decree. Sometimes the court directs an insertion, in the decree, of the reasons for making the declaration, and of the grounds upon which it proceeds in making it. (l) This however, is not very frequently done, though the utility of the practice has been often recognized. (m) And it seems, that as a declaration of the rights of the parties is the act of the court, it ought not to be introduced where the decree is taken by the complainant upon the defendant's making default at the hearing. (n).

Whenever a decree is made by consent, it should be so stated in the decree. (o)

Where a bill contains a prayer for general as well as special relief, the court, in making a decree, is not confined to the particular relief

(g) *Seaton on Decrees*, 36.

(h) *Id.* ib. *Cook v. Gwyn*, 3 Atk. 689.

(i) 1 R. S. 612, § 2.

(k) *Jenour v. Jenour*, 10 Ves. 568.

(l) *Gordon v. Gordon*, 3 Swanst. 478. *Maynard v. Mesely*, *id.* 653. *Onions v. Tyrer*, 1 P. Wms. 343. 1 Vern. 67. n. 7 Ves. 373.

(m) *Bax v. Whitbread*, 16 Ves. 24. 3 Swanst. 478.

(n) *Jennings v. Simpson*, 1 Keen, 404.

(o) *Seaton on Decrees*, 375.

prayed for, but may grant such relief as is warranted by the case made out in the bill. (p) (5)

(p) *Crumbough v. Smock*, 1 Blackf. 305.

(5) THE RELIEF GRANTED.

The relief granted to the plaintiff, if there be no answer, cannot exceed that demanded in the complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. (Code, § 275.)

The rule laid down in the latter clause of this section does not justify the court in granting relief upon a contract set up in an answer, which is materially different from that alleged in the complaint; unless the plaintiff accepts the contract as alleged in the answer, so as to waive his own version of it. (*Boardman v. Davidson*, 7 Ab., N. S. 439.) The plaintiff may be allowed any judgment to which, upon the allegations and proof, he is entitled, either at law or in equity. (*Armitage v. Pulver*, 37 N. Y. 494; S. C. 5 Trans. Ap. 186; *Jones v. Butler*, 30 Barb. 641; S. C. 20 How. 189; *New York Ice Co. v. N. W. Ins. Co.* 23 N. Y. 357.) If the case which the plaintiff states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled. (*Emery v. Pease*, 20 N. Y. 62.) Yet in *Bailey v. Ryder*, (10 N. Y. 363,) it is held that no decree can be made in favor of a plaintiff on grounds not stated in the complaint. Hence, if in a creditors' suit fraud is not alleged in the pleadings no proof of it can properly be received.

Where the cause of action stated in the complaint fails, on any ground, the plaintiff is not entitled to recover on facts that may come out on the trial, constituting another cause of action, not embraced in the complaint. (*Salters v. Genin*, 7 Ab. 197. S. C. 3 Bosw. 250.) The court is not empowered by § 275 of the Code to grant to the plaintiff any relief to which the proof on the trial may seem to entitle him; but only to such as is consistent with the case as made by the complaint, and embraced within the issues. (*Cowenhoven v. City of Brooklyn*, 38 Barb. 9.)

The rule is explicit and absolute that in chancery a party must recover according to the case made by his bill, or not at all—*secundum allegata*, as well as *probata*. (*Bailey v. Ryder*, 6 N. Y. 370.) And this rule is not affected by the Code. (*Rome Exchange Bank v. Eames*, 1 Keyes, 585.)

In an action against a corporation, to recover compensation for a grant of property to them, the plaintiff, on failing to recover, cannot have judgment for a restoration of the property, if he has not asked any such relief. (*Coleman v. Second Avenue R. R. Co.* 38 N. Y. 201; S. C. 48 Barb. 371.)

In *Ryder v. Jenny*, (2 Rob. 55,) where the cause of action set forth in the complaint was a breach of a covenant for renewal, contained in a lease, and the only relief demanded was judgment for a specified sum as damages; it was held that the only cause of action cognizable by the court was that stated in the complaint; and that it was therefore immaterial whether or not the evidence made out a case for specific performance.

A complaint is not to be dismissed because it demands more than the court is authorized to grant. (*Wood v. Brown*, 34 N. Y. 337.) But the plaintiff must establish his allegations. (*Salter v. Ham*, 31 id. 321.) When the plaintiff brings his action for equitable relief, alone, without alleging, in his complaint, anything that entitles him to legal redress or damages, and he fails in this, he cannot recover such damages on facts extra *allegata*, although *infra probata* on the trial. (*Bradley v. Aldrich*, 40 N. Y. 504.) And where an action is brought to obtain legal relief, only, viz: the recovery of money, and the plaintiff, upon the trial, fails to establish a right to recover anything upon legal grounds, the court cannot grant any equitable relief; for such relief cannot be deemed to be consistent with the case made by the complaint. (*Towle v. Jones*, 19 Ab. 449; S. C. 1 Rob. 87; *Hotop v. Neidig*, 17 Ab. 332.)

In an action by the purchaser of a thing pledged as security for the payment of a usurious loan, for relief from the usurious contract, the complaint should not be dismissed at the trial because there has been no offer to pay what is legally due. The plaintiff is entitled to judgment that, on payment of the principal with interest, and costs of the action, the securities pledged shall be surrendered to him. (*Beecher v. Ackerman*, 1 Ab., N. S. 141; S. C. 1 Rob. 30.) On a complaint framed to set aside an assignment as fraudulent, the plaintiff, upon a failure to establish the case on this ground, cannot have judgment settling the construction of the instrument. (*Hotop v. Neidig*, 17 Ab. 332.)

A decree must be founded on, and in conformity with, the allegations and proofs; and cannot be based upon a fact not put in issue by the pleadings. (*q*)

(*q*) *Carneal v. Banks*, 10 Wheat. 181. *Gregory v. Power*, 3 Litt. 339.

The object of the new system of pleading was to enable the court to give judgment according to the facts stated and proved, without reference to the form used, or to the legal conclusions of the pleader. (*Wright v. Hooker*, 10 N. Y. 51.) Thus, where the person who drew the complaint evidently supposed that the defendant was liable upon the instrument sued on, in one capacity, and the facts showed him to be liable in another capacity, on the same instrument, it was held that the plaintiff could recover. (*Ibid.*) If a complaint contains allegations which, by a reasonable interpretation, constitute a cause of action, although informal, it should not be dismissed. (*Simmons v. Elbridge*, 29 How. Pr. 309; S. C. 19 Ab. 296.)

Where the complaint prays for the specific performance of a contract to convey lands, or for damages, but shows that the defendant is incapable of conveying, and the parties go to trial, the court, under the Code, is not to dismiss the complaint, but should retain the case, for the purpose of awarding damages. (*Barlow v. Scott*, 24 N. Y. 40; *Woodward v. Harris*, 2 Barb. 439; *Wiswall v. McGowan*, id. 270.) So, where the plaintiff makes a case for damages, but none for specific performance. (*Greason v. Keteltas*, 17 N. Y. 491.) When the demand for a complete performance cannot be acceded to, a partial performance may be decreed, if the plaintiff asks for such relief, at the trial. But such relief cannot be granted on appeal. (*Mills v. Van Voorhies*, 20 N. Y. 412; S. C. 10 Ab. 152.)

Where a written instrument does not express the real contract, its reformation may be adjudged, by the court. (*Boardman v. Davidson*, 7 Ab., N. S. 439.) When a reformation of a contract is prayed, and damages for a breach of a written contract, if the reformation cannot, consistently, be ordered, the court should retain the case for adjudication as to the relief in damages. (*New York Ice Co. v. N. Western Ins. Co.* 23 N. Y. 357; S. C. 21 How. Pr. 296; 12 Ab. 414; *Bidwell v. Astor Mu. Ins. Co.* 16 N. Y. 263.)

In an action by a purchaser of land, in which the only relief specifically demanded was that the vendor be compelled to perform the agreement by conveying, it appearing that the defendant had never been able to perform his agreement, it was held that the court could not order a reference to ascertain the damages for the breach of the agreement; that the defendant had a right to have that question tried by a jury. (*Stevenson v. Buxton*, 15 Ab. 352.) Although legal redress and equitable relief can be demanded in the same action, and either or both afforded, by the court, yet to entitle a plaintiff to legal redress or equitable relief, he must ask it, in his complaint. (*Ib.*) The court has no power to direct the specific performance of a contract to convey real estate, in a case where the party has never had the ability to convey. (*Ib.*)

Although the plaintiff must notify the defendant of the relief he seeks, and if the latter does not contest the action by putting in an answer, can take no more than he has asked for, yet if the defendant answers, taking issue, the court may award any appropriate relief within the frame of the action, according to the pleadings and proofs. (*Marquat v. Marquat*, 12 N. Y. 336; *Rome Exchange Bank v. Eames*, 1 Keyes, 538; *Durand v. Hankerson*, 39 N. Y. 287.) Where the facts entitle the plaintiff to both legal and equitable relief, both may be obtained in one action. All the relief to which a party is entitled, arising from the same transaction, may be obtained in one suit. (*Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Gatlin v. McCarty*, 41 id. 107.) Purely equitable defences are available against strictly legal causes of action. (*Crary v. Goodman*, 12 N. Y. 266; *Phillips v. Graham*, 17 id. 270.) If the plaintiff asks for both legal and equitable relief, upon facts which entitle him to only one kind, he is not to be turned out of court on that account. The court may determine the proper mode of trial, in view of the issues framed. (*New York Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357; S. C. 12 Ab. 414; *Penn. Coal Co. v. Del. & Hud. Canal Co.* 1 Keyes, 72.) It is no objection to joining distinct causes of action or defense in one action, that they require different kinds of relief. (*Phillips v. Gorham*, 17 N. Y. 270; *Gatlin v. McCarty*, 41 id. 107.)

In actions brought for equitable relief, and tried before a judge, if the plaintiff does not show himself entitled to the relief sought for, the court should retain the case, and grant such legal relief as may be just. (*Cuff v. Dorland*, 55 Barb. 481.) Hence, although a judge refuses to decree a specific performance of a contract of sale

The 135th rule of the court specifies the substance of a decree for the sale of mortgaged premises.

A decree may be made between co-defendants, grounded upon the pleadings and proofs between the complainant and the defendants. (6)

at the suit of the purchaser, yet he should retain the case for the purpose of awarding to the plaintiff the damages he is entitled to, for the non-performance. (Ib.)

Upon a trial by the court of an action in which the complaint asks for equitable relief, only, the court cannot, on finding that the plaintiff is not entitled to any equitable relief, order an assessment of damages and a judgment for the plaintiff, upon facts appearing on the trial which would warrant an action for damages. (*Bradley v. Aldrich*, 40 N. Y. 504.) Section 275 of the Code relieves a plaintiff from any technical objection that he has not prayed for the precise relief to which it may, on the trial, appear that he is entitled; but the relief to be granted must still be consistent with the case made by the complaint. (Ib.) That section cannot be so construed as to enable a plaintiff, upon failing to establish the claim for equitable relief set up in the complaint, to compel the defendant to submit to a trial and determination by the court of an issue which is triable only by a jury; unless a jury trial is waived. (Ib.)

In an action to rescind a contract for the sale of land, on the ground of mistake or fraud, if the plaintiff fails to establish such mistake or fraud, the court has power to decree a specific performance of the contract, in favor of the defendant; and should do so, where he has asked for such relief, and no sufficient reason why it should not be enforced is shown. (*Masterton v. Beers*, 1 Sweeney, 406; S. C. 6 Rob. 368.)

Rate of damages.] Section 276 of the Code provides that whenever damages are recoverable, the plaintiff may claim and recover, if he shows himself entitled thereto, any rate of damages which he might have heretofore recovered, for the same cause of action.

As well before, as since, the Code, a plaintiff in a suit in equity, could claim and obtain not only ultimate and complete redress for the injury alleged, but also the damages he had sustained, and damages not merely to the commencement of the action, as at law, but down to the trial and disposition of the case. (*Davis v. Lamertson*, 56 Barb. 480.)

The court, having jurisdiction of an action to reform a contract, may give judgment for any damages which have occurred from a breach of the contract which is established by its judgment; if such relief is demanded in the complaint. A new action to recover such damages is unnecessary. (*Bidwell v. The Astor Mu. Ins. Co.* 16 N. Y. 263.)

(6) Section 274 of the Code, directs that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

This, however, has been held not to prejudice the plaintiff's right to judgment against all the defendants, where his title to relief has not been controverted by the answer put in. (*Woodworth v. Bellows*, 4 How. Pr. 21.) In *Mechanics' Savings Institution v. Roberts*, (1 Ab. 382,) it was intimated that the rights of co-defendants, which might thus be adjudicated, were rights arising from the claim of the plaintiff only; for as to all other claims between co-defendants, neither knows what the other sets up against him. (Van Sant. Eq. Pr. 584; *Norbury v. Seeley*, 4 How. Pr. 73.) In cases, however, where the defendants have answered, and the granting of relief between them does not prejudice the plaintiff's case, there seems to be no limit to the power of the court to adjudicate on their mutual rights or equities, as between themselves, and independent of the plaintiff. (Van Sant. Eq. Pr. 584.) But such judgment is not conclusive upon the defendant's rights; unless it contains express and positive provisions settling the rights of the defendants as between themselves. (*Woodgate v. Fleet*, 9 Ab. 222.)

In a creditor's action, brought to set aside an assignment by one defendant to another, of the property of a special partnership, where no answers have been put in, or pleadings between the defendants, no proofs have been taken on the main subject of litigation between the plaintiff and defendants, or any of them, by default; or any issues formed between them, of law or fact; the court has no jurisdiction or power to give judgment in favor of one defendant against two others, merely upon the confirmation of a referee's report, finding a certain sum due by the latter to the former (*Stephens v. Hall*, 2 Rob. 674.) There is no doubt that the Code permits affirmative

And it is the constant practice of the court to do so, to prevent multiplicity of suits. (r) But such decree, to be binding upon co-defendants, [*340] *must be founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants. (s)

Nunc pro tunc clause.] If the decree is entered *nunc pro tunc*, the following recital and direction should be inserted: "And it appearing by affidavit, to the satisfaction of this court, that the complainant A. (or the defendant E.,) has departed this life since the argument of this

(r) *Elliott v. Pell*, 1 Paige, 268. *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 710.

(s) *Elliott v. Pell*, 1 Paige, 268.

relief to be given to a defendant, as against the plaintiff; and where equities arise between defendants by reason of relief granted in the action to a plaintiff, as against one or more of them, possibly such relief may be given, in some peculiar cases, to defendants, against each other, in order to do complete justice. (Id. 676, per ROBERTSON, Ch. J.) But relief in such cases can be granted only in respect to matters immediately connected with the subject matter of the action, (*Elliott v. Pell*, 1 Paige 263; *Morrill v. Sandford*, 8 Jur. 967;) not as to those not litigated therein, (Ibid; *Jones v. Grant*, 10 Paige 348;) and particularly not as to transactions occurring in the course of the action, incapable of being set up in a pleading, although they refer to property to be affected by the litigation. (*Jones v. Grant*, *supra*.)

The provision of § 274, that the judgment may determine the rights of the parties on each side, as between themselves, is to be taken in connection with that of § 118, that any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination of the questions involved therein. And it is only in those cases, and in the manner in which the conflicting claims of co-defendants could be settled in the action, according to the practice of the court of chancery, that they can be settled under the Code. (*Wells v. Smith*, 7 Ab. 261.) It was only upon the hearing, when all the pleadings had been sifted and settled, and the testimony all produced, that the court of chancery would determine the ultimate rights of the parties between themselves. The whole case must have been before it, all the parties heard, and the defendant, sought to be decreed against, must have contested the point, or been apprised that it was a subject of litigation between his co-defendant and himself. (Ibid.) It is not a necessary conclusion that because parties are properly made defendants, a judgment between themselves may be had. (Id. 263.) In rendering judgment under § 274, the above provision is to be confined to the parties actually litigating before the court. (*Norbury v. Seeley*, 4 How. Pr. 73.) The section does not authorize a judgment against a defendant, in favor of his co-defendant, where he is not apprised by the complaint, nor by a cross-complaint, or otherwise, that in the action which he has been summoned to defend, his liabilities to his co-defendant will be urged against him. (*Tracy v. New York Steam Faucet Co.* 1 E. D. Smith, 349.) In the above case, the construction of § 274, respecting the power of the court to give judgment against one defendant, in favor of another, and in what cases it will be done, are considered.

Where one of several defendants, as surety, applied, after the plaintiff had obtained judgment against all the defendants, for want of an answer, to have execution against the principals, in case he had the debt to pay, it was held that it was not proper to determine the rights of the defendants between themselves, upon mere motion; especially without notice. (*Norbury v. Seeley*, 4 How. Pr. 73; S. C. 2 Code R. 47.)

In an action to compel the specific performance of a contract for the sale of land, the court cannot adjudge that the vendor shall procure releases from parties over whom he has no control. The judgment should direct a reference, to ascertain whether the defendant can give a good title, the amount of any incumbrance which is a lien on the premises and can be paid off, &c., and it should provide for the discharge, by the referee, of the incumbrances which can be paid off, and the execution, by the defendant, to the plaintiff, of a good and sufficient conveyance of the premises, in fee simple, &c. (*Jerome v. Scudder*, 2 Rob. 169.)

cause, it is further ordered, that this decree be entered *nunc pro tunc* as of the — day of —, 1843, the day when this cause was argued."

SECTION III.

DRAWING UP, SETTLING, ENTERING, AND ENROLLING DECREE.

Drawing up.] We have already seen that either party may, upon the hearing, deliver to the court and to the adverse party, a draft of the minutes of the decree to which he conceives himself entitled. (*t*) If this is done, the court will of course pass upon the draft or minutes submitted. If it is not done, the decree will be drawn up after the decision is made, by the register or clerk, from the minutes taken by him of the decision, or from the written opinion of the court, if one is delivered. Or, it may be drawn up by the solicitor of the party in whose favor the decision is made.

If the party entitled to draw up an order or decree, neglects to do so for twenty-four hours after the decision of the court is pronounced, any other party interested in having the order or decree entered, may apply to the register or assistant register, where the decision was made, to draw up and enter the order in conformity with the decision of the court, at the expense of the party applying.

Settling.] If the order or decree is special in its provisions, the party entitled to draw it up, should submit a copy to the adverse party, to enable him to propose amendments thereto, if he thinks proper. The draft and the amendments proposed, if any, are then to be delivered to the register, that the order or decree may be settled by him and entered. And where the register cannot understand the decision of the court, so as to be able to settle the order or decree in conformity therewith, he is then, and in that case only, to apply to the court to settle the same. (*w*) (*7*)

(*t*) Ante, p. 315. See also, Rule 94.

(*u*) Rogers v. Rogers, 2 Paige, 473.

(*v*) Id. ib.

(*w*) Whitney v. Belden, 4 Paige, 140. Rogers v. Rogers, 2 id. 473.

(7) Under the Code, the prevailing party should prepare the draft of the proposed judgment, and submit it to the attorney for the opposite party; and, unless the same is agreed to in form, serve him with a copy, together with notice of the settlement thereof, before the judge rendering the decision, at his chambers. The opposite party may propose amendments, on his part, and attend at the time and place of settlement. Either party dissatisfied with the settlement, may bring the question again, before the judge, upon an application, on notice, for re-settlement. (Van Sant. Eq. Pr. 450, 586.)

Where a defendant has appeared in the action, the plaintiff cannot settle. *ex parte*, the form of the judgment to be entered, if it grant him special relief. The defendant is entitled to notice of the application to settle the judgment. (*Wood v. Lambert*, 3 Sandf. 724.)

[*341] *Or the solicitors may, for their own convenience, submit the decree directly to the chancellor or vice-chancellor, to be settled by him. (x)

If the decree is settled by the register, the solicitor is allowed for attending him for that purpose; but if the question is submitted directly to the chancellor or vice-chancellor, no additional charge therefor can be allowed. (y)

Entering.] When the draft of the decree has been settled and allowed by the court or register, it is in the next place to be entered by the register or clerk in his book of decrees, at length. It is not necessary to engross or copy the decree for this purpose. The decree is entered in the minutes, from the draft, which is not filed as a record, but merely as a memorandum of the decree which is to be entered. Therefore, a charge for engrossing or copying the decree to be entered is not taxable. (z) (8)

(x) *Rogers v. Rogers*, *supra*.

(z) *Doe v. Green*, 2 Paige, 352

(y) *Id. ib.*

(8) ENTERING JUDGMENT.

The Code, (§ 278,) directs that judgment upon an issue of law, or of fact, or upon confession, or upon failure to answer (except where the clerk is authorized to enter the same, by the 1st subdivision of § 246, and by § 384, and except where it may be given at the general term, as provided in § 265,) shall, in the first instance, be entered upon the direction of a single judge, or report of referees, subject to review at the general term, on the demand of either party, as therein provided.

It has been held that judgment upon the written offer of a defendant, pursuant to § 385, although within the terms, is not within the spirit, of this section, and does not require the direction of the judge. (*Hill v. Northrop*, 9 How. Pr. 525.) When the order of the court directs a conditional judgment, it has been the long established practice for the clerk, on proof of non-compliance with the condition, to enter judgment according to the order. (*Hanna v. Dexter*, 15 Ab. 135.)

Where there is an issue of law and an issue of fact, joined in the cause, no judgment for costs can be entered in favor of the party who prevails upon the issue of law, until the issue of fact is disposed of. (*Belknap v. McIntyre*, 2 Abb. 366; *Masters v. Burnard*, 6 How. Pr. 113; S. C. 1 Code Rep. N. S. 407.) Where there are two defences set up in the answer, and one of them being demurred to, by the plaintiff, is held bad, judgment absolute should not be entered, but there should be an order to the effect that judgment should be entered for the plaintiff, unless the defendant shall succeed on the issues of fact joined. (Ib.) It is immaterial whether the proceedings, subsequent to the verdict, to enter judgment, are in the circuit or at special term. A judgment, in the first instance, is to be upon the direction of a single judge. (*Dart v. McAdam*, 27 Barb. 157.) In a court of equity, no judgment, except in a few specified cases provided for by rule, which only relate to the form and manner of proceeding, and do not affect the merits, can ever be taken by default, or without the actual direction or approval of the court. (*Beach v. Shaw*, 4 Barb. 288.)

A judge, at chambers, has no power to render a judgment for the defendant, on the ground that the plaintiff has not replied to the answer. (*Aymar v. Chase*, 12 Barb. 301; S. C. 1 Code Rep., N. S. 330.) There is but one case in which a judge at chambers can grant a judgment; and that is under § 247 of the Code, where, if a demurrer, answer or reply be frivolous, the party prejudiced thereby may apply to a judge, either in or out of court, for judgment thereon; and judgment may be given accordingly. (Ib.) In all other cases, judgment can be rendered only by the court, when sitting as such, and not by a judge at his lodgings, in the street, or even in chambers. (Ib.)

Where a judgment grants the plaintiff special relief, he cannot settle the form there-

Notice to the register or clerk to enter the decree is not necessary. (a)

Until a decree is settled and entered, it is considered as only inchoate, (b) and neither party can have any benefit from the decision until that time. (c)

All orders and decrees made by the chancellor, unless otherwise specially directed, may be entered either with the register or assistant register, at the option of the solicitor. (d)

A decree is considered as entered from the time it is left with the register or clerk for that purpose, although, from a press of business, it may not be actually copied into the book of minutes for some time afterwards.

Entering nunc pro tunc.] Where one of the defendants dies after the argument of a cause, and before it is decided, it is customary to enter the decree *nunc pro tunc*, so that it may have relation back as of the day of the final hearing. (d) So, where the complainant died after

(a) Hinde. 431. 2 Freem. 46.

(b) Whitney v. Belden. 4 Paige. 140.

(c) Rule 98.

(d) Campbell v. Mesier, 4 John. Ch. Rep. 334.

of *ex parte*, if the defendant has appeared in the action. (*Wood v. Lambert*, 3 Sandf. 724; S. C. 1 Code Rep., N. S. 214.)

Section 279 of the Code, directs that the clerk shall keep, among the records of the court, a book for the entry of judgments, to be called the "judgment book," and section 280 requires that the judgment shall be entered in the judgment book, and shall specify clearly the relief granted, or other determination of the action.

Rule 12 of the supreme court, directs that judgments shall only be filed, entered and docketed, in the offices of the clerks of the courts of this state, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business, and at no other time.

It has been held that all judgments filed and docketed by a clerk out of office hours take effect and become liens equally, at the next office hour after such docketing. (*France v. Hamilton*, 26 How. 180; *Wardell v. Mason*, 10 Wend. 573. See also, *Lemon v. Staats*, 1 Cowen, 593.) These cases, however, were decided previous to the amendment of Rule 12, by which the last five words ("and at no other time") were added. Since that amendment, it seems that a judgment entered or docketed out of office hours would be invalid.

Section 267 of the Code, directs that upon the trial of a question of *fact*, by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law, separately; and upon the trial of an issue of *law*, the decision shall be made in the same manner, stating the conclusions of law. Such decisions shall be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision must be entered accordingly, four days thereafter.

The Code, (§ 288,) directs that if any defendant be in actual custody under an order of arrest, and the plaintiff shall neglect to enter judgment, in the action within *one month* after it is in his power to do so, &c., the defendant may, on motion, be discharged from custody.

Under § 176 of the Code, the court is bound to disregard, or to order amended, any defect in the entry of judgment which does not affect the substantial rights of the party. (*Whitehead v. Pecare*, 9 How. Pr. 35.)

The delay of the clerk to enter a final judgment in the judgment book, does not affect its validity. (*Butler v. Lee*, 33 How. 251.)

The clerk can enter judgment only when the summons has been personally served. (*Hallett v. Richters*, 15 How. Pr. 43.) Where the summons has not been so served, a special order of the court is necessary. (Ib.)

There is no sense in which judgments are now entered as of any term; and there is no reason why a judgment by default, obtained in vacation, should relate back to the first day of the last preceding term. (*Livingston v. Randall*, 59 Barb. 493.)

the entry of an appeal from the decree of a vice-chancellor, and after the cause was ready for a hearing upon the appeal, but the fact of his death being unknown to the counsel, the cause was afterwards heard and decided by the chancellor, upon the appeal; it was held that the decree upon the appeal might be entered *nunc pro tunc* as of a day previous to the death of the complainant and after the entering of the [*342] appeal. (e) So, where *the *cestui que trust* of the complainant had died after argument and before the decision of the cause by which the suit was determined, the court ordered the decree to be entered *nunc pro tunc* as of the time of the argument. (f) (9)

And decrees have been entered *nunc pro tunc* after a very long interval has elapsed from the time of pronouncing the decree; and even where the original decree has been lost, the court has permitted it to be entered *nunc pro tunc* from the office copy, after the lapse of twenty-three years. (g)

In *Jesson v. Brewer*, (h) where the pleadings in the cause, as well as the original decree, (which was pronounced twenty-one years before the application,) were lost, a paper purporting to be a copy of the decree, was allowed to be entered as the decree, and enrolled; it appearing from the minute book of the register that such a decree was pronounced at the time, and from a master's report that it had been acted upon.

Enrolling.] (10) A decree does not, strictly speaking, become a record

(e) *Vroom v. Ditmas*, 5 Paige, 528.

(f) *Wood v. Keyes*, 6 Paige, 478.

(g) *Lawrence v. Richmond*, 1 Jac. & W. 241. *Donne v. Lewis*, 11 Ves. 601.

(h) 1 Dick. 371.

(9) The court has not power to order judgment *nunc pro tunc*, as of a date prior to the actual judgment, to enable a party to affect the amount of his costs. (*Moore v. Westervelt*, 14 How. Pr. 279; S. C. 6 Duer, 684.) But when the entry of a judgment upon a verdict obtained by a party is delayed by a bill of exceptions of his adversary and such party dies, after the service of the bill of exceptions, and before the decision of the court thereon, the Revised Statutes have no application; and the court, upon common law principles, without regard to the lapse of time, will allow the judgment to be entered up as of a term prior to such party's death. (*Crawford v. Wilson*, 4 Barb. 504.)

(10) JUDGMENT ROLL.

The Code, (§ 281,) directs that unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together, and file the following papers, which shall constitute the judgment roll: 1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment. 2. In all other cases, the summons, pleadings or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits, and necessarily affecting the judgment.

It is the usual practice, however, for the attorney of the party entering the judgment, to furnish the judgment roll, and this seems to be the intention of § 281. (*Van Sant. Eq. Pr.* 609.)

Proof of service of the summons should be inserted in the judgment roll, where the defendant fails to answer. (*Macomber v. Mayor, &c., of New York*, 17 Ab. 36.) Br.

of the court until it has been enrolled; and although the court itself, after it has been duly settled and entered, treats it as a foundation for ulterior proceedings, it is not considered of a sufficiently permanent

if the defendant has answered the complaint, either by answer or demurrer, proof of service is no part of the record. (*Smith v. Holmes*, 19 N. Y. 271.) Neither do a bill of costs, notice of adjournment, affidavit of disbursements and attendance of witnesses, constitute any part of a judgment roll. (*Schenectady & Saratoga Plank Road Co. v. Thatcher*, 6 How. Pr. 226; S. C. 1 Code Rep., N. S. 880.) Nor, where a party is arrested under § 284 of the Code, should the affidavit and order of arrest be entered on the record. (*Corwin v. Freeland*, 6 N. Y. 560.)

When an issue of fact has been tried by a jury, a copy of the verdict is a necessary part of the roll. If the issue has been tried before a referee, the report must be inserted. If the trial of the issue is by the court alone, the decision is a part of the roll. (*Thomas v. Tanner*, 14 How. Pr. 426.) The opinion of the court should never be carried at length into the record. (*Ib.*)

A judgment roll can only be constituted by the attaching of the papers which, for that purpose, are described in the Code. (*Townsend v. Wesson*, 4 Duer, 342.) Hence, to give to a paper, containing neither process nor pleadings, the name and effect of a judgment roll, would not only be an abuse of language, but a direct violation of the provisions of the Code. (*Ibid.*) In this case, the provision of the Revised Statutes, as to the necessity of filing a record of judgment, or at least the previous rule recognized by the statute, is considered not to be repealed by the Code. DUER, J. however, observes that the Code seems to dispense with any signing of the roll. In *Decker v. Judson*, (16 N. Y. 450,) DENTO, Ch. J., speaking of a paper which was claimed to be a judgment record, says: it "was not a record of judgment. It consisted of the circuit minutes, the pleadings, and what purports to be a rule for judgment. It was not signed by the clerk—a formality which, by the judiciary act, was essential to constitute a judgment record." In *Williams v. Wheeler*, (1 Barb. 48,) it is said the practice of docketing judgments before they have been signed by the clerk is erroneous, and will not be sanctioned by the court.

But, in *The Artisans' Bank v. Treadwell*, (34 Barb. 553,) it is held that a judgment is not irregular, though not signed by the clerk; at least not void, so as to enable a third person to object to its invalidity on that ground. That signing is not indispensable to its validity. (See *Van Orman v. Phelps*, 9 Barb. 500.)

An omission to attach the original summons to the roll does not vacate the judgment. (*Hoffaring v. Grove*, 42 Barb. 548; S. C. 18 Ab. 14, 142; *Calkins v. Packer*, 21 Barb. 275.) Nor will an omission to insert an order of reference in the judgment make the judgment void, (*Ib.*;) nor will an omission to insert a copy of the verdict, (*Cook v. Dickerson*, 1 Duer, 679;) or an omission of the summons and complaint. (*Martin v. Kanouse*, 2 Ab. 390, 393.) Neither is a judgment void because the roll or record does not embrace a pleading stated to have been withdrawn by the defendant before judgment, and to have been mislaid or lost. (*Hatcher v. Rocheleau*, 18 N. Y. 86.) Nor is it void where two defendants answer separately by different attorneys, and obtain a verdict, and a bill of costs is allowed to each attorney, merely because the judgment is entered in favor of the defendants jointly for the aggregate of such costs. (*Cook v. Dickerson*, 1 Duer, 679.) The items of costs, as adjusted by the clerk, and the affidavit of disbursements, must be filed, but not incorporated in the roll. They form no part of it. (*Ib.*) A demurrer when abandoned, like a pleading which has been amended, is not a part of the record. (*Brown v. Saratoga Rail Road Co.* 18 N. Y. 495.)

In *Martin v. Lott*, (4 Ab. 365,) where there was a variance between the order of dismissal of the complaint, as entered in the minutes, and that contained in the judgment roll, it was held that the variance was a mere irregularity, which could only be taken advantage of, if at all, within one year after perfecting judgment.

A variance between the record and the execution may be amended, or, if immaterial, may be disregarded. (*Townshend v. Wesson*, 4 Duer, 342, 353; *Swan v. Saddlemire*, 8 Wend. 676; *Jackson v. Walker*, 4 id. 462.)

The exceptions which properly constitute a part of the judgment roll according to section 281 of the Code, are the case or exceptions provided for by section 268; and these exceptions, after they are made, are to be settled and filed within ten days after settlement. (*Conolly v. Conolly*, 16 How. Pr. 224.) In case of the omission of a regular case or exceptions, the appellant is confined to such errors as appear upon the face of the record, strictly. (*Ib.*)

nature to entitle it, in other courts, to the same attention that is paid by one court of record to the records of other courts of the same nature. (i)

In fact, till a decree has been enrolled and thereby become a record, it is liable to be altered by the court itself, upon a rehearing; while a decree which has been enrolled is not susceptible of alteration except in a court of appeal, or by bill of review. For this reason it is that a decree which has not been enrolled, although it is, in its nature, a final decree, is considered as merely interlocutory and cannot be pleaded in bar to another suit for the same matter. (k)

The advantage to be obtained by the enrolment of a decree is to prevent its being the subject of a rehearing, and to enable the party benefitted by it to plead it in bar to any new bill which may be filed against him for any of the matters embraced by the bill upon which the decree is founded. (l)

It is declared by the 111th rule that no process shall be issued or other proceedings had on any final decree, until the same is duly enrolled.

[*343] *And such process must be issued from the office in which the decree is enrolled.

If a master is directed to sell real estate under such decree, he may give the notice of sale previous to the enrolment; but the decree must

(i) 2 Dan. 674.

(k) Id. ib. For. Rom. 183.

(l) Id. ib. Rule 112.

By rule 35 of the supreme court, any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, without the filing of a complaint, may be enrolled and docketed, as other judgments, at the request of any party interested.

A decree may be enrolled *nunc pro tunc*, and such an enrolment will have relation back to the time of the decree, and protect an intermediate sale. (*Goelet v. Lansing*, 6 John. Ch. 75; *Waring v. Waring*, 7 Ab. 472; *D'Agreda v. Mantle*, 1 id. 136; *Croghan v. Livingston*, 6 id. 350.)

If a pleading be amended of course, the amended pleading alone, without the original, may be inserted in the judgment roll. But if the pleading or summons be amended, by order of the court, as by striking out, or adding, the name of a party, both the original and the amended process and pleading, with the order allowing the amendment, should be included in the judgment roll. (*Van Sant. Eq. Pr.* 610.) And so as to all orders and papers involving the merits and necessarily affecting the judgment, and necessary to explain it. (Ib.)

Rule 67 of the supreme court requires that, in *mortgage cases*, all official searches for conveyances or incumbrances, made in the progress of the cause, shall be filed with the judgment roll.

A judgment roll is evidence that the clerk did his duty in respect to assessing the amount due. (*American Exchange Bank v. Smith*, 6 Ab. 1. But see *Squire v. Ellsworth*, 4 How. Pr. 77.)

The final decree of a court of equity takes effect when it is made and declared by the court; and the record, when made up, is only evidence of the decree, and simply proves it, without adding anything to its validity. It is not necessary even to enrol it, except in those cases where it is required to be enrolled as preliminary to some further action which the statute authorizes to be taken upon it only after enrolment. (*Butler v. Lee*, 33 How. 251.)

be enrolled and a certificate of the enrolment produced before the execution of a conveyance by the master. (*m*)

And where any previous decree or decretal order disposes of any part of the merits of the cause, or is necessary to explain the final decree, it must either be recited therein or enrolled therewith, as a part of the final decree in the cause. (*n*)

Under this rule, it has been decided that where the decree is final as to any branch of the cause, or as to any of the parties, it must be enrolled before a deed can be executed, on a sale under that part of the decree, and before an execution can be issued to compel a compliance with such decree. (*o*) If the enrolment of any subsequent decree is necessary, it is to be made by a continuance on the record of the first enrolment. (*p*)

When enrolment to be made. The statute provides that after the expiration of thirty days from the time a final decree shall have been entered in the minutes of the court, if no appeal shall have been entered therefrom, and if no petition for a rehearing shall have been presented, upon being required by either party, the register, &c., by whom the decree was entered, shall attach together the bill, pleadings, and such other papers filed in the cause, as the chancellor shall from time to time, by general rules, direct, together with the taxed bill of costs therein; and that he shall annex thereto a fair, engrossed copy of the decretal order, signed by the chancellor or vice-chancellor and countersigned by the register, &c., who entered the same, together with a brief statement or abstract to be prepared in such form as the chancellor shall direct, not to exceed five folios, of the proceedings from time to time had in the cause. (*q*)

A decree may be enrolled *nunc pro tunc*, but an order for that purpose is irregular, if the petition on which it is made does not set forth the date of the decree to enrolled. (*r*)

*An enrolment made *nunc pro tunc* will have relation back to [*344] the time of the decree, and protect an intermediate sale. (*s*)

A decree may be enrolled notwithstanding an abatement of the suit. (*t*)

Enrolment, how made. The papers and proceedings so attached, annexed, and signed, are then to be filed by the register, &c., and are to

(*m*) Rule 111.

(*n*) *Idem*.

(*o*) *Minthorne's ex'rs v. Tompkin's ex'rs*, 2 Paige, 102.

(*p*) *Id. ib.*

(*q*) 2 R. S. 181, § 97.

(*r*) *Parker v. Downing*, 1 My. & Keen, 634.

(*s*) *Golet v. Lansing*, 6 John. Ch. Rep. 75.

(*t*) *Gartside v. Isherwood*, 2 Dick. 612. *West's Rep.* 673.

remain of record in his office; and such filing is to be deemed an enrolment of the decree and proceedings. (*u*)

The chancellor, by the 186th rule, has specified the papers which, by the statute, are required to be attached together and annexed to the final decree on enrolment. They are the original bill or petition, and all other pleadings in the cause, including exceptions to pleadings, reports thereon, and exceptions to such reports, petitions to revive, or in relation to any change of parties, or in any way affecting the merits of the cause, and all reports affecting the merits, or which are necessary to explain the decree; together with the original taxed bills of costs of such of the parties as are entitled to costs under the decree.

The bills of costs which are to be annexed to the decree on enrolment must be fairly engrossed, without unnecessary erasures or interlinations. And if they are not so, the taxing officer should direct them to be re-engrossed before he certifies to the taxation thereof. (*v*)

Where the decree of a vice-chancellor has been appealed from subsequent to its enrolment, and it is afterwards affirmed, if the proceedings are directed to be remitted to the vice-chancellor, the decree of affirmance must be added to the original enrolment in the clerk's office, and must be signed by the vice-chancellor. But where the decree of affirmance does not direct the proceedings to be remitted to the vice-chancellor, the original enrolment must be transmitted to the officer with whom the decree of affirmance is entered, and the last decree should be added to such enrolment and be signed by the chancellor. (*w*)

The statement or abstract of the proceedings mentioned in the statute must state as concisely as practicable the time of filing the original bill, the defendants who appeared and answered, and those who appeared and suffered the bill to be taken as confessed against them, and the defendants against whom the same was taken as confessed for want of appearance; distinguishing those who neglected to appear after a personal [*345] *service of process from those who were proceeded against as absentees. It must also show the changes of parties which have occurred during the progress of the cause, and the manner in which the new parties were brought before the court or made parties to the suit, so far as the same can be ascertained from the minutes of the court and the papers on file. And such other proceedings in the cause are to be recited therein as may be necessary to a correct understanding of the decree. (*x*)

And to enable the register, &c., with whom the final decree is enter-

(*u*) 2 R. S. 181. § 98, (orig. § 92.)

(*w*) *Clapper v. Howe*, 6 Paige, 157.

(*v*) *Stafford v. Bryan*, 2 Paige, 46.

(*x*) Rule 187.

ed to prepare this statement or abstract, the several officers of the court, upon his written request, are required to transmit to him any information contained in the records of their respective offices which may be necessary. (y) And the several officers with whom any pleadings or papers are filed or deposited, are required by the 182d rule, to transmit them, upon the application of a party or his solicitor, or upon the written request of the register, &c., with whom the final decree is entered, to the office where the decree is to be enrolled, at the expense of the party requesting such enrolment.

If all the pleadings and other papers which are to be annexed to the enrolment are not in the office where the decree is entered, the party seeking the enrolment must apply at the proper office or offices and have them transmitted to the office of the register, &c., where the decree is to be enrolled. And he must also see that the necessary taxed bills of costs are furnished. (z)

Where the decree awards costs, to be paid out of the proceeds of a sale, or otherwise, any party wishing an enrolment may give notice to any other party entitled to costs under the decree, to file a taxed bill thereof with the register, &c., with whom the decree is entered, within fifteen days, or that the decree will be enrolled without such bill. (a) If the taxed bill is not filed within the time, the party serving the notice, on filing an affidavit of the service thereof, may have the decree enrolled without annexing thereto such taxed bill. (b) But if it is received at any time before the actual enrolment of the decree, it will be considered as in time, and must be annexed to the enrolment. If the taxed bill is not filed, however, until after actual enrolment, the party will forfeit his right to costs under the decree. (c)

What decrees, &c., may be enrolled. Any decree or decretal order *directing the payment of money, or affecting the title to pro- [*346] perty, if founded on petition where no bill is filed, may, at the request of any party interested, be enrolled in the same manner as other decrees. (d)

Decrees should be enrolled in all cases where a decree has been rendered, or an order of dismissal had, or any order in the nature of a decree, which determines the suit; whether such suit concerns real or only personal estate. (e)

It seems to have been formerly supposed that a decree for an account was never enrolled; for the reason that defects are very frequent in cases of that nature, and therefore the decrees should be left open, in order to give parties an opportunity to have a re-hearing where direc-

(y) Rule 188.
(c) Rule 185.

(z) Rule 181.
(d) Rule 123.

(a) Rule 183.

(b) Rule 184.
(e) Halst. Dig. 176.

tions in a decree were imperfect. But in the case of *Parker v. Downing* (*f*) it was decided that there is no rule preventing the enrolment of a decree which, among other things, directs the taking of accounts.

In all cases where there are proceedings subsequent to a final decree which go to alter such decree, the proceedings should be enrolled; but not where such proceedings do not alter the decree. (*g*) And where such subsequent enrolment is necessary, it is made by a continuance on the record of the first enrolment. (*h*)

Filing enrolled decree. The statute requires the papers and proceedings attached, annexed, and signed in the manner above mentioned, to be filed by the register, assistant register or clerk, and to remain of record in his office. And it declares that such filing shall be deemed an enrolment of the decree and proceedings, with the like effect as was formerly given to enrolled decrees. (*i*)

The cases in which the enrolment of a decree will be *vacated* will be mentioned when we come to speak of the manner of *rectifying decrees*. (*k*)

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*SECTION IV.

DOCKETING AND DISCHARGING DECREE.

Docketing.] It is provided by the revised statutes that every final decree directing the payment of any debt, damages, costs, or sum of money shall bind and be a charge upon the lands, tenements, real estate, and chattels real of the defendant which he may have at the time of the docketing of such decree, or which he may acquire at any time thereafter. (*l*) But such decree will cease to be a lien from and after ten years from the time of filing the same. (*m*)

The manner in which decrees made previous to the act of 1840, are to be docketed is also specified in the statute. (*11*)

(*f*) 1 Mylne & Keen. 634.(*g*) Halst. Dig. 175.(*h*) 2 Paige. 102.(*i*) 2 R. S. 110, § 98.(*k*) See post. Sec. V, p. 349.(*l*) 2 R. S. 182, § 101, (orig. § 96.)(*m*) Id. ib. § 103, (orig. § 97.)

(11) DOCKETING, LIEN, DISCHARGE AND SATISFACTION OF JUDGMENT.

Section 282 of the Code directs that upon filing a judgment roll upon a judgment directing, in whole or in part, the payment of money, it may be docketed with the clerk of the county where the judgment roll was filed, and in any other county, upon the filing, with the clerk thereof, a transcript of the original "docket."

It also specifies the property upon which the judgment shall be a lien; and for how long a time; authorizes the court, in case of an appeal from the judgment, and the giving of the requisite undertaking to stay execution, to exempt from the lien of the judgment, the whole or a part of the real estate, and to direct an entry to be

The register, assistant register, or clerk is required to make and preserve an alphabetical docket, in which shall be entered, upon the request of any party thereto, all final decrees filed and enrolled, which

made by the clerk, on the docket of such judgment, that the same is "secured on appeal," or "secured on appeal as per order of the court, dated —," &c.; and directs that thereupon, the judgment shall cease, during the pendency of such appeal, to be a lien upon the property so exempted, as against purchasers, and mortgagees in good faith.

Rule 12 of the supreme court directs that judgments shall only be docketed within the hours during which, by law, the clerks are required to keep open their respective offices, for the transaction of business, and at no other time.

It was held, previous to the amendment adding the last five words to the rule ("and at no other time") that all judgments docketed by a clerk out of office hours take effect and become liens equally, at the next office hour after such docketing. (*France v. Hamilton*, 26 How. 180; *Wardell v. Mason*, 10 Wend. 573. See *Lemon v. Staats*, 1 Cowen, 592.) It seems that since the amendment, judgments docketed out of office hours are absolutely void.

By the act of April 11, 1860. (Laws of 1860, ch. 276.) clerks of counties are required to keep their offices open daily, except on Sundays and holidays, in the county of New York, from 9 o'clock A. M. to 4 P. M., and in each of the other counties, between March 31 and October 1, from 8 o'clock A. M. to 6 P. M., and between Sept. 30, and April 1, from 9 A. M. to 5 P. M.

The date, and the order of the lien, is a question of time, depending on the day and the hour of docketing the judgment. (*Blydenburgh v. Northrop*, 13 How. Pr. 289.)

Judgments and decrees, rendered in the United States courts, duly recorded, need not be docketed in the several counties of the district; but they are a lien on all the real estate of the judgment debtor, located within the district; and, in this respect, the lien of a United States judgment takes effect differently from a state judgment. (*Crandell v. Cropsey*, 10 N. Y. Leg. Obs. 1.)

The statute relating to the docketing of judgments by transcript, (Laws of 1840, ch. 386,) is directory. An error in the statement of date, amount, &c., which would be amendable by the court in which the judgment was rendered, will not vitiate the lien of such judgment, as against persons who have not been actually misled and prejudiced thereby. (*Sears v. Burnham*, 17 N. Y. 445.)

The docketing of a judgment, when no judgment roll has been made and filed, is an unauthorized and illegal act, and creates no lien on the lands of the debtor. (*Townshend v. Wesson*, 4 Duer, 342.) Where the plaintiff, in an action for the recovery of land claims title under a sheriff's deed, he must prove the existence of the judgment recited in the deed, by the production of a judgment roll duly filed, and must also show that the judgment, evidenced by the roll, was regularly docketed. (Ib.)

Rule 35 of the supreme court authorizes any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, to be enrolled and docketed, as other judgments, at the request of any party interested.

The lien of a judgment does not attach upon the mere legal title to lands, existing in the defendant, when the equitable title is in another person. (*Lounsberry v. Purdy*, 18 N. Y. 515; S. C. 16 Barb. 376; 11 id. 490.) If a purchaser under the judgment has notice of the equitable title, before purchase and actual payment of the purchase money, he will not be protected as a bona fide purchaser. (Ibid; *Averill v. Loucks*, 6 Barb. 19.)

Judgments recovered against husband and wife, for a cause of action accruing after the marriage, do not bind the wife's separate estate. (*Tisdale v. Jones*, 38 Barb. 523.) Judgments do not become liens on leasehold property, unless the lessee (the judgment debtor,) is in possession; and if he transfers his lease to another party, without taking possession of the premises, the lien of the judgment never attaches. (*Crane v. O'Connor*, 4 Edw. 409.)

If land is sold under the first judgment, the lien of subsequent judgments is on the surplus, in the order of their priority. (*Averill v. Loucks*, 6 Barb. 470.)

If the amount of a judgment be paid by one who is not a party, and not liable thereon, the judgment will be extinguished or not, according to the desire of the person paying. (*Harbeck v. Vanderbilt*, 20 N. Y. 395; *Alden v. Clark*, 11 How. Pr. 209.) But where one of several defendants jointly liable under the judgment pays to

direct the payment of any debt, damages, costs, or other sum of money. (n)

Upon such request being made, and on the payment of the fees for

(n) Id. 181, § 99, (orig. § 93.)

the other party the entire sum, the judgment becomes thereby extinguished, whatever may be the intention of the parties to the transaction. (Ibid; *Bank of Salina v. Abbot*, 3 Denio, 181; *Ontario Bank v. Walker*, 1 Hill, 653. But see opinion of JAMES, J. in *Alden v. Clark*, 11 How. Pr. 209.)

When the judgment is in an action upon a promissory note, against maker and indorser, and the indorser pays the judgment, this is not an extinguishment of the judgment, and the indorser, having taken an assignment of it, may wield the judgment against the property of the maker. (*Corey v. White*, 3 Barb. 12.) So, upon the recovery of a judgment against principal and surety, the latter may pay the amount of the judgment, and enforce the same against the property of the principal. (*Alden v. Clark*, 11 How. Pr. 209; *Goodyear v. Watson*, 14 Barb. 481.) But tender of payment, if not accepted, does not extinguish the lien of a judgment. (*People ex rel. McKnight v. Beebe*, 1 Barb. 379.)

Although an execution is suffered to lie dormant, the judgment does not cease to be a lien on the real estate of the judgment debtor. The doctrine in regard to dormant executions refers to *personal* estate. (*Muir v. Leitch*, 7 Barb. 341.)

A judgment regularly docketed against the vendor of lands sold by an executory contract is a charge upon the lands; but the lien of the judgment is subject to all the equities previously existing. (*Moyer v. Hinman*, 13 N. Y. 180; S. C. 17 Barb. 137.)

A judgment docketed after the decease of the defendant, does not bind his real estate: but it is to be regarded as a *debt*, to be satisfied in the usual course of administration. (*Clark's case*, 15 Ab. 227.)

A judgment after ten years from the time it is docketed, ceases to bind, or be a charge upon real estate, as against purchasers in good faith, and as against incumbrancers subsequent to such judgment, by mortgage, judgment, decree or otherwise. (*Scott v. Howard*, 3 Barb. 319.) But such judgment, after the expiration of the ten years, continues a lien on the real estate as against the judgment debtor and his heirs, and as against the grantee of the defendant without valuable consideration. Where there are later judgments, it ranks, in effect, as to them, as a junior judgment, and after ten years, it ceases to be a lien as against subsequent purchasers in good faith, and subsequent incumbrances, although the purchaser purchased, and the subsequent incumbrance was accepted, with full knowledge of the prior judgment. (Ibid.)

When a judgment has been vacated, and afterwards the decision is reversed, and the order vacating the judgment is set aside, the lien of the judgment is restored, except as to intervening purchasers in good faith, or incumbrances. (*King v. Harris*, 34 N. Y. 330; S. C. 30 Barb. 471.)

Section 282 of the Code, does not apply to judgments rendered and docketed before it took effect, which was on the 10th of July, 1851. (*Fitch v. Livingston*, 4 Sandf. 712.)

The order directing an entry to be made by the clerk, on the docket, that the judgment is "secured on appeal" is discretionary, and the power to grant it should be carefully exercised. (*Orchard v. Binninger*, 4 Ab., N. S. 368; *Livingston v. Roberts*, 3 Ab. 231; S. C. 5 Duer, 680; *Fitch v. Livingston*, 4 Sandf. 712.) The order is not appealable. (Ib.) The court has power to direct an entry upon such terms as it may deem fit. It may require an additional surety. (*Bergen v. Stewart*, 28 How. 6.) The order will not be granted unless the undertaking on the appeal is sufficient to stay execution. (*Hoppock v. Cottrell*, 13 How. Pr. 461.) It may be referred to a referee to report on the sufficiency of the sureties. (*Munn v. Barum*, 2 Ab. 409.) When the court orders a third surety to be added to the original undertaking, the latter by signing the same assumes an equal responsibility with the former sureties. (*Bergen v. Stewart*, 28 How. 6.)

Where, after the undertaking on appeal was given, the attorney for the respondent executed a release of certain parts of the real estate of the appellant from the operation of the judgment, thereby discharging the sureties in the undertaking, the judge refused the order of entry, unless new security was given, on the appeal. (*Wells v. Kelsey*, 25 How. 384; S. C. 16 Ab. 221, n.)

Notice of a motion on the part of an appellant for an order, under the last sentence of section 282 of the Code, directing an entry on the docket that a judgment appealed

docketing the decree, and sending transcripts to the clerks of the supreme court, the register, &c., is to enter in such docket a statement of such decree, containing, 1. The names, at length, of all the parties to

from is "secured on appeal," need not be given to the sureties. It is enough that it is given to the owner of the judgment appealed from. (*Livingston v. Roberts*, 3 Ab. 231; S. C. 5 Duer, 680; *contra*, *Munn v. Barnum*, 2 Ab. 409.) In a later case, (*Burrall v. Vanderbilt*, 1 Bosw. 637; S. C. 6 Ab. 70,) it was held by the superior court of New York, that when several defendants unite in an appeal from the judgment, and third persons execute, as sureties, an undertaking on such appeal, in the terms prescribed by the Code, such sureties are not discharged from liability, merely because some of the appellants abandon their appeal, if the respondent obtains an affirmance of the judgment. Neither are such sureties discharged, because an order is made, on the consent of the respondent's attorney without their consent or notice to them, that the clerk enter on the docket of the judgment the words, "secured on appeal," and such entry is thereupon made. (Ib.)

Section 63 of the Code does not prescribe the form or mode of docketing a judgment in the county clerk's office, or a transcript from a justice's court; but, by a fair construction, that section may be held to refer to and adopt the mode prescribed by the Revised Statutes for docketing in courts of record. Such a judgment against two persons ought to be docketed under the initial letter of each. (*Blossom v. Barry*, 1 Lans. 190.) If, on filing a transcript of judgment against H. and C., the clerk docket it under the letter H. only, inserting the names of both defendants, it is a lien upon C.'s real estate as against him, and as against subsequent purchasers having notice of the judgment. (Ib.)

As against the judgment debtor, the lien of a judgment in a court of record attaches to land which has previously been conveyed to him by deed duly executed and delivered; notwithstanding such deed may have been redelivered to the grantor and destroyed without having been recorded; and a purchaser at a sale thereof on execution issued upon such judgment, acquires a perfect title, as against such debtor. (*Parshall v. Shirts*, 54 Barb. 99.)

The lien of a judgment extends only to lands, tenements, real estate, and chattels real, and does not affect future estates in expectancy. (*Jackson v. Middleton*, 52 Barb. 9.)

A judgment creditor who advanced his money upon the faith of the debtor's title to land which appeared unincumbered on the record, and without notice of the secret unrecorded lien of the vendor of his debtor, for a part of the purchase money, is entitled to priority over such lien. (*Hulett v. Whipple*, 58 Barb. 224.)

Improvements made upon land by a purchaser of the premises, or of a lease thereof, are subject to the lien of a judgment which was a lien upon the land at the time of the purchase, although he had no knowledge of such judgment. (*Cook v. Kraft*, 3 Lans. 512.) It is only where an equitable claim on land existed prior to the recovery of a judgment that equity will give it priority over such judgment. (Ib.)

A judgment docketed correctly, except that the initial of the middle name is wrong, but which error is corrected on motion, takes priority as a lien from the date of the original docketing, as against a subsequent judgment obtained before the correction. (*Geller v. Hoyt*, 7 How. Pr. 265.) Where one creditor has the first lien on two distinct securities, and another has a subsequent lien on only one of them, the latter can insist that the former resort first to the security on which the latter has no lien. (Ib.)

As to docketing judgments, or transcripts thereof, against stockholders in banking corporations, see laws of 1863, ch. 372, § 6.

See further as to docketing judgments, *ante*, p. 198, note 4.

Discharging. An attorney cannot legally discharge a judgment obtained by him, by virtue of his general authority in the suit, upon receiving a less sum than is due thereon, nor after the lapse of two years from the filing of the judgment roll. (*Beers v. Hendrickson*, 5 Rob. 53.) The right acquired by the assignment of a judgment, which does not in terms transfer the claim upon which it was founded, is absolutely terminated by the reduction of such judgment to a mere security for the claim, on letting the defendant in to defend; and the assignee having notice thereof, cannot discharge it. (Ib.) A court will not interfere and cancel a judgment previously rendered by it, upon the application of a mere stranger showing no equities. The application must be made by some party to the record, or person having some interest, and be based upon such legal or equitable considerations as the court can recog-

such decree, designating particularly those against whom it is rendered, the county of which they are respectively residents, if they are residents of this state, and if not, the state or country in which they reside; and

nize. (*Matter of Beers*, 5 Rob. 643.) A judgment at general term, in a case appealed from a special term, which merely affirms the judgment appealed from, with costs, is a judgment for the costs of the appeal, and not for the amount of the former judgment with those costs. And a satisfaction of such judgment operates merely as a discharge of such costs, and does not satisfy or authorize the discharge of record of the judgment appealed from, or of a prior judgment in the same suit, which, on being opened to let the defendants in to defend, was allowed to stand as security. (*Beers v. Hendrickson*, 6 Rob. 53.)

A judgment cannot be discharged even by what would be considered a good accord and satisfaction in other cases. (*Garvey v. Jervis*, 54 Barb. 179.)

Where a debtor pays a part of a judgment and then gives his own notes for a portion of the balance, which are paid at maturity, this will not discharge the judgment; there being no satisfaction or release of it given, although the notes were given in full satisfaction of the judgment, if they were paid at maturity. (*Moss v. Shannon*, 1 Hilt. 175.)

If a judgment be paid by a person who is neither a party to, nor liable upon it, the judgment will be extinguished or not, according to the intention of the party paying. (*Harbeck v. Vanderbilt*, 20 N. Y. 395.)

The rule that if a creditor gives his debtor in execution permission to go at large beyond the jail or its liberties, the judgment is absolutely discharged, applies even where the debtor agrees, in consideration of such permission, that he will still be bound by the judgment, and that the plaintiff may rearrest him on another execution in case he does not pay the judgment. (*Bonesteel v. Garlinghouse*, 60 Barb. 338.) Such a judgment ought to be satisfied of record on motion. (Ib.)

An entry made in the docket-book, (after filing a satisfaction piece,) under the heading, "when satisfied," referring to the judgment, the entry consisting of the words and figures, "April 11, 1864," is a sufficient cancellation. The long continued and uniform practice of canceling judgments only by a memorandum on the docket, amounts to a practical construction of the statute. (2 R. S. 362, § 22.) (*Booth v. Farmers' & Mechanics' National Bank*, 4 Lans. 301.) In making entries upon the docket, the clerk acts in a ministerial capacity, and his erroneous or false entries, *e. g.*, marking a judgment satisfied by one who had previously assigned it—cannot conclude the parties, even to protect a purchaser of lands in good faith. Parties must see that the clerk had due authority. (Ib.) A clerk is not authorized by a satisfaction piece purporting to refer to a judgment against "L. and others," to cancel the docket of a judgment obtained by the same plaintiff against M. and G. in an action where L. was made a party, but not served. And this, although the facts sustain the moral conviction that this was the judgment intended to be discharged. (Ib.)

Satisfaction. A judgment debtor has a right to settle the judgment with his creditor without the intervention of the attorney of the latter, unless he has notice of the lien of such attorney. And if he does settle it in good faith, with no intention to defraud such attorney of his costs, he is entitled to have the judgment satisfied of record, notwithstanding the creditor may not have paid such costs. (*Pearl v. Robitschek*, 2 Daly, 138; *Ackerman v. Ackerman*, 14 Ab. 229.)

If a judgment ordered to stand as security, on opening a default, has been assigned, and is still held as security by the assignees when application is made for its discharge, the plaintiff therein has an interest in it which entitles him to be heard, or at least to notice and an opportunity to be heard, before the court can satisfy it of record. (*Matter of Beers*, 5 Rob. 643.)

A mere verbal agreement to receive a less sum than the amount due in full satisfaction of a judgment, cannot be enforced; and even the payment and receipt of the sum agreed upon, as a part execution, would not be a satisfaction of the whole, or a bar to a recovery of the balance. (*Beers v. Hendrickson*, 6 Rob. 53.) A mere authenticated acknowledgment of satisfaction of a judgment, which by law authorizes the docket to be canceled and discharged, if not entered upon the judgment roll, is not a record, and cannot operate as an estoppel upon any of the parties; nor can there be given to it the effect of a release under seal, but, like any other receipt, it is open to inquiry. (Ib.)

When a satisfaction piece executed in furtherance of a compromise between a judg-

their title, trade, or profession, if any such be stated in the bill or petition on which the decree is founded. 2. The amount of the debt, damages, costs, or other sum of money directed to be paid by such decree: 3. The hour and day of entering such docket. And such statement is

ment creditor and his debtor, and to be delivered to the latter on his complying with certain conditions, is, by mistake, delivered to him without such compliance, and he causes the same to be filed and the judgment to be canceled of record, and refuses to perform the conditions, the creditor may maintain an action to set aside the satisfaction piece, and restore the judgment to full force, securing the rights of intermediate purchasers and incumbrancers. (*Slocum v. Freeman*, 6 Ab., N. S. 443. See also, *Bernstein v. Dennmiller*, 9 id. 285.)

Where a judgment debtor demands a satisfaction piece of a judgment against him, he must present it to the creditor for execution, and offer to pay all the expenses of executing it. (*Pettingill v. Mather*, 16 Ab. 399.)

The court may order a judgment to be satisfied of record, although it has already been discharged by the filing of a satisfaction piece, if such satisfaction piece was only given conditionally, and not in full discharge of the judgment. (*Ward v. Beebe*, 17 Ab. 1.)

It seems that where a judgment has been recorded in favor of several parties, the county clerk should satisfy such judgment of record when a satisfaction piece is duly executed by one of the judgment creditors, and is presented with a request that the judgment be satisfied of record. (*The People ex rel. Eagle v. Keyser*, 17 Ab. 214; S. C. 28 N. Y. 226.)

The imprisonment of a defendant on execution, and his subsequent discharge by the plaintiff, operates as a complete satisfaction of the judgment. (*Kasson v. The People ex rel. Rease*, 44 Barb. 347; *Bonesteel v. Garlinghouse*, 60 Barb. 338.) And this, although it is agreed between the parties that such discharge from imprisonment "shall not affect the force or validity of said judgment, or prejudice the right to enforce or collect the same by execution or otherwise." (Ib.) Where the plaintiff had separate judgments against two persons for the same trespass, and discharged one of the defendants from imprisonment on execution under such an agreement, it was held that such discharge operated as a satisfaction of both judgments. (Ib.)

Where a sheriff levies upon property sufficient to satisfy an execution, and after keeping it in his possession a day and a half, abandons the property, leaving it in the defendant's possession, on the plaintiff's refusing to indemnify him, this will not amount to a satisfaction of the judgment. (*Radde v. Whitney*, 4 E. D. Smith, 378.)

The entry of satisfaction of a judgment by the clerk, upon filing a satisfaction piece, signed and acknowledged by the plaintiff, may be disregarded by a plaintiff when such satisfaction piece was executed upon a condition which had not been performed, or was improperly obtained and filed; and he may issue execution upon his judgment as unsatisfied. (*Anderson v. Nicholas*, 4 Rob. 630.) A judgment does not, by the filing of the satisfaction piece and canceling of the docket, under such circumstances, so far lose its efficacy that no execution can be issued upon it. If the plaintiff chooses to disregard the entry of satisfaction and to issue an execution, the writ will be deemed regularly issued. (Ib.) The proper and regular course in such a case, however, is to move to take the satisfaction piece off the files, cancel the entry of satisfaction, and restore the docket before issuing execution. (Ib.)

Although it is irregular to include in a judgment rendered on appeal, the amount of the judgment of the court below, thus making it a judgment for the amount of that judgment and the costs of the appeal, yet, where judgment is entered in that form, payment of the amount thereof will operate not only as a satisfaction of such judgment, but of the judgment below included therein. (*Beers v. Hendrickson*, 45 N. Y. 665.) An attorney is not authorized by his retainer to satisfy a judgment without payment; and if he does so, the court will set such satisfaction aside. If he holds the judgment by assignment, as security for debts due from his client, his satisfaction without payment is good only for the amount of his interest. (Ib.) The execution of an acknowledgment of satisfaction, and acknowledging such execution, as required by statute, is an act of equal deliberation and solemnity as the execution of an instrument under seal. It is equally effective as an evidence of payment of the judgment, as an instrument executed under seal, and will discharge the judgment, although the consideration therefor is less than the amount due on the judgment. (Ib.)

to be repeated under the name of each person against whom the decree was rendered, in the alphabetical order of their names respectively. (o)

The register, &c., entering such docket, must immediately transmit a [*348] *certified transcript thereof to each of the clerks of the supreme court. Which transcripts are to be entered by such clerks with their dockets of judgments in the supreme court, in the same manner as the transcripts of such judgments; except that they must designate in the margin of such entry that the same is made of a decree in chancery. (p)

But as a substitute for these provisions of the revised statutes, it is provided by the act concerning costs and fees in the courts of law, &c., passed May 14th, 1840, that no decree thereafter entered, shall be a lien upon real estate, unless docketed in the office of the clerk of the county where the lands lie. (q)

And by the 27th section of that act the decrees of the court of chancery are required to be docketed in the same manner, and with the like effect as judgments of the supreme court. That act directs that when a judgment shall be perfected in the latter court, or at any time within five years thereafter, the clerk, on request, and on payment of the fees, shall furnish the party with one or more certificates or transcripts containing all the facts necessary to make a perfect docket of the judgment; and on presenting the same to any county clerk, he shall immediately file the same, and docket the judgment in the manner required by law, specifying the court in which the judgment was recovered, the day and the hour on which it was perfected, and the day and hour of docketing the same. If the judgment is not docketed within ten days from the time when it was perfected, it will only be a lien from the time of docketing. But if docketed within the ten days, it will be a lien from the time it was perfected, as against *bona fide* purchasers and mortgagees. (r)

Discharging.] It is provided by the revised statutes that a decree docketed in the manner therein directed, may be discharged by the register, assistant register, or clerk, with whom it was docketed, on producing to him a written acknowledgment of satisfaction signed by the party, in whose favor the decree was rendered, duly acknowledged before a vice-chancellor or master in chancery. (s)

The court, also, has the power to order the docket of a decree to be discharged, upon a hearing of the parties and upon satisfactory evidence that such decree has been paid. (t)

(o) Id. ib. § 100, (orig. § 94.)

(q) Laws of 1810, p. 334, § 25.

(s) 2 R. S. 182, § 104, (orig. § 98.)

(p) R. S. 182, § 101, (orig. § 95.)

(r) Laws of 1840, p. 334, § 26.

(t) Id. 183, § 105, (orig. § 99.)

*Upon the decree being so discharged, and when the decree [*349] is reversed or vacated, the register, &c., with whom the same was filed, must transmit to the clerks of the supreme court a certificate of such fact; who are to enter the same in the transcript of the docket of the decree. (*u*)

The act of 1840 makes no provision for discharging a docket of judgment or decree; and the above provisions of the revised statutes appear to be still in force.

SECTION V.

RECTIFYING DECREE.

I. BEFORE ENROLMENT.

On petition or motion.] As long as the decree remains in the shape of minutes, that is, until it has been settled and entered by the register, it may be rectified upon application to the court by petition, or motion. And even important matters may be brought before the court upon an application to vary the minutes. (*v*) Thus, where the court directed an issue to be tried at the next assizes, and the decree was not drawn up or passed in sufficient time, the minutes were varied by directing the trial of the issue at the subsequent assizes. (*w*) So where facts are stated in the answer, which are not contradicted, and which, if true, would lead to a material alteration in the frame of the suit, the court will, on motion, permit the minutes of the decree to be amended, with a view to ascertain the truth of those facts. (*x*)

It may be here observed that all applications to vary the minutes of decrees must be made to the court or officer by which the decree was pronounced, and that the chancellor has no power to alter a decree made by a vice-chancellor; except upon appeal. (*y*) Therefore, where a decree had been made by Lord Cottenham, when master of the [*350] rolls, an application to him after he was lord chancellor, to vary the minutes of the decree, and which was not consented to, was refused. (*z*)

Though the minutes of a decree may be corrected in the manner and for the causes above specified, yet *after a decree has been settled and entered*, the court will not entertain any application to vary it, unless upon consent of all parties, or in respect of matters which are quite of

(*u*) 2 R. S. 183, § 106, (orig. § 100.)

(*v*) 2 Dan. 668, 686. Grey v. Dickenson, 4 Mad. 464. 2 Harr. Ch. Pr. 321. Webber v. Hunt, 1 Mad. 13.

(*w*) Willis v. Farrer, 2 Young & Jer. 241.

(*x*) Harwood v. Fisher, 1 Young & Col. 110.

(*y*) See 2 Dan. 668.

(*z*) Reece v. Reece, 1 My. & Craig, 372.

course; (*a*) as where the decree is obviously wrong, or there is a clear mistake made by the court or counsel in drawing it up. (*b*) The proper mode of having a decree rectified in matters of substance, is by applying to have the cause reheard. (*c*) Therefore, after a final decree, an order for the defendant to account before the master, so as to vary the relief granted by the decree, will not be granted on motion. (*d*)

In cases, however, where a clerical error has crept into the decree, or in which some ordinary direction has been omitted, the court will entertain an application to rectify it, even though it has been passed and entered. (*e*) And so where the decree omitted the usual directions for the parties to be examined upon interrogatories, &c., Lord Eldon held that the decree might be corrected, by the insertion of the direction. (*f*) So where a decree in a creditor's suit omitted the usual direction to take an account of the personal estate, his lordship ordered it to be inserted; even though the decree had not been pronounced by himself, but by the master of the rolls. (*g*) So a decree will be amended, where, through inadvertence, costs have been given by it, to a party in a case where he was not entitled to them. (*h*)

A decree may also be corrected or amended on motion or petition, not only as to mere clerical errors, but by the insertion of any provision or direction which would have been inserted as a matter of course, if the same had been asked for at the hearing, as a necessary or proper clause to carry into effect the decision of the court. (*i*)

A decree cannot be rectified, however, by way of further directions. Further directions are not given upon motion. They are only granted [*351] *upon a hearing after a master's report, or upon the cause coming on again for the purpose, in pursuance of a former order or decree. The court may then add to a decree: for instance, by allowing interest upon a sum reported by the master to be due; (*k*) or by declaring what are the rights of parties as ascertained under the first order or decree, and thus carry out and effectuate the object of the suit. But upon a hearing for further directions upon points of equity reserved, the court cannot materially alter or vary the first decree. (*l*)

(*a*) 2 Dan. 686. 2 Harr. Ch. Pr. 322. Gardner v. Dering, 2 Edw. 131. Bennett v. Winter, 2 John. Ch. Rep. 205.

(*b*) Rogers v. Rogers, 1 Paige, 189.

(*c*) Id. ib. 2 Dan. 686. 2 Edw. 131. Clark v. Hall, 7 Paige, 382.

(*d*) Hendrick v. Robinson, 2 John. Ch. Rep. 484.

(*e*) Tomlin v. Palk, 1 Russ. 475. Lawrence v. Cornell, 4 John. Ch. Rep. 546.

(*f*) Wallis v. Thomas, 7 Ves. 292.

(*g*) Pickard v. Mattheson, 7 Ves. 293. See also 12 Ves. 456, 458. 1 Swanst. 573, n. 1 Russ. 475. 2 Mad. 391.

(*h*) Murray v. Blatchford, 2 Wend. 221.

(*i*) Clark v. Hall, 7 Paige, 382.

(*k*) Crenze v. Hunter, 2 Ves. jun. 164.

(*l*) Parnell v. Price, 14 Ves. 502. Gardner v. Dering, 2 Edw. 131. Le Grand v. Whitehead, 1 Russ. 309.

It is a principle of the court that no alteration can be made in a decree, on motion, without a rehearing, except in a matter of clerical error or form, or where the matter to be inserted is clearly consequential on the directions already given. (*m*) (12). Upon this ground, where the decree directed a commission to ascertain the boundaries of prebendal lands, a motion that the decree might be extended to copyhold as well as to freehold lands, which was opposed, was refused. (*n*) So where an ejectment was ordered to be brought without restraining the defendant from setting up an outstanding term, the introduction of such a restraint was not permitted. (*o*) In *Coleman v. Sarell*, (*p*) Lord Thurlow would not allow a decree to be varied, by giving costs to a defendant who was a mere trustee, and, as such, would have been entitled to them if they had been asked for at the hearing. And in *Brookfield v. Bradley* (*pp*), the court declined to correct a decree in which the error was apparent, because the alteration proposed would require new directions upon the corrected fact.

It seems, the application to rectify a decree before enrolment, in matters of form, or where there is a clear mistake, may be made either by motion or upon a petition. (*q*)

An order or decree *by consent*, cannot be modified or varied in an essential part, without the assent of both parties to the same. But the court, upon the application of either party, may give such further directions as shall become necessary for the purpose of carrying such order or decree into effect according to its spirit and intent. (*r*)

*As to the *manner* of rectifying a decree, it is laid down that [*352] where the alteration asked for is merely consequential upon the decree itself, or the addition of some direction which has been omitted, the

(*m*) 2 Dan. 687. *Clark v. Hall*, 7 Paige. 382.

(*n*) *Willis v. Parkinson*, 3 Swanst. 233.

(*o*) *Brackenbury v. Brackenbury*, 2 Jac. & W. 391.

(*p*) 2 Cox, 206.

(*pp*) 2 Sim. & Stn. 64.

(*q*) *Clark v. Hall*, *supra*. *Wallis v. Thomas*, 7 Ves. 292. *Pickard v. Matheson*, id. 293. 3 Swanst. 233. 13 Price, 766. *Brown v. Sansome*, 9 Price, 479. *Grey v. Dickinson*, 4 Mad. 464. *Murray v. Blatchford*, 2 Wend. 221. *Rogers v. Rogers*, 1 Paige, 188.

(*r*) *Leitch v. Cumpston*, 4 Paige, 476.

(12) Although the court retains sufficient control of an action, after judgment, to regulate its enforcement, yet it has no power to modify and add to it, or make another judgment, on motion. (*Prentiss v. Machado*, 2 Rob. 660.)

There is no power conferred upon the court, at special term, to review, alter, modify or change a judgment rendered at a general term. (*Sheldon v. Williams*, 52 Barb. 183.) Whatever power a special term may have to control judgments, in matters of practice not affecting substantial rights—such as to allow their entry *nunc pro tunc*, &c.,—they cannot exercise the power of review or modification upon the merits of a general term decision. (Ib.)

A judgment of the general term, rendered upon a case made at the circuit, on a verdict given there, subject to the opinion of the court at general term, cannot be altered or amended by the court at special term, either upon the case as made, or upon additional evidence. (*Hubbard v. Copcutt*, 9 Ab., N. S. 289.)

omission will be supplied by a distinct order, without altering or interlining the decree itself. (*s*) But in cases of error in the direction of the decree, where the alteration cannot be made by supplemental order, the court will direct the register to attend with his book, and make the alteration in open court, which the chancellor will countersign with his initials. (*t*)

Applications to the court to rectify decrees should be made within a reasonable time; otherwise they will not be granted. Therefore, where a party delayed a year and a half in applying to the chancellor to correct a mistake made in drawing up a decree, leave to amend it was refused. (*u*)

Rehearing.] It has been already stated that after a decree has been entered and before it has been enrolled, the proper method of having it rectified otherwise than upon the consent of all parties, or in respect of matters which are of course, is by applying to have the cause reheard. If any important error has occurred, or any thing material has been omitted in the decree, a rehearing should be applied for. (*v*) (13)

Until the decree is enrolled, it is not a record of the court, and may be altered upon a rehearing, but not after enrolment; and an enrolment by one defendant, of a decree dismissing the complainant's bill, will prevent the cause being reheard at the instance of another defendant. (*w*)

A rehearing is not considered a matter of course, except in the cases provided for by the rules of the court. (*x*) In other cases it rests in the discretion of the chancellor. (*y*) And if a motion for rehearing is made for delay, it will be refused. (*z*) Where a decree of one chancellor is reversed by his successor in office, a rehearing will be granted by a third chancellor, on cause shown. (*a*)

(*s*) *Clark v. Hall*, 7 Paige, 382. *Lane v. Hobbs*, 12 Ves. 458. 7 Ves. 292. 2 Dan. Pr. 688.

(*t*) *Tomlin v. Palk*, 1 Russ. 476. See also, *Skrymsner v. Northcote*, 1 Swaust. 573, n.

(*u*) *Rogers v. Rogers*, 1 Paige. 188.

(*v*) *Gardner v. Dering*, 2 Edw. 131. *Clark v. Hall*, *supra*.

(*w*) *Gore v. Purdon*, 1 Sch. & Lef. 234.

(*x*) *Land v. Wickham*, 1 Paige, 256. Rule 113.

(*y*) *Id. ib.* *Travis v. Waters*, 1 John. Ch. Rep. 48.

(*z*) *Id. ib.*

(*a*) *Land v. Wickham*, *supra*.

(13) The Code does not seem to make any provision for a rehearing, in the supreme court. Section 14 authorizes a rehearing in the court of appeals, when there is not a concurrence of at least five judges.

Yet the courts seem to recognize the practice of rehearing as still existing. In *Hubbard v. Copcutt*, (9 Ab., N. S. 289,) it is held that the court, at general term, can rehear and modify a judgment rendered by it upon a case made at the circuit, as the facts may warrant; but can do so only upon a case made. If further evidence is necessary, a retrial would be proper.

In *Butler v. Lee*, (33 How. 251,) it is decided that if a motion to set aside a judgment, and allow the defeated party to interpose his claim or defence, leads to a rehearing of the cause upon the merits, it should be reheard before the same judge who heard it before.

A rehearing may be applied for whether the decree or order is made upon the hearing of the cause, or of a demurrer or plea, or upon further directions, or upon exceptions. (*b*) A decretal order cannot, in fact, be *discharged in any other manner. And where an attempt was [*353] made to discharge an order pronounced by consent, upon further directions, by motion, on the ground that the party had been surprised, Lord Thurlow refused to make the order upon motion; although he appeared to think that where any thing is inserted in a decretal order, as by consent, to which the party has not consented, there must be some way of rectifying it: viz., by bill of review, but that it cannot be done by motion. (*c*)

The same rule also prevails where the order is made upon a petition; (*d*) in which case the proper course is to apply by petition of rehearing, in the same manner as upon a decree or decretal order. (*e*)

It seems also that an order made upon a petition presented in a matter under an act of parliament, and not in a cause, may be discharged upon motion, where the application to discharge it is grounded upon irregularity in the petition itself, and is accompanied by an application to take the petition off the file. (*f*)

It is to be observed, however, that orders made upon motion, are not proper subjects for rehearing, but may be varied or discharged upon application by motion, to the court. (*g*) But a decretal order made on motion, such as an order in a foreclosure suit under the statute, cannot be discharged on motion. (*h*)

A cause in which a decree has been made upon taking a bill as confessed, may be reheard. And where a bill had been taken as confessed against a husband and wife, and afterwards the husband died, the court allowed the cause to be reheard on the petition of the wife. (*i*)

A rehearing of a decree *by default* may also be had in the same manner as of other decrees. (*k*) And whatever decree is made upon the rehearing will be absolute, even though the party again makes default. (*l*)

So may an order for a rehearing be obtained by a complainant when the cause has been originally set down for hearing at the request of the defendant and a decree for dismissing the bill made upon default of the complainant's appearance. (*m*) Thus in *Terran v. Waite*, (*n*) where

(*b*) 3 Dan. 109.

(*c*) Anon. 1 Ves. jun. 93.

(*d*) Bishop v. Willis, 2 Ves. 113

(*e*) 2 Smith's Ch. Pr. 37.

(*f*) In re Dovenbury Hospital, 1 My. & Keen, 279.

(*g*) 3 Dan. 110.

(*h*) Cadle v. Fowle, 1 Bro. C. C. 515.

(*i*) Tooke v. Clarke, 1 Dick. 350.

(*k*) 2 Dan. 645 to 653.

(*l*) Hankiwitz v. Ocarrel, 1 Dick. 109.

(*m*) 2 Dan. 652.

(*n*) 2 Dick. 782

an order of this nature had been obtained by the complainant, upon an application being made to discharge it, it was ordered that, upon the complainant paying costs to the defendant, and consenting also to pay [*354] *such costs as should be awarded against him on rehearing the cause, the order should stand, or otherwise be discharged.

And it is to be observed that the right to have a decree upon default reheard, is not confined to the party against whom the decree has been obtained. If the party obtaining the decree finds that he has not taken such a decree as he is entitled to, or has committed an error in the form or substance of it, he may have it reheard upon the usual terms.(o)

Where by mistake sums paid into court under the decree were included in the balance reported due from the defendant, and the decree on further directions ordered those balances to be paid into court, it was held to be a proper case for rehearing the cause upon the latter decree, for the purpose of correcting the mistake.(p)

A rehearing ought never to be applied for, however, where the defect in the decree or order is one which can be remedied by any of the methods before pointed out.(q)

And it is to be borne in mind that as a rehearing will not be permitted after the enrolment of the decree, so it cannot be obtained till the decree or order has been settled and entered.(r)

A rehearing can only take place for the purpose of altering the decree upon grounds which existed at the time when the decree was pronounced. Where, therefore, the object is not to correct the decree, but to remedy a grievance consequent upon it, resulting from a circumstance *ex post facto*, and not making a part of the case as it originally stood, a rehearing will not be permitted.(s)

Nor can there be a rehearing of a decree made upon an appeal from the decision of a vice-chancellor or master of the rolls, except for the purpose of correcting a mere oversight in the decree of affirmance or reversal.(t) Nor will a rehearing be granted on account of the discovery of new evidence or new matter;(u) nor because the importance of testimony has only been ascertained since the decision; if the party had it in his power to ascertain its importance before the hearing and has neglected to do so and obtain the testimony; although the justice of the case might be promoted by it.(v) Nor will it be granted to enable

(o) *Baxter v. Wilson*, 2 Atk. 152.

(p) *Brookfield v. Bradley*, 2 Sim. & Stu. 11.

(q) 3 Dan. 111.

(r) *Id. ib.* *Robinson v. Taylor*, 1 Ves. jun. 44. *Taylor v. Popham*, 15 Ves. 72.

(s) *Bowyer v. Bright*, 13 Price, 316.

(t) *Attorney Gen. v. Ward*, 1 Donn. Ca. in Ch. 102.

(u) *Mead v. Arms*, 3 Verm. Rep. 148.

(v) *Prevost v. Gratz*, 1 Peters' C. C. Rep 364. *Wyld v. Ward*, 2 Young & Jer. 381. *Nevinson v. Stables*, 4 Russ. 210.

a party to obtain cumulative testimony, or for the purpose of contradicting witnesses examined by the adverse party; (*w*) or to enable a party to release the interest of a witness declared incompetent on the hearing, and to re-examine him. (*x*) Neither can there be a rehearing, for costs only; except in special cases. (*y*) Accordingly there can be no rehearing by a party because he did not get costs, or that costs were given to another party; but where the original decree gave costs, there may be a rehearing to have the decree rectified, not by taking the costs from the party to whom they are decreed, but by throwing them upon the party or fund liable to pay them, by the rules of the court. (*z*)

Where upon the hearing of the cause the counsel for the defendants abandoned the defence, after hearing the opening argument in behalf of the complainants, the court refused to grant a rehearing, upon the ordinary certificate of counsel. (*a*) To obtain a rehearing, under such circumstances, the defendants will be required to show a violation of duty on the part of their counsel, or that he had clearly mistaken the law or the facts. (*b*)

Who may apply for. Any party to the record, having an interest in the decree, may petition for a rehearing. Accordingly it has been held that a party made a defendant in respect to an office, which he resigns before any decree is made in the suit, but continuing upon the record, and having an interest in the subject matter of the suit, acquired by his tenure of the office, is entitled to rehear the decree, when made. But a party who, after a decree made, is brought before the court by supplemental bill, to which he has appeared but not answered, has no right to petition for a rehearing of the decree. And where such party joined in the same petition with other parties entitled to rehear, the court gave them leave to amend the petition by striking out his name. (*bb*)

Method of applying for. A rehearing is applied for upon petition. The petition must state the special matter or cause on which the rehearing is applied for, and the particular points in which the decree is alleged to be erroneous. And the facts, if they do not appear from the records of the court, must be verified by the affidavit of the party or of some other person. (*c*)

(*w*) *Dunham v. Winans*, 2 Paige, 24.

(*x*) *Id.* ib.

(*y*) *Eastburn v. Kirk*, 2 John. Ch. Rep. 317. 1 Molloy, 19. *Travis v. Waters*, 1 John. Ch. Rep. 48. *Taylor v. Popham*, 15 Ves. 72.

(*z*) *Mulvany v. Dillon*, 1 Moll. 19.

(*a*) *Decarters v. La Farge*, 1 Paige, 574,

(*b*) *Id.* ib.

(*bb*) *Atty. Gen. v. Earl of Stamford*, 6 Lond. Jurist Rep. 117.

(*c*) Rule 113.

[*356] *The petition must be confined to the case upon the record. If it suggests, as the grounds of rehearing, facts not alleged in the pleadings, the application will be refused. (*d*)

One petition cannot seek the rehearing of orders made in different suits, though the parties in both suits are the same. Thus where two bills were filed by the same complainant, against the same defendant, and the defendant put in a plea to one and a demurrer to the other, which both came on for argument on the same day, and the vice-chancellor made two separate orders, allowing them, with costs; whereupon the complainant presented a petition of appeal complaining of both the orders, the lord chancellor allowed an objection to the petition on the ground that it embraced several orders in separate suits. (*e*)

If any order of the court has been made since the decree, for the purpose of carrying its provisions into effect, it should be stated. And the circumstance of such an order having been made by consent, will not prejudice the right of the party to have the cause reheard. (*f*)

The petition concludes with a prayer that the cause, &c., may be reheard, and either that the decree may be reversed, or that it may be altered in such points as are objected to.

Where the petition is improperly framed, for example, if it makes a different case from that on which the decree was made, or introduces representations which were not made in the court below, the court will, on application by motion, order it to be taken off the file, with costs—the deposit to go in part of costs. (*g*) It seems, however, that it will, on such an occasion, introduce into the order a proviso that it is to be without prejudice to the party's presenting another petition in more regular form. (*h*)

In the case of *Wyld v. Ward*, (*i*) the court of exchequer allowed the petition for rehearing to be amended, for the purpose of stating the discovery of new evidence.

Certificate of counsel. A petition for rehearing must be accompanied by the certificate of two counsel, that they have examined the case, and that in their opinion the decree is erroneous in the particular mentioned in the petition. (*k*) This is required in order to guard against an abuse of the right to have a rehearing, by the pledge of counsel that [*357] *the case is fit to be reheard. (*l*) The counsel who sign the

(*d*) *Nevinson v. Staples*, 4 Russ. 210. *Wood v. Griffith*, 1 Mer. 35.

(*e*) *Boys v. Morgan*, 3 My. & Craig, 661.

(*f*) *Wood v. Griffith*, *supra*.

(*g*) *Id. ib.*

(*h*) *Id. ib.*

(*i*) 2 Young & Jer. 381.

(*k*) Rule 113.

(*l*) *Monkhouse v. The Corporation of Bedford*, 17 Ves. 380.

certificate are usually those who were concerned in the original hearing, or at least one of them; and "such credit is given by the court to their opinion that the case ought to be reheard, that it will, in general, order the cause to be set down," as a matter or course. (*m*)

Service of petition. A copy of the petition, with the usual notice of presenting the same, must be served on the adverse party. (*n*)

Hearing of petition. But although the general practice, in England, is for the lord chancellor to order the cause to be set down for rehearing, as a matter of course, upon the certificate of counsel, he may, if he has any doubt upon the subject, order the petition itself to come on for hearing, before he orders it to be set down. (*o*) And this is the usual practice here.

Where there is any irregularity in the petition, however, the proper course is for the party respondent to make a special application to the court, by motion, to have the petition taken off the file. (*p*)

Withdrawing petition. After a petition for a rehearing has been presented, it may be withdrawn on application by motion; provided it is consented to by the respondent. If not consented to, it cannot be withdrawn, but must come on, in its course. (*q*)

In what time rehearing to be applied for. A rehearing cannot be granted by a *vice-chancellor*, unless it is applied for within six months after the entry of the decree or order complained of, and before it is enrolled. And if the decree is affirmed on the rehearing, it cannot be reheard a second time. (*r*)

A rehearing before the *chancellor* may be applied for at any time before the decree is enrolled. But if a decree of the chancellor, or of a vice-chancellor, has been affirmed by the chancellor on rehearing or appeal, no further rehearing will be allowed. (*s*)

The above rule, so far as respects the rehearing of decrees made by the chancellor, is in accordance with the English practice; by which, as long as there has been no enrolment, there is no limitation as to the time within which it is necessary to apply for a rehearing. (*t*) Accordingly a rehearing has been granted in England, at the distance [*358] of two years, on the application of a defendant, of a decree *nisi* made absolute against him, according to the regular practice of the court. (*u*)

(*m*) Per Lord Hardwick, in *Cunyngham v. Cunyngham*, Amb. 91. See 18 Ves. 325. 13 id. 125.

(*n*) Rule 113.

(*o*) *Fox v. Mackreth*, 2 Cox, 159.

(*p*) *Wood v. Griffith*, 19 Ves. 550.

(*q*) *Thomson v. Thomson*, 10 Ves. 30.

(*r*) Rule 112. See 2 R. S. 177, § 57, (orig. § 52.)

(*s*) *Idem*.

(*t*) See 3 Dan. 116.

(*u*) *Carew v. Johnstone*, 2 Sch. & Lef. 300. *Knight v. Young*, 2 Ves. & B. 186.

The court has also reheard a cause at the distance of eighteen years from the time the decree complained of was pronounced; (*v*) and has refused to discharge an order for a rehearing, though at the distance of twenty-four years. (*w*)

A rehearing may be obtained after the decree has been carried into execution. (*x*) And the having acted under it, is no objection to the decree being reheard, upon the petition of the party who has so acted under it. (*y*) Where, after the trial of an issue, a party was desirous of changing the form of the issue, the court allowed him to present a petition for a rehearing of the decree or order directing it; and permitted the petition to come on for hearing at the same time as a motion for a new trial of the issue. (*z*)

In *Fournier v. Paine*, (*a*) a rehearing by way of appeal from an original decree, appears to have taken place after an appeal from an order made upon exceptions to the report of the master, under the decree. In fact, as long as the decree or order remains unenrolled, it is open to a rehearing. But under the English practice, if a party is desirous of obtaining a rehearing, he should, to prevent disappointment, immediately after it is passed and entered, enter a caveat against its being enrolled. (*b*) And having done that, he is obliged to present his petition for a rehearing within the time limited for that purpose by the practice of the court; (*c*) for if he delays it, and the decree is enrolled, he will be too late, unless he can vacate the enrolment upon some of the grounds hereafter pointed out.

In this state a caveat is not in use. By our practice, under the rules of the court above referred to, if the decree is made by a vice-chancellor, a rehearing must be applied for within six months, at farthest, from the time the decree is entered. But the other party is not bound to wait that length of time before he can enrol his decree. He *may*, as we have already stated, (*e*) enrol it at any time after the expiration of thirty days, but not before; and if the other party wishes to have the cause [*359] reheard, the only safe course is for him to present his petition within the thirty days.

The same remarks will apply to decrees rendered by the chancellor; except that there is no other limitation as to the time for applying for a rehearing, than that it be asked for before the decree is enrolled.

The 112th rule provides that if a rehearing is not applied for with-

(*v*) *Mills v. Banks*, 3 Peer Wms. 2.

(*w*) *Id. ib.*

(*x*) 3 Dan. 117.

(*y*) *Brophy v. Holmes*, 2 Molloy. 1.

(*z*) *White v. Lisle*, 3 Swanst. 351. See also *Legard v. Daly*, 1 Ves. 192.

(*a*) 3 My. & Keen, 207. n.

(*b*) 3 Dan. 117.

(*c*) *Id.* 118.

(*e*) *Ante*, p. 343.

in thirty days after the decree or order complained of is entered, the court may require payment of the costs incurred by the adverse party by any proceedings under the decree or order, as a condition of granting the rehearing.

Stay of proceedings. If it is necessary to stay the proceedings in the cause until a petition for rehearing can be presented, the party may apply *ex parte* for an order to show cause why the prayer of the petition should not be granted, and to stay the proceedings in the meantime. (*f*)

A copy of such order, petition, and the affidavit or certificate on which it is founded must be served the same length of time before the day, as in the case of special motions, (*see Rule 89,*) unless the court shall specially direct a shorter notice to be given. (*g*)

Deposit on rehearing. If a rehearing is granted, the petitioner will lose the benefit thereof unless he shall, within ten days thereafter, deposit with the register, &c., fifty dollars, to answer the costs and damages of the adverse party if the decree or order is not materially varied. (*h*)

Where there is an original and supplemenatal cause, or two supplemenatal causes, they are considered as one, and the payment of one deposit only is necessary. (*i*)

Course of proceeding. If, when the rehearing is called on, the petitioner does not appear, his petition will, upon reading an affidavit of service of notice of motion, be dismissed with costs. And so if the other party does not appear, the court will, upon reading a similar affidavit, proceed to rehear the cause *ex parte*. (*k*)

The pleadings are opened and the evidence read in the same manner as upon an original hearing. (*l*) The same objections may be raised, for want of parties, (*m*) or upon other grounds, as upon an original hearing. (*n*)

*The party obtaining the rehearing has the right to open [*360] and close the argument. (*o*)

All parties interested in supporting the decree or order which is sought to be reheard are entitled to be heard; but no party except the one who obtains the rehearing can be heard in opposition to it. If, therefore, any party who is not included as a co-petitioner in a petition of rehearing, is desirous of procuring a rehearing, he must present a separate petition; (*p*) otherwise he will be precluded from all benefit

(*f*) Rule 114.(*g*) *Idem*.(*h*) Rule 114.(*i*) *Cowper v. Scott*, 1 Eden. 17.(*k*) 3 Dan. 123.(*l*) *Margravine of Anspach v. Noel*, 1 Mad. 313.(*m*) *Jackson v. Lea*, 1 Dick. 92.(*n*) 2 Dan. 650.(*o*) Rule 115.(*p*) 2 Smith, 34.

of the rehearing; even though the result of it should be to show that the decree was completely wrong, as well against him as against the party obtaining the rehearing.(*q*)

Upon a rehearing, the decree is open for the party obtaining it, only in the matters complained of; but as to the opposite party, it is open at large.(*r*) Thus, upon a petition by the defendant, for a rehearing, the decree thereon may give the complainant more extensive relief than was given by the original decree.(*s*)

An objection of substance may be raised by a defendant, for the first time, upon a rehearing: even though it may prove fatal to the whole bill.(*t*)

An application will not be treated as one for a rehearing, unless it is apparently so, and made in due form, according to the settled practice of the court.(*u*)

Upon a rehearing, the court will give the complainant leave to amend by adding parties, in the same manner as upon an original hearing; and will order the rehearing to stand over for the purpose. And it has gone to the extent of allowing the complainant to add the attorney general as a party, either by converting the bill into an information and bill, or into an information only.(*v*)

Evidence upon rehearing. Upon a rehearing, all depositions taken [*361] *previous to the original hearing, though not then made use of, may be read.(*w*)

If, since the hearing, a witness has been convicted of perjury, the circumstance may be brought before the court upon a rehearing.(*x*) So, also, where a witness, in answer to a bill exhibited against him since the original hearing, had confessed that on the day he was examined he took a bond from the complainant, whereby the latter bound himself that, if he recovered the estate in question, he would convey part of it to the witness, the answer was allowed to be read at the rehearing, to take off the effect of the witness' evidence.(*y*)

It is only in cases in which the evidence was capable of being produced at the hearing that it can be read at a rehearing.(*z*) No new evi-

(*q*) 3 Dan. 4. Tasker v. Small, 1 C. P. Coop. Rep. 255.

(*r*) Rawlins v. Powell, 1 P. Wms. 300. Dale v. Roosevelt, 6 John. Ch. Rep. 256. Consequa v. Fanning, 3 id. 594. But see Glover v. Hedges, (Saxton's Ch. Rep. 113.) in which case it was held by the court of chancery in New Jersey, that on a petition and order for rehearing generally, the whole case is open; and that the party supposing himself aggrieved has a right to insist upon a reconsideration of any part of it.

(*s*) Sullivan v. Jacob, 1 Molloy, 472. Oldham v. Stonehouse, 3 My. & Craig, 317.

(*t*) Harrison v. McMenomy, 2 Edw. 251.

(*u*) Gardner v. Derier, 2 Edw. 131.

(*v*) President of St. Mary Magdalen v. Sibthorp, 1 Russ. 154.

(*w*) Cunyngnam v. Cunyngnam, Amb. 90. Needham v. Smith, 2 Vern. 463. 3 Dan. 124.

(*x*) Needham v. Smith. *supra*.

(*y*) Id. ib.

(*z*) 3 Dan. 125. Dale v. Roosevelt, 6 John. Ch. Rep. 255. Scales v. Nichols, 2 Yerg. 140.

dence can be gone into, unless it be that arising from documents which were omitted to be read at the original hearing. For which purpose, it seems the court will, even pending the rehearing, make an order for proving them *viva voce*, saving just exceptions.(a)

In the case of *Higgins v. Mills*,(b) a party on special application, by motion, obtained an order to prove documents *viva voce* on a rehearing, upon an affidavit of his solicitor that he had made diligent search for them before the hearing, but without being able to find them until after the hearing. But such an order was upon the terms of his paying the costs of the application.

If new evidence is discovered after the original hearing, the proper course is to obtain leave to file a supplemental bill in the nature of a bill of review, to come on for hearing at the same time with the rehearing of the original decree.(c)

The court of exchequer has gone the length of giving a party liberty to exhibit interrogatories to prove exhibits, upon an application supported by affidavit of the complainant, that the exhibits in question have come to his knowledge since the original hearing.(d) That court has also permitted the petition of rehearing to be amended, for the purpose of stating such a discovery.(e)

* In the case of *Hood v. Pimm*,(f) the court, on motion, [*362] permitted the complainants, who had, through the inadvertence of counsel, omitted to prove a will of real estate, in consequence of which the bill was dismissed at the original hearing, to prove the will at the rehearing; which was postponed on the terms of their paying the costs of the application, and the costs of the day of the original hearing.

It is also to be observed, that in no case, will the court permit new evidence to be given, at a rehearing, as to any matter which was not in issue upon the original hearing.(g)

Where the party obtaining a rehearing makes use of evidence on the rehearing which was not read below, he can only be permitted to do so on condition of giving up his deposit.(h)

Costs. The costs of a rehearing, as well as of an original hearing, are in the discretion of the court; but generally, if a rehearing is denied, it will be with costs.(i)

By one of Lord Lyndhurst's orders,(k) it is directed that the deposit

(a) Id. ib. For. Rom. 183. Walker v. Symonds, cited 1 Mer. 37, n. (a)

(b) 5 Russ. 287.

(c) 3 Dan. 125, n. (a)

(d) Williamson v. Hutton, 9 Price. 1-7. See also Williams v. Goodchild, 2 Russ. 92.

(e) Wyld v. Ward, 2 Young & Jer. 381.

(f) 4 Sim. 101.

(g) Holt v. Burleigh, Prec. in Ch. 293.

(h) 3 Dan. 125, 128, 97. Hedges v. Cardonnel, 2 Atk. 403.

(i) Id. 127, 97.

(k) Ord. 1828, XLII.

shall be paid to the adverse party when the decree or order is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, *unless the court shall otherwise order*. Under this order it has been held that the court has a discretion over the deposit as well as over the costs.(l)

A respondent can in no case be made to pay costs; but where he has made use of evidence which was not read at the hearing, that circumstance should be taken into consideration in disposing of the costs of rehearing.(m)

By supplemental bill in the nature of a bill of review.] Matter discovered after a decree has been made, though not capable of being used as evidence of anything which was previously in issue in the cause, but constituting an entirely new issue, may be brought before the court by a supplemental bill in the nature of a bill of review.(n) A party will not be allowed, however, except under very special circumstances, to file a bill of this kind, or to prosecute it after he has obtained leave to file it, unless he performs all that the decree commands him to do.(o) But he need [*363] *only perform so much of the decree as at the time of filing his bill, he is bound to perform. And if the proceedings under the decree are not, at the time, in such a state as to enable the adverse party to bring him into default, he may file a bill of this nature, although the decree has not been performed.(p)

Yet under special circumstances the court has dispensed with a strict performance of the decree. This was done where there was a decree for the payment of money to a person resident out of the country, whose appearance to the bill of review could not be compelled. The court first ordered the money to be paid into court. Upon an application on the ground of poverty, the party was permitted to give security for the amount.(q) So where a conveyance of mortgaged premises, which was decreed, would have extinguished a party's right, a conveyance was ordered to the clerk in court in trust, for the party who should be held entitled.(r) And again, where the party made oath that he was not worth £40 besides the matter in dispute in the cause, performance of the decree was dispensed with.(s)

The court, however, uses great caution in allowing the rule to be dis-

(l) *Rattenbury v. Fenton*. Cook's Orders, 21.

(m) *Williams v. Goodchild*. 2 Russ. 91.

(n) *Partridge v. Osborne*, 5 Russ. 195. *Wiser v. Blackley*: 2 John. Ch. Rep. 488. *Mead v. Arms*, 3 Vermont Rep. 148. *Hollingsworth v. McDonald*, 2 Har. & John. 230. *Pendleton v. Fay*. 3 Paige, 104.

(o) *Id.* ib.

(p) *Partridge v. Osborne*, 5 Russ. 195.

(q) *Cock v. Hobb*, Tothill. 173.

(r) *Balstone v. Byron*. cited 5 Russ. 237, 247.

(s) 2 Freeman, 97. 1 Hoff. Ch. Pr. 571.

pensed with. The great amount of the sum decreed is not a sufficient reason. (*t*)

To entitle a party to file such a bill, it is necessary that the new matters should be discovered after the decree, or at least after the time when it could have been introduced into the cause; because a party is not to be permitted to amend his case after the hearing, in respect of matter which was before in his power. (*u*)

It has been decided with reference to a bill of this nature, that the question always is, not what the complainant knew, but what with reasonable diligence he might have known. And that the decisions with regard to bills of review, upon facts newly discovered, appear to have been upon new evidence, which if produced in time, would have supported the original case, and are not applicable where the original cause would not have admitted the introduction of the evidence, as not being put in issue originally. (*uu*)

Where a party was aware of the fact in question, or by reasonable *diligence could have acquired the information, before the de- [*364] cree, he should have filed a supplemental bill shortly after the discovery, or after gaining that information which could put him upon inquiry. He cannot, in such a case, resort to this bill after going to a decree. (*v*)

The rule is not that a party should be taken strictly to know every thing which he could have discovered. An instance is given by Lord Eldon, of an omission to look into a box for documents, which no human prudence would have suggested as the place of their deposit. An omission of this character would not prevent a bill. (*w*)

A supplemental bill in the nature of a bill of review, may also bring before the court new matter discovered since the decree, although it could not have been used in evidence in the cause, from not being regularly in issue. (*x*)

It is not sufficient that the matter sought to be brought before the court is new. It must also be material. (*y*) The sense which is to be given to the word *material* is of the highest importance; and in the case last referred to, the court says the true rule is to be collected from the case of *Norris v. Le Neve*. (*z*) In that case it was held to be sufficient to entitle a party to a bill of review, if the new proof did not come to his knowledge until after publication, or when, by the rules of the court,

(*t*) *Partridge v. Usborne*, 5 Russ. 250.

(*u*) *Ord v. Noel*, Mad. & Geld. 130.

(*uu*) *Brigham v. Dawson*, 1 Jacob, 243. *Young v. Keighly*, 16 Ves. 352.

(*v*) *Pendleton v. Fay*, 3 Paige, 206.

(*w*) *Young v. Keighly*, 16 Ves. 352.

(*x*) *Partridge v. Usborne*, 5 Russ. 195.

(*y*) *Ord v. Noel*, Mad. & Geld. 130.

(*z*) 3 Atk. 26.

he could make use of it. It was also decided in that case that notice to the party's attorney, &c., before the cause was heard, was notice to the party himself.

The new matter must be such as, if unanswered in point of fact, would either clearly entitle the complainant to a decree, or would raise a case of so much nicety and difficulty as to be a fit subject of judgment in a cause. (*a*)

In the case of *Blake v. Foster*, (*b*) it was held by the court of chancery, in Ireland, that to entitle a party to file a bill of this nature after a reversal of the decree in parliament, he should satisfy the court that the new matter discovered is such as will materially affect the ground of the lords' order. And as the court had not, in that case, knowledge of the grounds upon which the house decided, it refused the application; in order that the materiality of the newly discovered facts might be determined on appeal from the order refusing the application.

Application for leave to file. A supplemental bill in the nature of a [*365] bill of review cannot be filed without special leave of the court first obtained. (*aa*)

The application should be made by petition founded upon an affidavit of the discovery of new matter. (*bb*)

The petition should also state that the decree has not yet been enrolled. It should be served upon the other party, with the usual notice of presenting the same.

In what time bill to be filed. Bills of this nature are required by the 173d rule, to be brought within the time limited for bringing an appeal: i. e. within six months as to final decrees, and fifteen days as to interlocutory decrees or orders made by a vice-chancellor; (*c*) and within two years after enrolment of a final decree, and within fifteen days after notice of any other order or decree, including decrees for the general costs of the cause, made by the chancellor. (*d*)

Deposit or security. Upon filing this bill, the complainant must make the like deposit, or give security to the adverse party in the same amount which would be required on an appeal from the order or decree complained of. (*e*) The security required upon an appeal, is a bond in the penalty of at least \$250, and the deposit, if one is made, must be of that amount. (*f*)

(*a*) *Ord v. Noel*, *supra*.

(*b*) 2 Molloy, 312.

(*aa*) Rule 173. *Pendleton v. Fay*, 3 Paige, 204.

(*bb*) *Pendleton v. Fay*, *supra*.

(*c*) 2 R. S. 178. § 65, (orig. § 59.)

(*d*) *Id.* 605, §§ 78, 79. *Id.* 604, 5, §§ 21, 22.

(*e*) Rule 173.

(*f*) Rule 116. 2 R. S. 605, § 80.

But where the complainant in a bill of this nature, through a mistake as to the practice, neglects to give security or to make the requisite deposit, the court may permit him to do it *nunc pro tunc*. (*g*)

Supplemental bill when to be heard. If the court allows a supplemental bill in the nature of a bill of review to be filed, it will be necessary to have a rehearing of the cause in order that the decree may be varied. For this purpose the party should present a petition for a rehearing, at the same time that he applies for leave to file a bill. And the order should provide that the party have leave to file the bill; that the cause be reheard; and that the supplemental bill come on for hearing at the same time with the rehearing. (*h*)

If an original bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill founded upon matters which have subsequently taken place. (*i*)

A bill purporting to be a supplemental bill, will not be ordered, on *motion, to be taken off the file, on the ground that it is not in [*366] fact such. The course is to demur, in such a case. (*k*)

II. AFTER ENROLMENT.

By petition.] The general rule is that a decree regularly obtained and enrolled, cannot be altered except by bill of review. (*l*)

But the court will, in some cases, go so far as to rectify decrees in which there have been clerical mistakes, or surprise, although such decrees have been actually enrolled. (*m*) (14.)

(*g*) *Webb v. Pell*, 1 Paige, 564.

(*h*) 3 Dan. 125, n. (a)

(*i*) *Candler v. Pettit*, 1 Paige, 163.

(*k*) *Bowyer v. Bright*, 13 Price, 316.

(*l*) *Bennett v. Winter*, 2 John. Ch. Rep. 205. *Wiser v. Blackley*, id. 488. *Mead v. Arms*, 3 Vermont Rep. 148. *Dexter v. Arnold*, 5 Mason, 303. 2 Har. & John. 230.

(*m*) 2 Dan. 688. 1 John. Ch. Rep. 200.

(14) RECTIFYING, MODIFYING AND AMENDING JUDGMENT.

Under the general power of amendment, conferred by § 173 of the Code, the court may, without doubt, in furtherance of justice, and on such terms as may be proper, amend a judgment, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the judgment to the facts proved.

This section, it is said, in *Sherman v. Fream*, (8 Ab. 33,) includes almost all cases which can arise and call for the interposition of the court.

It has been decided that a judgment is amendable in the matter of the christian name of one in whose favor it is rendered. (*Marsh v. Berry*, 7 Cowen, 344.)

An error in a judgment record is no ground for a new trial, in a case where the verdict is correct. The record, in such a case, may be amended by the general term, after appeal and argument, so as to conform to the Code. (*Walsh v. Kelly*, 27 How. Pr. 359; S. C. 42 Barb. 98; 40 N. Y. 556.)

After a cause has been tried by a judge, and his decision has been made and filed, he cannot alter it. If it is erroneous or defective, it can only be amended or corrected by application to the court. (*Hoyt v. Carter*, 7 How. Pr. 140; *Hotaling v. Marsh*, 14 Ab. 161.)

And in such cases it seems the course is to apply by petition. (n)

In cases of miscasting, where the matter demonstratively appears

(n) *Radley v. Shaver*, 1 John. Ch. Rep. 200.

A judicial error in a judgment cannot be corrected on motion. (*Lillie v. Sherman*, 39 How. 287.)

Where it becomes necessary to amend a judgment and the judgment record, by substituting the individual name of an attorney for the name of a firm of which he is a member, and also by striking out an award of costs erroneously directed, it is not proper to make an actual obliteration of the record, or an erasure of such parts thereof as are deemed erroneous or intended to be amended. It should be done by entering an order for amendment, in the proper book kept by the clerk, and appending a copy thereof to the judgment record. It is also proper to mark the passages struck out by the amendment, by brackets or lines of distinction, and to refer, by an entry in the margin of the judgment, to the order of amendment, by its date. Or the judgment, as amended, may be entered at length, if the party so desire. (*Sluyter v. Smith*, 2 Bosw. 673.) But it is no ground for vacating a judgment that an amendment has been made by an erasure. (1b.)

In *Fry v. Bennett*, (9 Ab. 45; S. C. 3 Bosw. 200; 28 N. Y. 324,) the defendant demurred to one of thirteen causes of action contained in a complaint, and answered as to the others. The issues of fact were tried, and the plaintiff had a verdict, leaving undisposed of, the issue on the demurrer. Judgment being entered, upon this verdict, and the cause of action demurred to inserted in the judgment roll, the court allowed the plaintiff, on motion, to amend the judgment roll by inserting, *nunc pro tunc*, an order that he take nothing by the cause of action demurred to.

An amendment of the judgment, in an action for the recovery of personal property and damages for the detention thereof, by allowing the defendant the alternative of returning the property claimed, is a material alteration, and the defendant is entitled to notice of the change having actually been made, or the entry of the new judgment. A mere notice of permission to amend having been given is not sufficient to start the running of the time for bringing an appeal. (*Brown v. Hardie*, 5 Rob. 678.)

So long as a judgment is subject to appeal, and perhaps afterwards, it is, it seems, subject to such correction and modifications as the court, by which it is pronounced, may see fit to make. (*The New York Ice Co. v. The North Western Ins. Co.*, 23 N. Y. 357; S. C. 12 Ab. 414; 21 How. 296.) An order amending a judgment dismissing the complaint without prejudice to the plaintiff's right to bring a new action, so as to permit him to file an amended complaint in the original action, is a matter of discretion, from which no appeal lies to the general term. (1b.)

If a judgment of foreclosure is erroneous in respect to the directions therein contained as to costs, and the distribution of the proceeds, the remedy is by appeal, and not by motion to amend the judgment. (*Barnard v. Bruce*, 21 How. Pr. 360.)

While an appeal is pending in the court of appeals, the court below has control of the judgment for the purpose of making amendments. (*Judson v. Gray*, 17 How. Pr. 289.)

It is not within the power of the court to allow an amendment of an insufficient statement and confession of judgment, so that a judgment entered upon it will be valid against intervening incumbrances or *bona fide* purchasers. (*Buchan v. Sumner*, 2 Barb. Ch. 165; *Hammond v. Bush*, 8 Ab. 152; *Johnston v. Fellerman*, 13 How. Pr. 21; *Judges of Lewis Common Pleas v. The People*, 15 Wend. 110; *Lawless v. Backett*, 16 John. 149.)

A judgment of foreclosure, and report of sale, are proceedings which may be amended *nunc pro tunc* under § 173 of the Code. (*Hogan v. Hoyt*, 37 N. Y. 300; S. C. 4 Trans. Ap. 409.)

In *Alford v. Beach*, (5 Ab. 451,) where, in a judgment of sale, the sale was directed to be advertised three weeks, instead of six as required by law, but the advertisement was in fact published six weeks, it was held that, even after sale, the error might be corrected on motion, and the purchaser be compelled to take the title.

An enrolled judgment may be amended and rectified, on motion, by filing and attaching to the judgment roll any papers necessary to the judgment, which the party making up the judgment roll has omitted to file. (*Waring v. Waring*, 7 Ab. 472.) And it has been held that the court, even after a sale in a partition suit, will allow a judgment roll to be so amended by filing, *nunc pro tunc*, a bond of a guardian *ad litem* for an infant defendant. (*Croghan v. Livingston*, 6 Ab. 350.) The omission to file such a bond is an irregularity, merely, and does not affect the validity

upon the decree itself to have been mistaken, it may be explained and rectified by order; (o) so, likewise, if some part of the decree be omitted

(o) For. Rom. 184.

of the judgment, or discharge the purchaser from completing his contract, (Ib;) but he is not compelled to do so, or to take title until the amendment is made. (*Waring v. Waring*, 7 Ab. 472.)

If a judgment fails to contain a necessary recital, the court, on a direct and proper application for that purpose, has power to amend it. (*Pitt v. Davison*, 12 Ab. 385.)

But all amendments made after judgment are allowed only for the purpose of sustaining the judgment. (*Englis v. Furniss*, 3 Ab. 82; *Gasper v. Adams*, 24 Barb. 288.)

Though a judgment of the general term cannot be altered, or set aside, by the special term, upon any matter connected with the merits, (*Englis v. Furniss*, *supra*;) yet an application to correct a general term judgment, as to any matter of form merely, and indeed as to any proper amendment embraced in § 173 of the Code, may be made at special term. (*Van Sant. Eq. Pr.* 615; *De Agreda v. Mantel*, 1 Ab. 130; *Ayres v. Coville*, 9 How. Pr. 573; *Corning v. Powers*, *id.* 54.)

Although an amendment of a statute, increasing the damages that may be allowed, on appeal, can only operate prospectively, and to cases thereafter brought, yet if an allowance of the statutory increase be made in a case pending at the time of the passage of the amendment, this, though error, will not discharge the sureties from their liability, but will be a ground for a motion to correct the erroneous judgment, which can be made only in the original cause. The question cannot be raised by the sureties, in an action against them upon their undertaking. (*Horner v. Lyman*, 4 Keyes, 237.)

The law provides but two modes of correcting errors in legal proceedings; one by *motion*, where the error is one of form, arising out of a failure to conform to the settled rules of practice; the other by *appeal*, where the errors consist in the omission of the court itself to properly observe and apply the law affecting the rights involved in the controversy, in making its adjudication upon them. (*Libby v. Rosekrans*, 55 Barb. 202.) Such errors cannot be corrected by an independent action brought for that purpose. (Ib.) Thus, even though directions contained in judgments are unwarranted by the law applicable to such cases, the error cannot be corrected in an action against the plaintiffs in such judgments, brought for that purpose by a stockholder in the corporation which was the defendant therein. (Ib.)

Although the entry of a judgment upon a remittitur from the court of appeals, with the costs inserted therein as adjusted, in the absence of the attorney of the unsuccessful party, is irregular, the whole judgment is not void for irregularity in inserting such costs. The irregularity, being confined to the entry of the award of costs, can be corrected by amending the judgment roll, docket and execution, by striking it out. (*Lawrence v. Bank of the Republic*, 6 Rob. 497; S. C. 35 N. Y. 320; 31 How. 502.)

Although a judgment dismissing the complaint at the close of the plaintiff's testimony, on the trial, need not, so far as the court rendering it is concerned, declare that it shall not be a bar to a subsequent action for the same cause, yet, to prevent any misconstruction of it, or misconception of its effect in another court, such a judgment may be so amended as to declare on its face, that such dismissal is without prejudice to the right of the plaintiff to commence a new action. (*The Mechanics' Banking Association v. The Mariposa Company*, 7 Rob. 225.)

A judgment of the general term cannot be altered or amended by the court at special term, either upon the case as made or upon additional evidence. (*Hubbard v. Copcutt*, 9 Ab., N. S. 289.) The court at general term, can rehear and modify a judgment rendered by it upon a case made at the circuit, as the facts may warrant, but can do so only upon a case made. If further evidence is necessary, a retrial would be proper. (Ib.)

Under § 173 of the Code, the court has full power to order an amendment of a judgment record, as of the day the record was filed, and this question of amendment is between the plaintiff and the defendant, no notice being necessary to be given to other judgment creditors. (*Mann v. Brooks*, 7 How. Pr. 449; S. C. 8 *id.* 40.)

Where a judgment has been entered against a party by a wrong name, and an execution has been issued thereon, and the property of a person of a different name sold, no amendment of the judgment and execution, after such sale, by substituting the

in the enrolment, it may be inserted, upon motion to the court. But under the denomination of miscasting is not to be included any pretended miscasting or misvaluing, but only error in auditing and numbering. (*p*)

In *Weston v. Haggerston*, (*q*) Lord Eldon held that all errors on the face of the schedule could be rectified, even after enrolment, but that there could be no correction except of such apparent errors. And he therefore held that no affidavit introducing a new fact, could be permitted, after enrolment.

In a case where the master had made a mistake in his report, directing a sum of money to be paid to two defendants, whereas he was ordered by the decree to direct the payment of it to one only, the court ordered the docketing of the enrolment to be altered accordingly. (*r*)

A decree against several defendants will only be opened in favor of him who asks it. (*s*)

If any irregularity has occurred in the enrolment of a decree, or in the proceedings to accomplish that object, the court will, upon application by motion, order it to be vacated. (*t*)

Thus in *Parker v. Downing*, (*u*) an enrolment was vacated because [*367] *the order to enrol it *nunc pro tunc* was irregular, by reason of the petition upon which it was made not setting forth the date of the decree

In the case of *Beekman v. Peck*, (*v*) a decree entered *by default*, and enrolled, was set aside on motion, and on payment of costs; the complainant having been previously served with notice of the motion and copies of the affidavits on which it was intended to be made.

It is not a matter of course, however, to set aside an *order* taking the bill as confessed, merely upon an affidavit of merits, even before a

p) Beames' Ord. 3.

q) Coop. Rep. 134.

r) *Yow v. Townsend*, 1 Dick. 59.

s) *Hodges v. Mullikin*, 1 Bland. 507.

t) 2 Dan. 684. *Richards v. Wood*, 2 My. & K. 621.

u) 1 My. & K. 634. *Robinson v. Newdick*, 3 Mer. 13.

v) 3 John. Ch. Rep. 415.

name of the proper party, will be of any avail; nor will it transfer the title to the property sold, to the purchaser. (*Farnham v. Hildreth*, 32 Barb. 277.)

Where the action involves the construction of a will, the court cannot amend the judgment therein, after it has been entered, by giving an allowance to some of the parties, in addition to the allowance provided for by § 308 of the Code, as expenses of the suit. (*Hotaling v. Marsh*, 14 Ab. 161.)

A statement and confession of judgment may be amended in the same way that relief may be had against defaults and slips in practice. (*Union Bank v. Bush*, 36 N. Y. 631; S. C. 3 Trans. Ap. 235.) Upon a motion by a subsequent judgment creditor, to set aside judgments confessed by his debtor, under § 383 of the Code, the court may allow an amendment supporting the judgment, by the signing and verifying of a new statement, stating the facts more specifically. (*Mitchell v. Van Buren*, 27 N. Y. 300.)

decree in the cause.(w) But the sworn answer which the defendant intends to put in must be produced; or he must state, in his affidavit or petition to open the default, the nature of his defence and his belief in the truth of the matters constituting such defence.(x) The affidavit of the solicitor in such a case, showing a meritorious defence, and the nature thereof, is not sufficient, unless he is himself acquainted with the facts; and even then a sufficient excuse must be shown for not producing the affidavit or sworn answer of the defendant.(y)

Where a *final decree* has been entered, if the defendant applies to set aside his default and open the decree, he must, upon the motion, produce the answer he proposes to put in; so that the court may be satisfied as to the sufficiency thereof, and be apprised of the nature of the defence.(z)

And the court is less indulgent in opening a decree *pro confesso* than in setting aside one obtained on a default at the hearing.(a) And where the order to take a bill *pro confesso* is regular, the court, in opening it, will impose equitable terms. For example, it will not permit the defence of usury to be set up, so as to deprive the complainant of the amount actually due, with legal interest.(b)

The court will not set aside a decree made by consent.(c)

Where the cause *has been heard upon its merits*, the court will not exercise this discretionary power,(d) unless there has been something in the nature of a surprise upon the party affected.(e) And with regard to what amounts to a surprise, the rule has been laid down * by Lord Eldon, that "if the party enrolling the decree has [*368] said that which might lead the other party to believe that the decree would not be enrolled, that would be a surprise." (f) But it is not every expression that may lead the party to suppose that the decree will not be enrolled which will induce the court to vacate an enrolment. In order to establish such a case, there must be fraud or deception on the part of the party enrolling, which has misled the other party.(g)

It seems also that where the case has not been heard upon its merits, the court will exercise a discretionary power of vacating an enrolment and of giving the party an opportunity of having the merits of his

(w) Wells v. Cruger, 5 Paige, 164. Hunt v. Wallis, 6 id. 371.

(x) Hunt v. Wallis, *supra*.

(y) Id. ib.

(z) Wells v. Cruger, *supra*. Herne v. Ogilvie, 12 Ves. 563.

(a) Knight v. Young, 2 Ves. & Bea. 184. Lansing v. McPherson, 3 John. Ch. Rep. 424.

(b) Wager v. Stickley, 3 Paige, 407.

(c) Harrison v. Rumsey, 2 Ves. 488. Bradish v. Gee, Amb. 229. King v. Wightman, 1 Anst. 80.

(d) Charman v. Charman, 16 Ves. 115.

(e) Anon. 1 Ves. 326. Stevens v. Guppy, 1 Tnr. & Russ. 178. Parker v. Dee, 2 Ch. Ca. 200.

(f) Stevens v. Guppy, *supra*.

(g) Barnes v. Wilson. 1 Russ. & My. 486. 2 Dan. Pr. 685. Balguy v. Chorley, 1 Mylne & K. 640.

case discussed. Thus where a decree of dismissal was made by default, owing to the neglect of the complainant's solicitor in providing counsel to attend at the hearing, the enrolment was vacated.⁽ⁱ⁾ The court also has power, after enrolment, to open a regular decree obtained by default, and to discharge the enrolment, for the purpose of giving the defendant an opportunity to make a defence on the merits, where he has been deprived of such defence either by mistake or accident, or by the negligence of his solicitor.^(k) And such decree may be opened after a sale has been made by a master under the decree, where the complainant himself became the purchaser of the premises, and has not parted with his interest therein to a bona fide purchaser, or mortgagee.^(l)

So, where a bill had been taken *pro confesso* for want of an answer, while the defendant was in an unsound state of mind, and had, from that circumstance, omitted to put in an answer, a similar order was made.^(m)

Where, upon a bill filed by a husband for a divorce, *a vinculo matrimonii*, a decree dissolving the marriage contract was made, and after enrolment both parties joined in a petition to the court, requesting that the enrolment of the decree might be opened and vacated, and the decree reversed, the court granted an order according to the prayer of the petition, and dismissed the complainant's bill; but without prejudice to the rights which third persons might have acquired under the decree.⁽ⁿ⁾

[*369] **By bill of review.*] A bill of review is resorted to for the purpose of correcting a decree after it is enrolled, in other respects than mere form or on account of surprise.^(o) (15)

Bills of this nature are filed for errors of law apparent on the face of the decree, and for matters *dehors* the record, such as the discovery of new evidence.^(p)

A bill of review for error apparent must be for an error in law arising

(i) Robson v. Cranwell, cited 1 Ves. 205.

(k) Millspaugh v. McBride, 7 Paige, 509. Tripp v. Vincent, 8 id. 176.

(l) Id. ib.

(m) Benson v. Vernon, cited 1 Ves. 206. See also Kemp v. Squire, 1 Ves. 205.

(n) Colvin v. Colvin, 2 Paige. 335.

(o) Wiser v. Blackley, 2 John. Ch. Rep. 488.

(p) Edwardson v. Maseby's Heirs, 4 J. J. Marsh. 500. Bleight v. McIlvoy, 4 Monro, 146.

(15) The Code makes no provision for correcting a judgment by means of a bill of review. But Mr. Van Santvord (Eq. Pr. 615.) is of the opinion that the practice of correcting an enrolled judgment or decree in other respects than mere form, mistake or surprise, as for example, for errors of law appearing upon the face of the judgment, or for matters *dehors* the record, such as the discovery of new evidence, is similar to that formerly pursued in the court of chancery by bill of review, conforming the proceedings to the new practice.

ing out of the facts admitted by the pleadings, or recited in the decree itself, as settled, declared, or allowed by the court. It cannot be sustained upon the ground that the court has decided wrong upon a question of fact. (*q*)

It is not necessary to obtain leave to file a bill of this nature where it is brought to correct errors on the face of the record. *Aliter*, where it is brought upon the discovery of new matter. (*r*)

The further consideration of bills of review will be deferred until we come to treat of the different kinds of bills, post, BOOK IV. ЧАП. 6. (16)

SECTION VI.

DECREES PRO CONFESSO.

Where the bill is taken *pro confesso*, the cause must be brought to a hearing, as well as in other cases. (*s*)

(*q*) Webb v. Pell, 3 Paige, 368.

(*r*) Id. ib. 4 J. J. Marsh. 500.

(*s*) Rose v. Woodruff, 4 John. Ch. Rep. 547.

(16) VACATING OR SETTING ASIDE JUDGMENT.

The Code (§ 174) authorizes the court in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect, to supply an omission in any proceeding.

It has been held that under this section a party may have relief even against a judgment in his own favor. (*Montgomery v. Ellis*, 6 How. Pr. 326.) He must, however, show sufficient excuse or cause to satisfy the court that the judgment ought to be opened. (*Mann v. Provost*, 3 Ab. 446.)

An irregularity in the entry of a judgment is always a ground for setting it aside; even for setting aside a judgment of the general term by a motion at special term. (*Van Sant. Eq. Pr. 616*; *Englis v. Furniss*, 3 Ab. 82.)

A motion to set aside a judgment for irregularity, must be made within one year from the entry of judgment, where a knowledge of the judgment exists. (2 R. S. 359, § 2; Code, § 174; *Van Benthuyssen v. Lyle*, 8 How. Pr. 312; *Whitehead v. Pecare*, 9 id. 35; *Park v. Church*, 5 id. 381; *Moulton v. DeMaCarty*, 6 Rob. 470; *Cook v. Dickerson*, 1 Duer, 679.)

The notice of motion to set aside a judgment for irregularity should state the grounds of the motion; that is, specify the irregularity complained of. (*Whitehead v. Pecare*, 9 How. Pr. 35.)

To entitle a defendant to relief from a judgment entered against him by a wrong name, on the ground of the non-service of the summons upon him, he must admit that he was the actual defendant named in the action. (*Moulton v. DeMaCarty*, 6 Rob. 470.) In this case it was said by ROBERTSON, Ch. J., that it would be dangerous absolutely to overthrow a judgment entered upon an affidavit of personal service of the summons, after a lapse of sixteen years and the death of the deponent who made it, so as to let in the defence of the statute of limitations, upon a simple denial by the defendant of service. A defect in an affidavit of service of the summons, in respect to the name of the defendant, is a mere irregularity; and if not specified in a notice of motion to vacate the judgment, or taken advantage of within the time allowed by law for such motions, it cannot be done afterwards. (Ib.)

Where there has been constant, repeated, and renewed laches in moving to set aside a judgment for irregularity, that is a sufficient reason for denying the motion. (*Martin v. Lott*, 4 Ab. 365.)

If, upon the hearing, the complainant appears to have any equity against the defendant, the court will decree accordingly. And it is to be observed that where a bill is to be taken *pro confesso*, the court hears

Only a party to the record, or a person having some legal or equitable interest in the cancelment of a judgment is entitled to apply to the court to vacate or order it satisfied of record; and such application must be founded on recognized legal or equitable grounds. A mere stranger, without any personal equity therefor, who does not show any personal injury to arise from its continuance, is not entitled to such relief. (*Matter of Beers*, 5 Rob. 643.) If such judgment be a lien upon the property of a third person, all parties interested in such judgment, or its continuance, must be brought before the court by action, or notice of the application, whether the object be to vacate the judgment or to relieve such property from its lien. (Ib.)

Where a judgment ordered to stand as security, has been assigned to third persons who hold it as security, the plaintiff has an interest in the judgment, upon which he has a right to be heard, or at least notice and opportunity to be heard before the court can satisfy it of record. (Ib.)

Unless a party can show that he had no notice of the judgment sought to be opened, he cannot obtain any relief under § 174 of the Code. (*Amory v. Amory*, 33 How. 490; S. C. 3 Ab., N. S. 16; 6 Rob. 514.) Where judgment is entered upon a verdict while a case and amendments are with the judge to be settled, the court has the power under that section, after the time for appealing has expired, to relieve the defendant from the judgment on the ground of mistake, inadvertence, &c., and permit him to be heard. But to justify the granting of such relief, the case should be one of unquestionable mistake on the part of the defendant, and evince perfect good faith, and should be meritorious; and even then, to grant such relief, is going to the extreme verge of judicial discretion. (*Jellinghaus v. The New York Ins. Co.* 5 Bosw. 678.) If granted, it should be upon terms. (Ib.)

The only limitation to the control of the court over its judgments, is the statute which forbids it to set aside judgments for *irregularity* after a year has elapsed; but this does not apply to questions of *right* or *substance*. (*Hallett v. Righters*, 13 How. Pr. 43; *Dedrick's Administrators v. Richly*, 19 Wend. 108; 3 Denio, 257; *Moulton v. DeMacarty*, 6 Rob. 470.) Hence, the court has the power to set aside a judgment for want of jurisdiction, although more than a year has elapsed. (Ib.)

If a judgment for foreclosure and sale is vacated for irregularity, the mortgage may be regarded as in full force, if it has not been actually paid. (*Stackpole v. Robbins*, 47 Barb. 212.)

Where a judgment has been suspended by an order vacating it, and such order ceases to have any validity, by being itself vacated, the lien revives, as if it had never been suspended. And where other judgment creditors have not proceeded under their several judgments, all parties are restored to their original rights. (*King v. Harris*, 34 N. Y. 330; S. C. 30 Barb. 471.) But if, in the meantime, *bona fide* purchasers had intervened, the case would be otherwise. As to them, the *vacatur* of the judgment would be held operative and binding as against transactions entered into while the judgment appeared from the docket to be vacated, if they had no notice that the order had been reversed. (Ib.)

A motion to set aside a judgment and allow the defeated party to interpose his claim or defence, is a motion always addressed to the discretion of the court, and the decision thereon is not the subject of review in the court of appeals. (*Butler v. Lee*, 33 How. 251.)

For defects or irregularities not affecting the jurisdiction of the court, and where no fraud or collusion is imputed, the remedy is given to the *party* alone. Another judgment creditor is not entitled to have such proceedings or judgments set aside. (*Gere v. Gundlach*, 57 Barb. 13.)

A judgment entered by collusion between the attorneys will be set aside. In such a case, any question as to the authority or responsibility of the attorney who appeared for the defendants is wholly immaterial. (*Yates v. Horanson*, 7 Rob. 12.)

If a judgment be rendered against an *infant* defendant, for whom no guardian *ad litem* has been appointed, it will be set aside on his motion, even though he appeared by attorney and answered. (*Fairweather v. Satterly*, 7 Rob. 546; *McMurray v. McMurray*, 60 Barb. 117; S. C. 9 Ab., N. S. 315; 41 How. 41.) Such motion should be decided on the same strict legal principles as would have applied to the old remedy by writ of error in fact. (*McMurray v. McMurray*, *supra*.) By ana-

the pleadings, and itself pronounces the decree, and does not permit the complaint to take such a decree as he thinks will stand, (as it does in ordinary cases when the defendant makes default at the hear-

logy to the old writ of error, a party against whom a judgment has been entered while an infant, must move to set it aside within two years after he comes of age; otherwise, the motion will be denied. (*Ib. Barnes v. Gull*, 13 Ab., N. S. 139.)

For an irregularity in substituting defendants, upon consent given by an attorney of record without authority, the proper remedy is by motion to vacate all the proceedings, including the verdict and judgment. (*McGarry v. Board of Supervisors*, 1 Sweeny, 207; S. C. 7 Rob. 464.)

Want of service of the summons in an action affects the jurisdiction, and is not a mere irregularity. Therefore, it is not affected by the statutory limitation of two years for motions to set aside for irregularity. (*Weeks v. Merritt*, 5 Rob. 610.) Want of notice to the defeated party of the settlement of the findings of fact, by the judge who tried the cause, and of an opportunity to be present, is not an irregularity for which the judgment will be set aside. (*People v. Albany & Susq. R. R. Co.* 39 How. 49; S. C. 8 Ab., N. S. 122; 57 Barb. 204.) Before a party can set aside, or even modify a judgment for want of notice of settlement, it is necessary for him to show that in some material particular, to be pointed out, it has been entered otherwise than in accordance with the findings of fact or of law, as stated by the judge or referee. (*The People v. Church*, 2 Lans. 459.)

A judgment entered upon proof by affidavit of the personal service of the summons on the defendant, will not be vacated on his motion, based upon his affidavit denying such service, and all knowledge of the proceedings or judgment against him, if there is other evidence tending to disprove the denial. In such case the affidavit of service must prevail. (*Moulton v. DeMacarty*, 6 Rob. 470.)

Where the plaintiff's attorney returned the defendant's answer to his attorney, on the ground that the defendant told him that he (the defendant,) had never sworn to it, and entered judgment as for want of an answer the judgment was set aside, on motion, as irregular. (*Chadwick v. Snediker*, 26 How. 60.)

Where a summons is issued under the first subdivision of § 129 of the Code, and judgment is taken by default, for fraud, under the second subdivision, the judgment will be set aside as irregular, and will not sustain an execution against the person. (*Field v. Morse*, 7 How. Pr. 12.) So where the service of the summons and complaint was made upon the defendant's father, instead of himself, by mistake, and judgment was entered against the defendant, by default, upon an affidavit of personal service of the summons and complaint; it was held that although the defendant subsequently received the summons and complaint, the judgment and execution were entirely irregular and defective, and should be set aside for want of jurisdiction. (*Williams v. Van Valkenburg*, 16 How. Pr. 144.)

The provision of the Revised Statutes forbidding the setting aside of a judgment for irregularity, after the expiration of one year, (3 R. S. 5th ed. 637, § 3,) is not applicable to a judgment by confession, sought to be set aside for want of a sufficient statement. (*Manuf., &c., Bank v. St. John*, 5 Hill, 497; *Manuf. Bank v. Boyd*, 3 Denio, 257; *Bonnell v. Henry*, 13 How. Pr. 142. But see *Park v. Church*, 5 How. Pr. 381.)

A judgment creditor, not a party to the record, may move to set aside a judgment by confession fraudulently made by his judgment debtor. (*Lowber v. Mayor &c., of New York*, 15 How. Pr. 123; S. C. 26 Barb. 262; 5 Ab. 484.) The court will not allow a trustee to concede away any part of the trust estate without full consideration, &c. Hence, the comptroller of the city of New York may apply to the court, both as a tax payer and an officer, on facts tending to show collusion, to set aside a judgment against the Mayor, &c., obtained through the consent of their officials. (*Ib.*)

A motion to set aside a fraudulent judgment rendered against the debtor may be made by a judgment creditor, but not by a general creditor, nor the debtor's assignee. The assignee represents the debtor, and, of course, is bound by his statements. He also, as trustee, represents the creditors at large, and they have no standing in court, in such action. (*Beelman v. Kirk*, 15 How. Pr. 228.) An attaching creditor, who has not recovered a judgment, cannot impeach the *bona fides* of a judgment confessed by his debtor, to a third person, before the attachment was levied. (*Bentley v. Goodwin*, 38 Barb. 633; S. C. 15 Ab. 82.)

Where, in a confession of judgment, the statement of the facts out of which the indebtedness arose is insufficient, it is not a mere irregularity to be remedied only

ing.) (t) Therefore, where a supplemental bill brought against judgment creditors to have their several demands bound by the decree, was taken *pro confesso*, and it appeared that the suit had become necessary [*370] *by the unreasonable refusal of the defendants to comply with a plainly equitable request, the court decreed, *inter alia*, that they should pay the costs of the suit.(u) And in the case *Landon v. Ready*,(v) where it appeared, upon hearing the case, that the complainant had no equity, the bill was dismissed.

Like any other decree of the court it cannot be impeached collaterally, but only upon a bill of review, or to set it aside for fraud.(w) And therefore, where a bill was filed for an account of matters which were embraced in a former bill filed some years before, which had been taken *pro confesso* for want of an answer, and the defendant insisted

(t) *Geary v. Sheridan*, 3 Ves. 192. *Barrett v. Birmingham*, 1 Irish Eq. Rep. 417.

(u) *Barrett v. Birmingham*, 1 Irish Eq. Rep. 417.

(v) 1 Sim. & Sta. 44.

(w) *Wooster v. Woodhull*, 1 John. Ch. Rep. 541. 13 Ves. 563.

by moving to set the judgment aside. This is not an irregularity in practice. The object of the statute being to protect the creditors of the party confessing the judgment against fraud, its violation forms a proper subject of equitable jurisdiction. The provision virtually constitutes a condition precedent to the right of the party to confess the judgment at all; and a subsequent judgment creditor may institute a creditor's action to have such a judgment set aside. (*Dunham v. Waterman*, 6 Ab. 357; S. C. 17 N. Y. 9.)

Upon a motion by a subsequent judgment creditor, to set aside judgments confessed by his debtor, under § 3e3 of the Code, the court may allow an amendment supporting the judgment, by the signing and verifying of a new statement, stating the facts more specifically. (*Mitchell v. Van Buren*, 27 N. Y. 300.)

After service of the summons, the plaintiff, out of forbearance to the defendant, delayed to proceed for three years, and then made proof of service, and entered judgment for failure to answer. Held that the defendant having died, meanwhile, the judgment was irregular, and was not saved by a subsequent suggestion on the record, but must be set aside. (*Livingston v. Randall*, 59 Barb. 493.)

The court has power to set aside a judgment on motion, where it clearly appears that the plaintiff had no legal cause of action. So held, where the alleged cause of action was a foreign judgment recovered without jurisdiction. (*Phelps v. Baker*, 60 Barb. 107.)

Where it appeared upon a motion to set aside a judgment, that it was for an amount exceeding \$2,500; that to that extent it was upon a demand for which the defendant had given his promissory notes, which were not due when the action was commenced, it was held that this presented a question of law for trial. That *prima facie*, this was against the right of the plaintiffs to the judgment to that extent. (*Rowles v. Hoare*, 61 Barb. 266.)

It is no ground for setting aside a judgment on motion, before another judge than the one who granted it, that the findings are headed as at chambers, and not at special term, if it appear that the action was tried at a special term held at the appointed place. (*Fisher v. Hepburn*, 48 N. Y. 41.)

The supreme court has control of its own judgments, and has not unfrequently vacated them on motion of parties having interest in property on which they were a cloud. (*Blodgett v. Blodgett*, 42 How. 19.) Where the facts disclosed authorized the court to assume that the defendant was dead when the plaintiff commenced his action against him, and consequently that the judgment obtained, in the action was void, yet, it being an *apparent* lien or cloud on the real estate of the defendant, it may be set aside, on motion, by an *heir* at law of the defendant, having an interest in such real estate. (Ib.)

upon the decree in the former suit in bar to the new one, the new bill was dismissed, with costs. (x)

In *Knight v. Young*, (y) however, where an attempt was made on the part of a defendant, by motion, to get rid of a decree taken *pro confesso* upon a sequestration, and to put in an answer, on the defendant's own affidavit that he had been deranged, Lord Eldon, although he refused the application, appeared to think that a case might occur in which such a proceeding would be allowed, upon the ground of imbecility of mind; when the fact was established by other evidence than that of the defendant himself. And in *Bolton v. Glassford*, (z) his lordship, although he did not go the length of admitting the party to set aside the decree generally, as if the cause had never been before the court for hearing, gave relief to the party by limiting the effect of the decree. It appears, however, from the statement of the case in *Knight v. Young*, that previously to doing this, his lordship had satisfied himself, by the affidavits and documents in the cause, that the defendants, although they held out a long time, did not mean that the cause should be heard *pro confesso*, and that an answer had, in fact, been prepared stating the circumstances upon which they relied, the truth of which was established by many other documents.

It has been already stated, that a cause in which a decree has been made upon taking a bill *pro confesso*, may be reheard. (a) And where a bill had been taken *pro confesso* against a husband and wife, and afterwards the husband died, the court allowed the cause to be reheard, on the petition of the wife. (b)

*The court is less indulgent, however, in opening a decree [*371] *pro confesso* than in setting aside one obtained on a default at the hearing. (c) And where the defendant applies to set aside his default, and to have a decree of this nature opened, the court will require him to produce, upon the motion, the answer he proposes to put in; so that the court may be satisfied as to the sufficiency thereof, and be apprised of the nature of the defence. (d) (17)

We have before seen that where the court opens an order of this nature regularly entered, it will impose equitable terms. (e)

(x) *Ogilvie v. Hearne*, 13 Ves. 563.

(y) 2 Ves. & B. 184.

(z) Cited 2 Ves. & B. 186.

(a) Ante. p. 353.

(b) *Tooke v. Clarke*, 1 Dick. 350.

(c) *Knight v. Young*, *supra*.

(d) *Wells v. Cruger*, 5 Faige, 164. Ante, p. 367.

(e) Ante. p. 367.

The statute relative to proceedings against absent, concealed, and non-resident defendants, provides that if the defendant against whom a decree *pro confesso* shall have been made, under that statute, or his representatives, shall afterwards appear and petition to be heard, such petitioner may, upon paying or securing to be paid such costs as the court shall adjudge, be admitted to answer the complainant's bill. And the suit is then to proceed as if no decree had been made. *(f)*

But the defendant or his representatives, must so appear within one year after notice in writing of the decree shall have been given to him or them; and within seven years after the making of the decree, if such notice shall not have been given. *(g)*

If the defendant or his representatives shall not so appear before the expiration of one year after such notice shall have been given, and if notice is not given before the expiration of seven years after the making of the decree, the court shall then confirm the decree against the defendant and against all persons claiming under him by virtue of any act subsequent to the commencement of the suit; and may make such further order in the premises as shall be just and reasonable. *(h)*

The defendant cannot institute a new suit while the decree on the bill *pro confesso* is in force. He must apply under the statute for relief. *(i)*

If he comes in and applies within the time prescribed, no other terms can be imposed upon him than the payment or giving security for costs. *(k)* In the case of *The Bishop of Rochester v. Knapp*, *(l)* it was held he should pay such costs as had accrued, and give security for subsequent costs.

[*372] *The proceedings under a decree *pro confesso*, are the same as those under other decrees made upon a hearing. If the decree directs a reference to a master, the reference must be proceeded with in the master's office in the same way as any other reference. *(m)*

A bill taken *pro confesso*, however, cannot be read before the master as evidence of the state of the account. *(n)*

Taking a decree *pro confesso* will not amount to a confession of any fact not alleged in the bill. *(v)*

A defendant who has appeared by a solicitor, is entitled to notice of all the subsequent proceedings in the cause, although he suffers the

(f) 2 R. S. 187, § 139, (orig. § 133.)

(g) Id. ib. § 140.

(h) Id. ib. § 141.

(i) *Davone v. Fanning*, 4 John. Ch. Rep. 202.

(k) 1 Hoff. Ch. Pr. 556.

(l) Dick. 70.

(m) 1 Dan. 698.

(n) *Dominicetti v. Latri*, 2 Dick. 588.

(v) *Carnear's heirs v. Day*, 2 Littell, 397.

complainant's bill to be taken as confessed. And a decree taken against him *ex parte*, without giving his solicitor notice of hearing, will be set aside as irregular. (*w*)

SECTION VII.

DECREEES BY DEFAULT. (18)

We have already mentioned the cases in which a decree may be taken by default at the hearing. (*x*)

(*w*) Hart v. Small, 4 Paige, 551. See also Doe v. Green, 2 id. 317.

(*x*) Ante, p. 323.

(18) JUDGMENT ON FAILURE TO APPEAR AT THE TRIAL. See *ante*, 182, note (2.)

JUDGMENT ON FAILURE TO ANSWER. See *ante*, 193, note (4.)

In addition to what is there said on the subject of judgments of this kind, the following remarks and citations are submitted in respect to *opening* and *setting them aside*.

The court has power to open a judgment, and allow a defence to be made, in a case where a defendant has omitted to answer within the proper time. (*Lynde v. Verity*, 1 Code Rep. 97; *Allen v. Ackley*, 2 id. 21; S. C. 4 How. Pr. 5; *Salutat v. Downs*, 1 Code Rep. 120; *Foster v. Udell*, 2 id. 30; *Clark v. Lyon*, 2 Hilt. 91.) This may be done before judgment is entered. (*McGuin v. Cace*, 9 Ab. 160.) Or after the entry of the judgment. (*Elsworth v. Campbell*, 31 Barb. 134; *Sharp v. Mayor, &c.*, of New York, id. 578; S. C. 19 How. Pr. 193.) But the defendant must use due diligence in applying for relief; and if there is delay, must furnish satisfactory excuse therefor. (*Bogardus v. Livingston*, 2 Hilt. 236; S. C. 7 Ab. 428.)

The terms upon which a judgment will be opened, are entirely discretionary with the court, and are not the subject of review. (*Lord v. Vandenburg*, 15 How. Pr. 363; S. C. 6 Duer, 703; *Jacobs v. Marshall*, id. 689.) The court may impose the terms that the defendant will not set up the defence of usury. (*Toole v. Cook*, 16 How. Pr. 142.) Or it may, in its discretion, refuse to impose those terms. (*Grant v. McCaughlin*, 4 How. Pr. 216. See *Union Nat. Bank v. Bassett*, 3 Ab., N. S. 359; *McQueen v. Babcock*, 3 Keyes, 428.) A defendant, after having suffered a regular judgment to be taken against him by default, will not be allowed, as a matter of grace, to interpose the statute of limitations, to the plaintiff's demand. (*Haves v. Hoyt*, 11 How. Pr. 454; *Allen v. Ackley*, 4 id. 5; S. C. 2 Code Rep. 21.) To allow a plaintiff, after judgment, to come in, not as a right, but as a favor, and plead the statute of limitations in bar of a counter-claim set up by the defendant in his answer, would not be "in furtherance of justice." By suffering the action to go on, without setting up the statute, in a reply, the plaintiff will be deemed to have elected to stand upon the other defences made by him to the counter-claim, on the trial, and should not be allowed to abjure such election. (*Clinton v. Eddy*, 54 Barb. 54; S. C. 37 How. 23.) But, in *Harriott v. Wells*, (9 Bosw. 631,) where the plaintiffs, after alleging performance, on their part, failed to prove it, but gave evidence of a waiver by the defendants, of performance, and asked leave to amend their complaint accordingly, which was allowed, on condition that the defendants be allowed to amend their answer, so as to meet the plaintiffs' amendment; but the terms or nature of the amendment to be made by the defendants was not prescribed; it was held, on motion of the defendants, after judgment, for leave to amend their answer, by interposing the statute of limitations, that unless the plaintiffs elected to withdraw their motion to amend, the judgment should be vacated and the defendants allowed to amend by interposing the statute of limitations, or any other legal defence, without restriction. It was also held, in that case, that upon a complaint being amended in a material particular, the defendant's right to answer the amended complaint, by interposing any defence which he may possess, is absolute and unrestricted. And when, for sufficient cause shown, the court opens a default regularly taken, it should not impose, as terms of the favor, a requirement that the defendant shall not interpose the defence of a former adjudication; such a defence being neither dishonest nor un-

Decrees of this nature differ little in point of form from ordinary decrees made upon hearing all parties; the principal variation being in the omission of the recital of the evidence, which in other decrees is

conscientious. (*Audubon v. The Excelsior Fire Ins. Co.* 10 Ab. 64.) The rule that on opening a default, the defendant may be restricted in his defences should not be extended to defences other than those of usury, limitations, &c., which gave rise to the rule. (Ib.) Accordingly, it was held, in *The Bank of Kinderhook v. Gifford* (40 Barb. 659,) that after default, a defendant, on showing sufficient excuse, may be allowed to put in an answer, although the defence sought to be set up is that the note sued on was given for money won at play.

It seems that where a defendant has obtained leave to answer, a copy of the answer embodying the defence which he proposes to set up, should be served with the moving papers; so that the court may see that it contains a good defence, (*Marquise v. Brigham*, 12 How. Pr. 399,) or at least the nature of the answer proposed to be put in must be disclosed. (*Hunt v. Wallis*, 6 Paige, 371; *Wells v. Cruger*, 5 id. 164.) If the proposed answer will not constitute a defence, a motion to vacate a judgment taken for want of an answer will be denied. (*Dwight v. Webster*, 10 Ab. 128; S. C. 32 Barb. 47; 19 How. Pr. 349.) It is not usual, and rarely proper, to try, upon affidavits, on a motion after judgment, that the defendant be let in to defend the question whether he has a good defence. But where it clearly appears that the defence suggested has no foundation in fact, that may be taken into view, in disposing of the application. (*Catlin v. Latson*, 4 Ab. 248; S. C. 13 How. Pr. 511.)

Under § 174 of the Code—which provides for relief in cases of mistake—the court has power, at any time within one year, to relieve against a judgment suffered by mistake, surprise, inadvertence or excusable neglect. (*Macomber v. The Mayor, &c., of New York*, 17 Ab. 35.) But leave to plead or answer, after default, should not be granted, unless the party has a good defence on the merits, and the omission to plead or answer was the result of accident or mistake, without culpable negligence. (Ib.; *Quinn v. Case*, 2 Hilt. 467; *Comrs. of Excise v. Hollister*, id. 588.) In an application by the comptroller of the city of New York, to set aside a judgment by default against that city, entered upon a voluntary appearance without proof of timely service of the summons, the merits of the action being doubtful; it was held that the want of proof of service of the summons entitled the defendant to have the judgment vacated; and that the defendants should be allowed to plead or answer without terms. (Ib.)

On a motion to open a regular judgment, entered upon a failure to answer, the defendant showed that his counsel had prepared an answer, in due season, but, for the reason that he believed the plaintiff's proceedings irregular, had not served it; that his counsel had made repeated attempts to see the plaintiffs personally, but had been unsuccessful; and that he understood from the plaintiff's attorney that no further steps would be taken until he could have an interview with the plaintiffs. Held that this was a case of surprise, or excusable neglect authorizing the court to open the judgment, upon terms. (*Mann v. Provost*, 3 Ab. 446.)

Where more than two years have elapsed since the entry of judgment upon an inquest and service of notice thereof upon the defendant, a motion to open the inquest and set aside the judgment will not be granted, where the parties reside within the jurisdiction of the court. (*Hendricks v. Carpenter*, 2 Rob. 625; S. C. 4 id. 665; 1 Ab., N. S. 213.)

In *Selover v. Forbes*, (22 How. Pr. 477,) stringent terms were imposed on the defendant, upon opening a judgment obtained by default, where his best excuse was that both he and his attorney had neglected to attend to the case. In *Clark v. Lyon*, (2 Hilt. 91,) where the answer was prepared, and verified, and placed with the clerk of the defendant's attorney, for service, in season, and the defendant's attorney having left town, the answer was not served; through the forgetfulness of the clerk, this was held a sufficient excuse to warrant the opening of the default, the judgment and execution being allowed to stand as security.

It is the usual practice, on setting aside a regular judgment, to make the order conditional, requiring payment of the costs incurred in entering it up. But where a judgment is obtained by default, through a misapprehension of the defendant's attorney, and it appears, clearly, that the plaintiff has no cause of action, the judgment and execution, (if any,) will be set aside, with costs of the motion. (*Kane v. Demarest*, 18 How. Pr. 465.)

On moving to open a judgment, the defendant should make an affidavit of merits. Yet the lack of such an affidavit is not a conclusive objection to the application. The

always entered as read. (y) The omission of the evidence, however, does not extend to cases in which the object of the suit is to establish a will against an heir at law; because in such cases the court will not declare the will well proved without hearing the evidence read. (z)

A decree of this nature is not considered as a judgment of the court, but as the act of the party who obtains it, conceiving what the judgment of the court would be if the other party had appeared. And it is taken at the peril of the party obtaining it, if he cannot support it by his pleadings and proofs. (a) Thus it is the constant practice of the court, *upon a default, to hear the affidavit of service of the notice of [*373] hearing read, and to tell the counsel to take his decree. (b)

In this respect a decree by default differs from a decree *pro confesso*; which, as we have seen, is the act of the court, and not of the party. (c)

The cases in which decrees of this nature will be opened or rectified have been already pointed out. (d)

(y) 1 Smith. 417. 2 Dan. 646.

(z) Webb v. Litcot. 3 Atk. 25. 1 Dick. 88. S. C.

(a) Carew v. Johnston, 2 Sch. & Lef. 300. Knight v. Young, 2 Ves. & B. 186. Stubbs v. 10 Ves. 30.

(b) 1 Hoff. Pr. 557.

(c) Ante, p. 369.

(d) Ante, p. 353, 367, 8.

defendant may supply the defect on terms. (*Fassett v. Tollmadge*, 15 Ab. 205.) Where the defendant, in his affidavit, alleged that he had a meritorious defence; that the note in suit had been paid; but did not state when, where, or how; it was held that a motion to open the judgment could not be granted. (*Hunter v. Lester*, 18 How. Pr. 347; S. C. 10 Ab. 260.) When a defendant has suffered a judgment to be taken against him voluntarily, and under the advice of counsel, he must make an affidavit of merits, and show specifically what his intended defence is, when he seeks to open such judgment. (*Ellis v. Jones*, 6 How. Pr. 295.)

In the first judicial district, a motion to open a judgment and let defendants in to defend, may be made to a justice out of court. (*Lowber v. The Mayor, &c., of New York*, 5 Ab. 325.) A motion to open a default may be made before any judge or judges holding a term other than that at which the judgment was taken. (*Bolles v. Duff*, 56 Barb. 567.)

Although, under § 311 of the Code—which provides for the insertion of costs in judgments—a judgment be entered before the adjustment of costs, a failure to comply with this rule is not sufficient to justify the setting aside of a judgment otherwise regular. (*Macomber v. The Mayor, &c., of New York*, 17 Ab. 35.)

If a married woman is sued alone, on a contract made by her during coverture, and allows judgment to pass by default, and subsequently applies to set aside the judgment, the court will not interfere, when it appears, in answer to the motion, that she obtained the credit by representing herself to be a widow, and that the plaintiffs had no notice to the contrary. (*Genet v. Dusenbury*, 2 Duer, 679)

Where a motion is made to open an inquest, the order granting or denying it cannot be reviewed by the general term, on appeal. (*Farish v. Corlies*, 1 Daly, 274.)

Rule 46 of the supreme court, so far as it permits a judgment by default, or by the consent of the adverse party, does not extend to divorce cases. And rule 92 declares that no judgment declaring void a marriage contract, or granting a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause, and that no judgment, in an action for a divorce, shall be entered except upon the special direction of the court.

SECTION VIII.

DECREES BY CONSENT. (19)

A decree by consent is binding, unless procured by fraud. (*e*) But by this, must be understood that the parties are competent to consent. (*f*)

A decree may be made by consent in a cause relating to the separate property of a married woman, in which she and her husband are co-complainants. (*g*)

As respects infants, although the court will not, in general, make any decree by consent where they are concerned, without referring it to a master to inquire whether it will be for their benefit; yet when once a decree is pronounced without that previous step, the infants will be bound by it. (*h*)

A decree or order made by consent of the counsel for the parties, cannot be set aside either by rehearing or appeal, (*i*) or by bill of review; (*k*) unless by clerical misprision any thing has been inserted in the order, as by consent, to which the party had not consented; in which case Lord Thurlow appears to have considered that a bill of review would lie. (*l*) If, however, the decree has been obtained by fraud, relief may be had against it by original bill. (*m*) The consent of counsel to a decree is to be given upon their own conception of the authenticity of their instructions; (*n*) and as the client is bound by the act of [*374] his counsel, he must, if the counsel has consented without sufficient authority, seek his remedy against the counsel. (*o*)

A person affected by a decree, but not a party, may aver and prove that it was entered by an agreement of the parties, though it contradict the record. (*p*)

A decree of nullity declaring void a marriage contract, or a decree for a divorce or a separation or limited divorce, cannot be entered by consent. (*q*) (20) (21)

(*e*) French v. Shotwell. 6 John. Ch. Rep. 564.

(*f*) 2 Dan. 617.

(*g*) Stinson v. Ashley. 5 Russ. 4. (*h*) Per Lord Thurlow, Wall v. Rushby, 1 Bro. C. C. 487. (*i*) 2 Dan. 617. and cases there cited. Atkinson v. Manks, 1 Cowen, 691. Kane v. Whittick, 8 Wend. 219. Ringgold's case, 1 Bland. 5, 12. Id. 18, 270. Coster v. Clark, 12 Chan., May 17, 1842.

(*k*) Webb v. Webb, 3 Swanst. 658. And see Smith v. Turner, 1 Vern. 274.

(*l*) Anon., 1 Ves. jun. 93.

(*m*) Bradish v. Gee, Amb. 229.

(*n*) Mole v. Smith. 1 Jac. & W. 673.

(*o*) Bradish v. Gee. Amb. 229.

(*p*) Stark's adm'r v. Thompson's ex'rs, 3 Mouro, 302.

(*q*) Rule 170.

(19) JUDGMENT BY CONSENT, UPON THE OFFER OF A PARTY. See *ante*, p. 201, note (5.)

(20) JUDGMENT BY CONFESSION.

Section 382 of the Code allows a judgment by confession to be entered without action, either for money due, or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed in chapter III, of title 12, part II.

Section 383 requires a statement in writing to be made, signed by the defendant and verified by his oath, to the following effect: 1. It must state the amount for

which the judgment may be entered, and authorize the entry of judgment therefor. 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due. 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely, the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

By § 384, the statement may be filed with a county clerk, or with the clerk of the superior court of the city of New York, who shall indorse upon it and enter in the judgment book a judgment of the supreme, or said superior court, for the amount confessed, with five dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, shall thenceforth become the judgment roll. Executions may be issued and enforced thereon, in the same manner as upon judgments in other cases in such courts, &c.

A judgment may be confessed as security for future advances. (*Truscott v. King*, 6 N. Y. 147; *Marks v. Reynolds*, 12 Ab. 403; *Averill v. Loucks*, 6 Barb. 19.) A confession of judgment by a married woman is not void, but voidable merely. If she elects to allow it to stand, and the title of her property through its instrumentality to be charged, there is no good reason why she may not do so. (*Roraback v. Stebbins*, 33 How. 278; S. C. 3 Keyes, 62. See *Knickerbocker v. Smith*, 16 Ab. 241; *Palmer v. Davis*, 28 N. Y. 242.) A married woman may, under the statutes of 1860 and 1862, confess a judgment to obtain and secure a loan of money to carry on her separate business. (*First National Bank of Canandaigua v. Garlinghouse*, 36 How. 369; S. C. 53 Barb. 615.) But in *Watkins v. Abrahams*, (24 N. Y. 72,) it was held that a confession of judgment by a married woman is void, although the consideration is money borrowed for, and applied to the improvement of her separate estate. And that where husband and wife unite in confessing a judgment, it may be retained as good against the husband, though void as to the wife.

But a judgment by confession, without action, can only be entered against the person who signs the confession. One of two partners, or joint debtors, cannot confess judgment for both. The party confessing such a judgment in effect makes the debt his individual debt, and it cannot be enforced against the joint property. (*Stoutenbergh v. Vandenberg*, 7 How. Pr. 229, 234, n.; *Lambert v. Converse*, 22 How. 265; *Averill v. Loucks*, 6 Barb. 19; *Bridenbecker v. Mason*, 16 How. Pr. 203.) But in *Von Keller v. Muller*, (3 Ab. 375, n.) where the confession was to bind the defendant "as one of the firm," it was held that it meant not only to bind the defendant individually, but the partnership property; and that on such a confession, judgment was properly entered against both partners. And in *Leahey v. Kinyon*, (22 How. 209, S. C. 13 Ab. 102,) it was held that one partner has authority to confess judgment for both, which may be enforced against the joint property of both, and the individual property of the one confessing.

A trustee, though described as such, cannot confess an ordinary judgment, so as to bind the trust estate. (*Mallory v. Clark*, 20 How. Pr. 418; S. C. 9 Ab. 358. See *Marks v. Reynolds*, 12 id. 403.)

A judgment entered upon a bond and warrant of attorney executed by a person of unsound mind, with all subsequent proceedings, may be set aside on terms in the discretion of the court. (*Perron v. Warren*, 14 Barb. 488.)

The provision of the Revised Statutes forbidding the setting aside of a judgment for irregularity after the expiration of one year, (3 R. S. 5th ed. 637, § 3,) is not applicable to a judgment by confession, sought to be set aside for want of a sufficient statement. (*Manuf., &c., Bank v. St. Johns*, 5 Hill, 497; *Manuf. Bank v. Boyd*, 3 Denio, 257; *Bonnell v. Henry*, 13 How. Pr. 142. But see *Park v. Church*, 5 How. Pr. 381.)

A mere confession of judgment is not a violation of an injunction granted in supplementary proceedings, restraining the defendant from disposing of, or in any manner interfering with his property, unless accompanied by acts of the defendant showing an attempt to dispose of his property. (*Ross v. Clussman*, 3 Sandf. 676; S. C. 1 Code Rep., N. S. 91.)

A statement under § 383, that the judgment is confessed to secure the plaintiff for a debt justly to become due, upon his indorsement, as the surety of the defendant, and for his benefit, of bills and notes which are fully described as to names, dates, amounts and times of payment is sufficient. (*Dow v. Platner*, 16 N. Y. 562.) So as to a statement that "the indebtedness arose on the sale and conveyance by the plaintiff to the defendant of his interest," in certain partnership property; though it did not show how the plaintiff was connected with the firm, or what was his interest. (*Thompson v. Vechten*, 27 N. Y. 568.) See also, the following cases in which the statements on confession of judgment were held sufficient: (*Freleigh v. Brink*, 22

N. Y. 418; S. C. 18 How. Pr. 89; *Hopkins v. Nelson*, 24 N. Y. 518; *Lanning v. Carpenter*, 20 N. Y. 447; S. C. 23 Barb. 402; *Frost v. Koon*, 30 N. Y. 428; *Dow v. Platner*, 16 N. Y. 562; *Ely v. Cooke*, 28 N. Y. 365; *Kirby v. Fitzgerald*, 31 id. 417; *Acker v. Acker*, 1 Keyes, 291; *Clements v. Gerow*, id. 297; *Kellogg v. Cowing*, 33 N. Y. 408; *Delaware v. Ensign*, 21 Barb. 85; *Read v. French*, 28 N. Y. 285; *Gandall v. Finn*, 1 Keyes, 217; S. C. 33 How. 444; *Neusbaum v. Keim*, 24 N. Y. 325; *Thompson v. Van Vechten*, 27 N. Y. 568; *Johnston v. McAusland*, 9 Ab. 314.)

The particular facts must be set forth in such manner as to show a just debt, and the amount thereof, but where the creation of a just debt is averred, it is unnecessary in terms, to negative the fact that it has been paid or otherwise discharged; or to state in terms that the sum confessed is justly due, or to become due. (*Lanning v. Carpenter*, 20 N. Y. 447; S. C. 23 Barb. 402.)

In the following cases the statements in the confession were held to be insufficient: *Chappel v. Chappel*, 12 N. Y. 215; *Bonnell v. Henry*, 13 How. Pr. 142; *Dunham v. Waterman*, 17 N. Y. 9; S. C. 6 Ab. 357; *Bank of Kinderhook v. Jenison*, 15 How. Pr. 41; *Winnebrenner v. Edgerton*, 30 Barb. 185; S. C. 17 How. Pr. 363; *Daly v. Mathews*, 20 How. Pr. 267; S. C. 12 Ab. 403, n.; *Von Beck v. Shuman*, 13 How. Pr. 472; *Boyden v. Johnson*, 11 id. 503; *Purdy v. Upton*, 10 How. Pr. 494; *Stebbins v. East Society, &c.*, 12 How. Pr. 410; *Davis v. Morris*, 21 Barb. 152; *McDowell v. Daniels*, 38 Barb. 143; *Beekman v. Kirk*, 15 How. Pr. 228.

Where the matter to which the oath relates is within the personal knowledge of the party, a direct and positive affirmation that the statement is true is necessary. (*Ingram v. Robbins*, 33 N. Y. 403.) Simply swearing that the deponent "believes the above statement of confession is true," is insufficient. (Ib. *Contra, Delaware v. Ensign*, 21 Barb. 85.) A statement in the affidavit that "the facts stated in the above confession are true," has been held a sufficient verification. (*Mosher v. Heydrick*, 30 How. 161; S. C. 45 Barb. 549; 1 Ab., N. S. 258.)

Where the statement is sufficient in part, and insufficient as to the residue, the judgment may be sustained to the extent of the sufficient statement, and set aside as to the residue. (*Frost v. Koon*, 8 N. Y. 428; *Marks v. Reynolds*, 12 Ab. 403; *Hop-pock v. Donaldson*, 12 How. Pr. 141.)

Where the affidavit and statement are upon the same page, and the defendant signs the affidavit only, this is a substantial compliance with § 383. (*Purdy v. Upton*, 10 How. Pr. 494; *Post v. Coleman*, 9 id. 64; *Mosher v. Heydrick*, 45 Barb. 459; S. C. 30 How. 161; 1 Ab., N. S. 258.)

A judgment confessed to several persons to secure an actual indebtedness, is presumed to be in favor of all the plaintiffs equally; but such presumption may be rebutted. (*Rathbone v. Stocking*, 2 Barb. 135.) Where a judgment is confessed to several persons to secure them for their separate liabilities as sureties for the debtor, in respect to different debts, there is no legal presumption that the liabilities of the sureties are equal in amount. (Ib.) Nor can the plaintiffs in such a judgment, without further proof, after the consideration and purposes of the judgment have been established, be adjudged to be equally interested in the amount to be raised thereby. They will not be presumed to be thus equally interested, without the further presumption or proof that their respective liabilities were equal. (Ib.)

An amendment of an insufficient statement will be permitted, in order to preserve the lien and priority of the judgment, where the good faith of the indebtedness is not questioned, and no superior equities exist in favor of other creditors. (*Davis v. Morris*, 21 Barb. 152; *Johnson v. Fellerman*, 13 How. Pr. 21; *Union Bank v. Bush*, 36 N. Y. 631; S. C. 3 Trans. Ap. 35; *contra, Von Beck v. Shuman*, 13 How. Pr. 472.) But a judgment by confession, founded on a defective statement cannot be amended so as to sustain its priority over intervening judgment creditors. (*McKee v. Tyson*, 10 Ab. 332, and cases cited in note.) The power of the court below to amend in such cases, is a matter of discretion, the exercise of which is not reviewable in the court of appeals. (*Mitchell v. Van Buren*, 27 N. Y. 300; *Union Bank v. Bush*, 36 id. 631; S. C. 3 Trans. Ap. 285.)

In *McDowell v. Daniels*, (38 Barb. 143.) it is held that judgments by confession, entered upon insufficient statements, being by statute pronounced void as to other judgment creditors, cannot be supported by affidavits, on a motion to set them aside for irregularity.

There is nothing in the Code, nor any other provision of law, requiring a judgment by confession to be entered at any particular time after the confession and statement are made. (*Curtis v. Corbitt*, 25 How. 58.) Judgment may be entered with the county clerk of any county, and not merely in the county where the statement authorizing it was verified. (*Mosher v. Heydrick*, 30 How. 161; S. C. 45 Barb. 459; 1 Ab., N. S. 258.)

A judgment by confession may be *set aside* for a defect in the statement upon which it is entered, on the application of a junior judgment creditor. (*Chappel v. Chappel*, 12 N. Y. 215; *Rae v. Lawser*, 18 How. Pr. 23; S. C. 9 Ab. 380, n.; *Bonnell v. Heury*, 13 How. Pr. 142;) or upon the application of a subsequent *bona fide* purchaser of real estate, upon which the judgment is an apparent lien, (*Kendall v. Hodgkins*, 1 Bosw. 659; S. C. 7 Ab. 309;) or in an action in the nature of a creditors suit, at the suit of a subsequent judgment creditor. (*Dunham v. Waterman*, 17 N. Y. 9; S. C. 6 Ab. 357.)

The right to set aside or attack a void judgment entered up by confession upon a defective statement, is not limited to judgment creditors. A judgment confessed without a full compliance with the provisions of the Code is to be deemed fraudulent and void, as against the creditors of the judgment debtor; and it may be attacked by a grantee or mortgagee of premises upon which such judgment is a lien, as well as by judgment creditors. (*Norris v. Denton*, 30 Barb. 117.) They may do this either by bringing an action for that purpose, or in defence of an action brought to enforce such judgment to which they are made parties. (*Ibid.*)

But the general assignee for the benefit of creditors, of a judgment debtor, has not such a standing in court as entitles him to question the validity of the judgment. It is only a judgment creditor, or one claiming under him, that is authorized to move to set it aside. A creditor at large cannot be heard. (*Beckman v. Kirk*, 15 How. Pr. 228. See *Lomber v. Mayor, &c., of New York*, *id.* 123.) An assignee for the benefit of creditors, as *assignee*, represents the debtor himself, with whom it does not lie to take advantage of his own statement. As *trustee*, he represents the creditors at large, who do not occupy a position to question the validity of the judgment. (*Ib.*)

Where the statement in a judgment by confession is defective, the plaintiff cannot avail himself, by motion, of defects in the statement on which a former judgment was confessed by the same defendant to another plaintiff. (*Rae v. Lawser*, 18 How. Pr. 23.)

A judgment by confession, although voidable, cannot be impeached collaterally. (*Sheldon v. Stryker*, 34 Barb. 116; S. C. 21 How. Pr. 329.) A judgment confessed directly to a third party, who takes it in good faith, and for value, cannot be impeached for fraud existing between the defendant and the original creditor. (*Kirby v. Fitzgerald*, 31 N. Y. 417.) Otherwise, however, if the party takes such judgment as collateral security only, after it has been confessed. (*Ib.*)

The court has the power in any case, to compel the defendant in a judgment entered upon an insufficient statement to sign and verify an amended statement, in the same manner that it may relieve against any other default or slip in the practice. (*Union Bank v. Bush*, 36 N. Y. 631; S. C. 3 Trans. Ap. 235.)

A judgment by confession having been duly docketed, the omission by the clerk to make the indorsement on the statement, required by § 384 of the Code, may be supplied by an order of the court directing the indorsement to be made *nunc pro tunc*. Section 176 of the Code was intended to cover errors and defects of this nature. (*Daly v. Mathers*, 20 How. Pr. 267; S. C. 12 Ab. 403, n.; *Neale v. Berryhill*, 4 How. Pr. 16; *Talcott v. Rosenberg*, 8 Ab., N. S. 237.)

A motion to set aside a judgment by confession, for a defect in the statement, is not founded upon an irregularity, so as to require the moving party to specify in his papers, the grounds of the motion. (*Winnebrenner v. Edgerton*, 30 Barb. 185; S. C. 17 How. Pr. 363.)

The ordinary rule that a party asking for relief must make out his case by a preponderance of proof, is applicable to a motion to set aside a judgment by confession. (*Williams v. Hernon*, 33 How. 241; S. C. 3 Keyes, 99.)

On a judgment by confession, under the Code, there is no suit, no recovery or adjudication, either actual or formal, of any court or officer, until the judgment is *entered* by the clerk; and it is this act of the clerk that not only creates a *lien*, but the *judgment*. Until this entry is made, there is no judgment—nothing of the existence of which notice can be given to subsequent incumbrancers or grantees. (*Blydenburgh v. Northrop*, 13 How. Pr. 289.)

Judgment upon confession (except where the clerk is authorized to enter the same by the first subdivision of § 246, and by § 384, and except where it may be given at the general term, as provided in § 265) must, in the first instance, be entered upon the direction of a single judge, or report of referees, subject to review at the general term, and on the demand of either party as provided in the Code. (Code, § 278.)

In *Johnston v. McAusland*, (9 Ab. 214,) a creditor was absent from the country when his attorney, without the creditor's knowledge, accepted for him, from a debtor, a confession of judgment, upon which he entered a judgment. The attorney

then received from the partner of the creditor, directions to proceed and issue execution. *Held*, that the judgment was sufficiently accepted, so as to be valid against creditors who obtained judgments against the debtor after the directions were given by the partner.

A judgment by confession entered upon an insufficient statement, but not impeached for actual fraud, is good as between the parties. (*Miller v. Earle*, 24 N. Y. 110.)

Judgments by confession, drawn up by the plaintiff, the defendant having no legal adviser, will be carefully scrutinized by the court, that they may not be the cause of oppression. (*Merritt v. Baker*, 11 How. Pr. 456.)

Where the defendant is a religious corporation, and as such having no proper dealings, except to defray the common expenses of the church, &c., it is bound to explain to its creditors, when it confesses judgments, how the debts arose, for what consideration, and who the creditors are who received large sums of money, and whether the debts are *bona fide* debts of, or donations to, the church, &c. (*Stebbins v. East Society of the M. E. Church, Rochester*, 12 How. Pr. 410.)

A judgment by confession is not absolutely void on the ground of a defective statement, but merely voidable at the instance of a party interested. (*Read v. French*, 28 N. Y. 285.)

(21) *Judgment on frivolous demurrer.* See *ante*, p. 247, note (25.)

Judgment on the report of a referee. See *ante*, p. 638, note (6.)

JUDGMENT DISMISSING COMPLAINT. See *ante*, p. 316, note (6.)

JUDGMENT ON APPEAL. See *Post*, Book II. chap. 1, note to sec. 5.

BOOK II.

'PROCEEDINGS SUBSEQUENT TO THE DECREE.

CHAPTER I.

APPEALS.

- Sect. 1. FROM WHAT DECREES OR ORDERS, AND ON WHAT GROUNDS,
AN APPEAL LIES.
2. WHO MAY APPEAL.
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CHANCELLOR.
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9. FROM A SURROGATE TO A CIRCUIT JUDGE.
10. TO THE CHANCELLOR FROM A CIRCUIT JUDGE.
11. TO THE CHANCELLOR FROM A COURT OF COMMON PLEAS.
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The next step of procedure in a cause, subsequent to the decree, is to bring an appeal to a higher tribunal, for the purpose of having the decree reversed or modified, if either party is dissatisfied with it, and is advised to resort to that measure. The subject of appeals will therefore claim our attention in this place, before we enter upon the manner of carrying a decree into execution.

And while upon the subject, we shall not only treat of the ordinary appeals which, according to our arrangement, properly belong in this

place, but of appeals in special cases, as, appeals to the chancellor from circuit judges, and from courts of common pleas, and from surrogates to circuit judges. It will be more convenient to exhaust the subject at once, than to return to it again in some other connection.

SECTION I.

FROM WHAT DECREES OR ORDERS, AND ON WHAT GROUNDS, AN APPEAL LIES. (1)

It is impossible to point out all the grounds upon which a party may appeal from a decree or order of this court; as they are as numerous and as various as the cases themselves. In fact, wherever the court is called upon to determine a question of law or of fact, the decision may be the subject of an appeal by any party who considers himself aggrieved by it. The only case in which a party cannot appeal from the decision of the court is where the determination complained of is merely the result of the exercise of discretion on the part of the judge,

(1) FROM WHAT JUDGMENTS OR ORDERS, AND ON WHAT GROUNDS.

Writs of error, in civil actions, are abolished by the Code; and the only mode of reviewing a judgment or order, in a civil action, is that prescribed by Title XI of that statute, viz.: By appeal. (Code, § 323.)

This provision, while applying to *civil* actions of every class, does not extend to appeals from decisions, orders and decrees of *Surrogates' courts*. (Code, § 471.) These are still regulated by the former practice, and the existing rules of the court. (Van Sant. Eq. Pr. 651.)

By the act of April 15, 1854, (Laws of 1854. chap. 270,) an appeal is authorized to be taken to the general term of the supreme court, or the superior court, or court of common pleas, of the city of New York from any judgment, order or final determination made at a special term of either of those courts, in any *special proceedings* therein. And §§ 327, 329, 330 and 332 of the Code of Procedure, are made applicable to appeals in special proceedings.

By section 344 of the Code, an appeal may be taken to the supreme court, from any order affecting a *substantial right* made by a county court, or a county judge, in any *action or proceeding*.

The judgments from which an appeal may be taken are *final* judgments. Hence, where a decision is made which is merely *interlocutory*, leaving something to be done, such as an accounting, &c., no appeal lies from the judgment. (*McMahon v. Allen*, 7 Ab. 1; *D'Ivernois v. Leavitt*, 8 id. 59; *Lawrence v. Farmers' Loan and Trust Co.* 15 How. Pr. 57; *People ex rel. McSpedon v. Hays*, 34 Barb. 69; S. C. 21 How. Pr. 178; 12 Ab. 204; *Griffin v. Cranston*, 5 Bosw. 658.)

A decree which directs a reference, for the purpose of taking and stating an account between the parties, and for other purposes, and reserves further directions until the coming in and confirmation of the report; and then "that such further order or decree may be made thereon as shall be just," is not a final decree that can be appealed from to the court of appeals; although it may be final in many particulars. (*Cruger v. Douglass*, 4 How. Pr. 215.)

It seems that until the costs are finally adjusted and inserted in the judgment, it is not sufficiently perfected, in form, to allow an appeal. (*Sherman v. Wells*, 14 How. Pr. 527.)

A judgment is not final, so as to be the subject of an appeal, so long as there may be future litigation under it. Thus, a judgment for the sale of lands, and the disposition of the proceeds in accordance with the report to be made by the referee, upon a reference therein ordered, to ascertain the shares of the respective parties, is not final, so as to be the subject of an appeal to the court of appeals; though no provision is made, in the judgment, for a review of the report; or for suspending the actual payment of the moneys, to give an opportunity to appeal. (*Tompkins v. Huatt*, 19 N. Y. 534; *Harris v. Clark*, 4 How. Pr. 78; *Cruger v. Douglass*, id. 215.) The judgment from which an appeal to the general term may be taken, means the same thing as a judgment from which an appeal may be taken to the court of appeals. (*Lawrence v. Farmers' Loan and Trust Co.*, 15 How. Pr. 57.)

It is said by DANIELS, J., in *Libby v. Rosekrans*, (55 Barb. 202,) that the law provides but two modes of correcting errors in legal proceedings: one by motion, when the error is one of form, arising out of a failure to conform to the settled practice of the court; the other by appeal, when the errors consist in the omission of the court itself to properly observe and apply the law affecting the rights involved in the controversy, in making its adjudication upon them.

The proper method of reviewing an award of arbitrators is not by appeal but by a writ of error. (*Isaacs v. The Beth Hamedrash Society*, 19 N. Y. 584; *Freeman v. Kendall*, 41 id. 518.)

The appeal under the Code was intended to be a mere substitute for the writ of error in respect to common law judgments and proceedings; and in respect to equitable proceeding, the appeal is intended to be such a proceeding, and with just such force as was formerly in practice in reviewing proceedings in equity by appeal. (*Gornally v. McIntosh*, 22 Barb. 275, 276.) The court of appeals now has the power to review, upon appeal, every actual determination made by the supreme court, at a general term, and the latter court has like power to review every judgment in the county court. (Id.)

In regard to *final judgments*, entered upon the report of referees, or the direction of a single judge, an appeal upon *the law* may be taken in all cases, and upon the *fact* when the trial is by the court or by referees. (Code, § 348.)

A judgment is deemed entered by the direction of a single judge when it is entered by the clerk, at the circuit, upon the verdict of a jury under section 264 of the Code; and from such judgment section 348 authorizes an appeal upon the law, as presented by exceptions taken on the trial, to the general term, without motion previously made at special term for a new trial. (*Morrison v. New York & New Haven R. R. Co.* 32 Barb. 568; *Moranoe v. Morris*, 12 Ab. 164; S. C. 32 Barb. 650; *Jackson v. Fassitt*, 12 Ab. 281; S. C. 33 Barb. 645; 21 How. Pr. 279.)

As to the review of *specific questions of fact*, in equity causes, which have been ordered to be tried by a jury as a substitute for a feigned issue, this is not by appeal, but is specially provided for by rule 40 of the supreme court.

An appeal will not lie, in the first instance, to the general term, upon a case containing questions of fact. In such a case, application for a new trial must be made at special term. (*Collins v. Albany & Schenectady R. R. Co.* 5 How. Pr. 432; *Lotach v. Hotchkiss*, 17 Ab. 88.)

Conclusions of fact found by a judge, at special term, may be reversed by the supreme court on appeal; but if the latter court affirms the finding at special term, the court of appeals cannot review the decision. (*Waters v. Green*, 3 Keyes, 385; S. C. 2 Trans. Ap. 346.)

Where, on a frivolous demurrer to the complaint, judgment is ordered for the plaintiff, and on appeal such order is affirmed, at general term, the judgment of affirmance is appealable to the general term, and must be heard there before a review can be had in the court of appeals. (*Hollister Bank of Buffalo v. Vail*, 15 N. Y. 593.)

In regard to *orders*, an appeal is not a matter of course, but is allowed only in the cases specified in section 349 of the Code. (Van Sant. Eq. Pr. 656.)

Section 349 allows an appeal to be taken from an order made at a special term by a single judge of the same court, or county, or a special county judge, or by a recorder, or by any recorder's court of any city, in any stage of the action, including proceedings supplementary to execution, in the following cases:

1. When the order grants or refuses, continues or modifies, a provisional remedy.
2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer.
3. When it involves the merits of the action, or some part thereof, or affects a substantial right.

4. When the order in effect determines the action, and prevents a judgment from which an appeal may be taken.

5. When the order is made upon a summary application, in an action, after judgment, and affects a substantial right.

Section 349 includes an order made out of court, upon notice; but in such case the order must be first entered with the clerk. And for the purpose of an appeal, any party affected by such order may require it to be entered by the clerk, and it must be entered accordingly. (Code, § 350.)

Whenever the decision sought to be reviewed is not a *final judgment*, and is not embraced in, and forms no part of, such judgment, the appeal is from an *order* merely, and the right of appeal is to be determined by the principles governing the practice of the court in the latter class of appeals. (Van Sant. Eq. Pr. 656; *Lawrence v. Farmers' Loan and Trust Co.* 15 How. Pr. 57.)

An order from which an appeal may be taken must be such an order as is defined by section 400 of the Code, viz.: "A direction of a court or judge, made or entered in writing, and not included in a judgment." (Van Sant. Eq. Pr. 657.) A mere interlocutory decision upon a trial by the court disposing of the case, except that a reference to take an account is ordered before final judgment, is not such a decision or order as can be appealed to the general term for the purpose of reviewing decisions made at the trial, because such interlocutory decision is to become part of, or is to be included in the judgment. Hence no appeal to review the merits of such decision, can be taken until after final judgment is entered. (*Lawrence v. Farmers' Loan and Trust Co.* 15 How. Pr. 57.)

The order from which an appeal is allowed by section 349 when it "involves the merits of the action, or some part thereof, or affects a substantial right," must be something different from a decision during the actual progress of the trial, disposing of some claim made by either party, affecting the relief to be granted, and something other than a conclusion of law included in the decision on which the judgment, in whole or in part, is to be entered. (Id.) Hence, the interlocutory decision, if to be embraced in, and to become a part of, the final judgment, can be reviewed only on appeal from the *judgment*. And on the same principle, the order founded on such decision must be reviewed in the same way, and is not directly appealable as an order; except, perhaps, for the purpose of reviewing the competency of the court to make the order. (Id.)

An order of a single justice, refusing to strike out matter as irrelevant and redundant, in a pleading, is not an appealable order to the general term. (*Bedell v. Stickles*, 4 How. Pr. 482.) Appealable orders, as settled in the 2d district, are: 1st. Those mentioned in section 349 of the Code. 2d. Special proceedings of an equitable nature, such as, under the former practice, were appealable from a vice-chancellor to the chancellor. 3d. In special proceedings, not of an equitable nature, where an appeal is expressly given by statute, or existed according to the former practice of the supreme court. (Id.) *Special proceedings* are not regulated by section 349, but depend upon the pre-existing laws and practice. (Id.; *Matter of Fort Plain & Cooperstown Plank Road Co.*, id. 148.) And the act of April, 1854, in relation to special proceedings, (Laws of 1854, ch. 270.) allows an appeal to be taken to the general term of the supreme court, or court of common pleas of the city of New York, from any judgment, order or determination, made at a special term of either of those courts in any special proceedings therein. Such an appeal will not stay the proceedings unless the court, or a judge thereof, so order; which order may be upon such terms, as to security, or otherwise, as may be just; such security not to exceed the amount required on an appeal to the court of appeals. (§ 1.) Sections 327, 329, 330 and 332 of the Code are made applicable to appeals in special proceedings. (Id. § 3.)

The cases in which it has been decided that an appeal will lie, under the act of 1854, are collected in Wait's Code. p. 686, note to § 349.

The cases in which, and from what orders, an appeal lies, are also collected in the same valuable work at page 688; and the cases in which no appeal lies, at page 686.

The provision in subdivision 2 of section 349, allowing an appeal from an order made at a special term "when it sustains or overrules a demurrer," is applicable to all cases where leave to amend is given in connection with the decision on the demurrer, and also to decisions on demurrer to part only of a complaint or answer, containing several causes of action, or defenses. (*Cook v. Pomeroy*, 10 How. Pr. 221; *Bauman v. The N. Y. Central R. R. Co.* id. 218.)

By the words "a substantial right," in subdivision 3, of section 349, the legisla-

in a case where the matter was fairly a subject for the exercise of discretion. (2) In such cases, the practice of the court will not allow an appeal from the discretion of one judge to that of another. Upon this

ture must have intended a fixed determinate right, independent of the discretion of the court, and of some value. Such a right must exist, and be injuriously affected by an order, to bring a case within that subdivision. (*Tallman v. Hinman*, 10 How. Pr. 89.) The word "merits," as used in that subdivision, means the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court. (*Id.*; *St. John v. West*, 4 How. Pr. 329.)

An order for an extra allowance, made by a single judge, before judgment, affects a substantial right, within the meaning of section 349, and is the subject of appeal to the general term. (*The People v. The N. Y. Central R. R. Co.* 29 N. Y. 418. But see *Union Bank v. Mott*, 13 Ab. 247.) So an order denying to the plaintiffs the exclusive right to a large sum of money may be appropriately said to affect a substantial right, and is therefore appealable. (*The Artisan's Bank v. Treadwell*, 34 Barb. 553.) Where a judge, at special term, denied an application, made by the plaintiff in a judgment recovered against a special partnership, that the receiver should pay the amount of such judgment out of the funds of the partnership, in his hands, on two grounds: 1. That the judgment and execution could not, by law, take preference over the demands of the general creditors of the partnership; and 2. That the receiver's rights took effect by relation back to the commencement of the action in which he was appointed, which was prior to the plaintiff's lien by execution—it was held that the decision, upon either of these grounds, was a decision upon the merits of the application. (*Id.*)

Where costs are allowed to the plaintiff, on an adjustment by the clerk, to which he has no legal right, and which the defendant cannot be required to pay without a violation of the statute, and the court, at special term, denies a motion to correct the adjustment, an appeal lies to the general term. (*Stuyter v. Smith*, 2 Bosw. 673.)

An order directing that in default of discovery, the party who is required to make the discovery shall be nonsuited, is an order involving the merits, and affecting a substantial right, and is therefore appealable. (*Broderick v. Shelton*, 18 Ab. 213.)

From a judgment directing that the plaintiff recover of the defendants \$42.05 damages, without costs; that the defendants recover of the plaintiff the like sum, for costs and disbursements; and that the said judgments be offset against each other, an appeal lies. (*Houland v. Coffin*, 47 Barb. 653.)

The granting of a new trial, by the county court, under section 366 of the Code, is a matter of mere discretion, not reviewable on appeal. (*Wavel v. Wiles*, 24 N. Y. 635; *Tanner v. Marsh*, 36 How. 140; S. C. 53 Barb. 438.)

(2) The right to make an extra allowance being a matter of discretion on the part of the judge who makes the order, the court of appeals has no power to review the exercise of that discretion, or to examine as to the merits or amount of the allowance. (*People v. The N. Y. Central R. R. Co.* 29 N. Y. 418.)

The granting of a new trial, by the county court, under section 366 of the Code, is a matter of mere discretion, not reviewable on appeal. (*Wavel v. Wiles*, 24 N. Y. 635; *Tanner v. Marsh*, 36 How. 140; S. C. 53 Barb. 438.)

As a general rule, discretionary orders are not appealable, and will not be reviewed, in the court of appeals. (*Tauton v. Groh*, 8 Ab., N. S. 385; S. C. 39 How. 147; *King v. Platt*, 3 id. 174; *Forrest v. Forrest*, 25 N. Y. 501, 520.) But where the order appealed from denies a strict legal right, it is so far not discretionary, and may be reviewed. (*King v. Platt*, 3 Ab., N. S. 174; *Leland v. Hathorn*, 42 N. Y. 547; *Tracy v. First National Bank of Selma*, 37 N. Y. 523; S. C. 5 Trans. Ap. 14.) Where the court below denies the order on the ground of want of power to grant the relief, the order denying such relief is appealable. (*Russell v. Conn*, 20 N. Y. 81.)

An appeal is not allowed from an order relating to mere matters of practice, or forms of proceeding. (*St. John v. West*, 4 How. Pr. 331; *Cruger v. Douglass*, 2 Code Rep. 123; S. C. 4 How. Pr. 215; *Tallman v. Hinman*, 10 How. Pr. 90; *Tracy v. N. Y. Steam Transit Co.* 1 E. D. Smith, 357.)

ground it is that the courts have adopted the rule that there can be no appeal upon the question of costs.(a) (3)

But if costs are given contrary to statute, or to a standing rule of the court, and do not rest in discretion merely, an appeal will lie.(b) So where a party is entitled to costs as a matter of strict right, if the court below refuses to give costs, the erroneous decision as to such costs may be corrected on appeal.(c) And if a party appeals, having a substantial ground of appeal, and brings in the question of costs along with it, he may proceed with respect to the costs, though he does not succeed on the substantial ground of appeal. But a point which, on the slightest consideration, appears to have no substance, is not to be put forward merely for the purpose of covering an appeal on the question of costs.(d)

What has been said above respecting appeals as to costs, must be understood as applicable only to the costs of *interlocutory proceedings*. The revised statutes authorize an appeal from a decree as to the general costs in the cause, provided the appeal is entered within fifteen days after notice of the decree.(e)

The operation of the rule prohibiting appeals for costs is confined to cases in which costs are to be paid by one party to another, and do not form any part of the relief sought by the bill; and it is liable to exception where the costs are payable out of a fund, or are chargeable upon an estate, or are part of the relief to which a party is entitled, and the facts of the case distinctly appear upon the face of the proceedings themselves; so that it is not necessary, in determining the question of costs, upon the appeal, to enter into any investigation of the merits.(f) Upon this ground Lord Hardwick, in the case of *Owen v.*

(a) 3 Dan. 100. *Atty. Gen. v. Butcher*, 4 Rnss. 180. *Cometer v. Ewing*, 1 Molloy, 19. *Ashby v. Kiger*, 3 Rand. 165. *Owen v. Griffith*, 1 Ves. 250.

(b) *Buloid v. Miller*, 4 Paige, 473. *Winslow v. Collins*, 3 id. 88. *Tod v. Tod*, 1 Bligh, (New Series) 639.

(c) *Id. ib.*

(d) *Attorney General v. Butcher*, 4 Rnss. 180.

(e) 2 R. S. 605, § 79.

(f) *Angell v. Davis*, 4 M. & C. 360. *Winslow v. Collins*, 3 Paige, 88.

(3) The general rule is that the court of appeals does not hear appeals upon questions relating to the adjustment and taxation of costs. (*People ex rel. Lumley v. Lewis*, 28 How. 470; *Collumb v. Read*, 24 N. Y. 517; *Anon.* 10 How. Pr. 353. But see *McGregor v. Constock*, 19 N. Y. 581, per GROVER, J.) From an order of the general term, affirming an order made at a special term, denying a motion to re-adjust costs, no appeal will lie to the court of appeals. It is not an appealable order. (*People ex rel. Clute v. Boardman*, 41 N. Y. 362.) It is only reviewable, if at all, as an intermediate order, on appeal from the judgment. (*Clarke v. City of Rochester*, 34 N. Y. 355; *McGregor v. McGregor*, 32 id. 479.)

Costs, in equity cases, are in the discretion of the court, and the giving or withholding thereof cannot be controlled or reviewed by the court of appeals. (*Staiger v. Shultz*, 3 Keyes, 614; S. C. 3 Ab., N. S. 377; 3 Trans. Ap. 4.)

Griffith, (g) entertained an appeal by an incumbrancer who had brought his bill to compel the payment of his charge, out of an estate which he had extended by *elegit* upon a judgment, and to whom the judge below had refused his costs, although he had given him his principal and interest; his lordship holding that an incumbrancer upon an estate, for a just debt, has a lien upon the estate for his costs, as well as his demand; and that therefore the appeal, although for costs, affected the merits of the case.

The same distinction was recognized in *Cooper v. Scott*, (h) and in *Jenour v. Jenour*. (i) In the latter case the question arose upon the interest of the parties in a trust fund which had been separated from the general residue; and the bill prayed that the costs of the suit might be paid out of the general estate. Upon the hearing the costs were ordered to be paid out of the general estate; but on the appeal, although the decree, upon the right to the fund was affirmed, Lord Eldon corrected the decree, as to costs, by directing them to be paid out of the particular fund, and not out of the general estate; holding that the costs were not within the common rule.

So, in *Taylor v. Popham*, (k) Lord Eldon states the rule to be that where the costs are disposed of as subjects of relief, though they are the subject of appeal, it is not an appeal for costs. (l)

In a more recent case (m) it was decided that as a party interested in a fund might appeal from a decree directing costs to be paid out of that fund; so parties personally ordered to pay costs might appeal from the decree, on the ground that the costs ought to be paid out of the fund.

It is a general rule, as already observed, that the exercise of the discretion of the court is not the subject of appeal. (n) Upon this principle there can be no appeal from an order concerning the *mere practice* of the court, or course of proceeding in the cause. (o)

In the case of *Rowley v. Van Benthuyssen*, (p) Mr. Justice BRONSON observed: "The line of separation is not always very strongly marked between questions which are purely of a discretionary character, and those which depend upon some established principle of equity jurispru-

(g) 1 Ves. 250.

(h) 1 Eden, 17. 1 Bro. C. C. 141, u.

(i) 10 Ves. 562.

(k) 15 Ves. 72.

(l) See, also, *Bushett v. Spray*, 1 Ross. & My. 113. *Taylor v. Southgate*, 4 M. & C. 203. *Marsden v. Eyre*, id. 231.

(m) *Bagot v. Bagot*, cited 3 Dan. Ch. Pr. 103.

(n) *Read v. Houlgens*, 2 Moll. 381. Per COWEN, J., in *Tripp v. Cook*, 26 Wend. 150. *Rogers v. Hosack's ex'rs*, 18 id. 319.

(o) *Rowley v. Van Benthuyssen*, 16 Wend. 369, 371, 378, 379. Per BRONSON, J., in *Tripp v. Cook*, 26 id. 150, 155.

(p) *Supra*.

dence. And the practice and principles of the court are so intimately connected that it may sometimes be difficult to determine whether a particular order shall be regarded as disposing of the rights of the party, or merely regulating the course of proceeding in the cause." And he refers to the article of the constitution respecting the court for the correction of errors, which is as follows: "When an appeal from a *decree* in chancery shall be heard, the chancellor shall inform the court of the reasons for his *decree*. And when a writ of error shall be brought on a *judgment* of the supreme court, the justices of the court shall assign the reasons for their *judgment*." And the learned judge proceeds to remark: "Nothing but a 'decree' brought up by 'appeal' in the one case, or a 'judgment' removed by 'writ of error' in the other, can be reviewed in this court. This is legal language, and as no contrary intention is manifested on the face of the instrument, it must be understood in its legal sense. It cannot extend to every decision of the inferior tribunal, but only to such decrees and such judgments as, on well settled principles, may be reviewed on appeal or by writ of error." "I know not upon what principle it can be maintained that this court has jurisdiction to review the practice of the court of chancery in a matter wholly collateral to the subject of controversy. What is a decree in chancery? Like a judgment at law, it is the sentence pronounced by the court upon the matter of right between the parties; and this sentence is founded on the pleadings and proofs in the cause. None of the various orders which are so often made in the progress of the suit, for time to answer or produce witnesses, for leave to amend, setting aside a default, or the like, have ever been, or can, with the least degree of propriety, be called decrees, within the meaning of that word as used in the constitution. A decree may be either final or interlocutory; but in either case it is an adjudication upon the merits, and not an order in relation to some collateral matter."

The revised statutes do not specify what decrees or orders may be appealed from; and as the decisions upon the subject are conflicting; the question cannot be considered settled, except as respects orders which are merely initiatory. It is settled that no appeal lies from a mere initiatory order; as for instance, an order for an attachment to bring a party into court to answer for an alleged contempt;(q) or an order for the examination of one of several defendants as a witness, where all exceptions are reserved until the hearing;(r) or a temporary order of the court awarding an injunction.(s)

(q) McCredie v. Senior, 4 Paige, 378. Buel v. Street, 9 John. 443.

(r) Per Chancellor Walworth, 2 Wend. 239.

(s) Trustees of Huntington v. Nicoll, 3 John. 566.

Neither will an appeal lie from an order directing a sale of the property in litigation, and that the money be brought into court; such order not affecting the merits, and relating only to the preservation of the property.(t) Or from an order refusing a re-hearing of a motion for instructions to a master as to the examination of a witness.(u) And it seems that an appeal will not lie to the court for the correction of errors, in any case, from an order of the chancellor refusing a re-hearing; unless under very peculiar circumstances.(v)

But if an order for an attachment contains a final determination or adjudication, that the defendant is in contempt, he may appeal therefrom.(w) An appeal also lies from an order directing a suit to stand revived against the representatives of a deceased party, if the rights of the appellant are in any way affected by such revival of the suit.(x) So an order directing an issue is a proper subject of appeal.(y) And a refusal to grant an issue, in a proper case, when directly applied for, and where, in the exercise of a sound discretion, an issue should have been directed, is a good ground of appeal.(z) But the omission of the court below to award an issue, is not a ground of appeal if neither party asked for an issue on the hearing.(a)

In the case of *Beach v. The Fulton Bank*,(b) it was decided by the court for the correction of errors that an appeal will lie from an order refusing to open proofs in a cause, for the purpose of re-examining a witness who, since his examination, has disclosed facts material and pertinent to the issue, which he did not disclose when on examination. This decision was upon the ground that the order appealed from affected the merits of the cause.

An appeal does not lie to the chancellor to reverse an *ex parte* order of a vice chancellor which is merely irregular. The proper remedy of the party against whom such *ex parte* order has been made is to apply to the vice chancellor to vacate or modify it.(c) Nor will it lie from an order or decree refusing to displace an executor and to appoint a receiver in his stead;(d) or for a mere error in figures in carrying out a principle of apportionment, in the distribution of funds among creditors.(e)

(t) *Chapman v. Hammersley*, 4 Wend. 173. *McKim v. Thompson*, 1 Bland, 172.

(u) *Williamson v. Hyer*, 4 Wend. 170.

(v) *Id. ib.*

(w) *McCredie v. Senior*, *supra*.

(x) *Rogers v. Patterson*, 4 Paige, 450.

(y) *Drayton v. Logan*, *Harper's Eq. Rep.* 67.

(z) *Townsend v. Graves*, 3 Paige, 453.

(a) *Belknap v. Trimble*, *id.* 577. *Townsend v. Graves*, *supra*.

(b) 2 Wend. 225.

(c) *Gibson v. Martin*, 8 Paige, 481. *Rogers v. Hosack's ex'rs*, 18 Wend. 319.

(d) *Rogers v. Hosack's ex'rs*, 18 Wend. 319.

(e) *Id. ib.*

In the case of *Tripp v. Vincent*, (f) it was held that an appeal would lie to the chancellor from an order of a vice chancellor made subsequent to a final decree in a cause. An appeal will also lie to the court for the correction of errors from an order of the chancellor refusing to dissolve an injunction; (g) and from an order dissolving an injunction. (h) And in the case of *Hoyt v. Gelston*, (i) the supreme court was of opinion that an appeal would lie from a decision refusing to grant an injunction.

No appeal will lie from an order or decree entered by consent. (k) (4) And it is to be observed, that for this purpose, an order made at the hearing for the cause to stand over with liberty to the complainant to add parties, is considered as an order made by consent, and cannot be appealed from; for, in truth, the want of parties is, in its nature, a reason for dismissing the complainant's bill, and it was a matter of relaxation on the part of the court when it permitted the cause to stand over. If the complainant is dissatisfied with the opinion of the court, as to the want of parties, he should let the bill be dismissed and then appeal from the order of dismissal. (l) But this rule does not apply to cases in which, upon a demurrer for want of parties, the demurrer is allowed, with liberty to the complainant to amend. In such cases, the complainant, by acquiescing in the undertaking to amend, does not preclude his right of appeal. (m) And it seems that a party dissatisfied with a decree will not prejudice his right to appeal by consenting to an order consequential upon the decree. (n)

Neither will an appeal lie from a decree entered by default. (o) (5)

(f) 8 Paige, 176.

(g) *McVicar v. Wolcott*, 4 John. 510. *Lomax v. Picot*, 2 Rand. 247.

(h) *Simpson v. Hart*, 14 John. 65. *Martin v. Dwelly*, 6 Wend. 11.

(i) 13 John. 140.

(k) *Atkinson v. Manks*, 1 Cowen, 691. *Ringold's case*, 1 Bland, 5, 12. *Id.* 18, 270. 2 Dan. Ch. Pr. 617, and cases there cited. *Coster v. Clark*, in Chancery, May 17, 1842.

(l) *Beresford v. Adair*, 2 Cox, 156.

(m) *Ledbetter v. Long*, 4 My. & Craig, 286.

(n) *Wood v. Griffith*, 1 Mer. 35.

(o) *Kane v. Whittick*, 8 Wend. 219.

(4) Section 348 of the Code authorizes an appeal, upon the law, from a judgment, "in all cases." Whether or not this gives an appeal from a judgment entered by consent, has not, it seems, been decided by the courts. (See *Van Sant*, Eq. Pr. 655.) But it has been held that an appeal from an order entered by consent, or by default, is not authorized. (*Boyd v. Bigelow*, 14 How. Pr. 511.)

If the successful party fails to enter judgment, the other party, if he desires to appeal, may have an order requiring the former to enter judgment against him; and may appeal from the judgment entered pursuant to such an order. This is not an entry of judgment by consent. (*Skinner v. Quinn*, 43 N. Y. 99.)

(5) *Dorr v. Birge*, 8 Barb. 351; S. C. 5 How. Pr. 323; *Maltby v. Greene*, 1 Keyes, 548; *Pope v. Dinsmore*, 8 Ab. 429; S. C. 29 Barb. 367; *Jones v. Kip*, 1 Code Rep. 119; *Stewart v. Morton*, 8 Ab. 429, n. The defendant's remedy is to move, upon excuse, to have the default opened. (*Pope v. Dinsmore*, *supra*.) Yet where the court, at special term, makes upon default, an order which it has no authority to

But as respects decrees entered *pro confesso*, the rule is not quite so well settled. In *Rowley v. Van Benthuyzen*,^(p) the court for the correction of errors decided that an appeal would not lie from an order of the chancellor refusing to vacate an order that the bill be taken *pro confesso*, and that the defendant have leave to put in an answer.^(q)

In 1840 that court decided, in the case of *Murphy v. The American Life Insurance and Trust Company*,^(r) that a defendant in a bill of foreclosure, who suffers the bill to be taken *pro confesso*, and permits a decree of sale to be made out without opposition, is not entitled to prosecute an appeal.

But in 1841, the same court decided that an appeal would lie from a decretal order of the chancellor refusing to open the sale of mortgaged premises and grant a re-sale, on the application of the defendant, although he has permitted the bill to be taken *pro confesso* against him.^(s) But it is to be observed, that the appellant in that case, did not ask to set aside or vacate the decree, but only the sale.

SECTION II.

WHO MAY APPEAL.

A person having no interest in the subject matter of a suit, or whose interest has ceased since the commencement thereof, cannot bring an appeal.^(t) (6) And a mere interest in the costs gives no right of appeal in respect to any other matter.^(u)

(p) 16 Wend. 369.

(q) See, also, *Hoye v. Penn*, 1 Bland, 35. *Ringold's case*, id. 5, 12. *Shye v. Llewellyn*, id. 18. *McKim v. Thompson*, id. 270.

(r) 25 Wend. 249.

(s) *Tripp v. Cook*, 26 Wend. 243.

(t) *Reid v. Vanderheyden*, 5 Cowen, 719. *Idley v. Bowen*, 11 Wend. 238.

(u) *Id. ib.*

make, the party prejudiced may move, at special term, to set aside the order, for irregularity, or may appeal from the order to the general term. (*Wilkinson v. Tiffan*, 4 Ab. 98.) And the power of the court to grant an allowance to the plaintiff being limited to ten per cent. upon the amount of his recovery, an order awarding to the plaintiff a sum exceeding that amount, affects a substantial right of the defendant, and is therefore appealable, even though made upon a default. (*Id.*)

(6) The Code (§ 325) provides that any party *aggrieved* may appeal, in the cases prescribed in Title XI.

Any one of several parties, who is *aggrieved* by the judgment or order, or some part thereof, may appeal, whether his co-plaintiffs or co-defendants join in the appeal or not. (*Mattison v. Jones*, 9 How. Pr. 152; *Brown v. Richardson*, 4 Rob. 603.) Such appeal by one will not prevent the others from appealing. (*Brown v. Richardson*, *supra*.) Section 325 does not embrace strangers to the action, but

includes only a party to the record, or his representatives. (*Matter of Bristol*, 16 Ab. 397; *E. B. v. E. B. C.* 8 id. 44; S. C. 28 Barb. 299; *Martin v. Kanouse*, 2 Ab. 390; *Beach v. Raymond*, 3 id. 78.) Hence, although a stranger may apply to be relieved from proceedings in an action, yet on the denial of his application, he cannot appeal therefrom. (*Matter of Bristol*, *supra*; *E. B. v. E. B. C.* *supra*.) But a devisee or legatee, although not a party to proceedings before the surrogate, may appeal from a decree made by him, without even obtaining leave of the court. (*Lewis v. Jones*, 50 Barb. 645. See *Parish v. Parish*, 42 Barb. 274; *Sherman's Appeal*, 16 Ab. 397 n.; *DeLafield v. Parish*, 25 N. Y. 9.) So an attorney for a married woman, in an action against her by the husband, may appeal from an order of discontinuance, &c., when his fees and disbursements are not provided for. (*McKenzie v. Rhoads*, 13 Ab. 337.) And a purchaser at a foreclosure sale may appeal from an order setting the sale aside. (*Mortimer v. Nash*, 17 Ab. 229 n. See *Matter of Cavanagh*, 14 id. 208; S. C. 37 Barb. 22; 23 How. 358.) A wife, who is a necessary party to a foreclosure suit, and whose individual right of dower may be affected by the decree, has such an interest as to authorize an appeal by her. (*Kiefer v. Winkens*, 39 How. 176.) It has been held that the words "party aggrieved," in section 325, must be taken in a sense comprehensive enough to embrace the representatives of a deceased party to the suit. (*Beach v. Gregory*, 11 Ab. 203, 209; S. C. 1 Hilt. 201.) The same view should be applied to the words "party appealing," in section 332. (Id.) And an administrator, before he can appeal, should cause himself to be made a party, for that purpose. The plaintiff, on the other hand, wishing to proceed by notice, to limit the right of appeal, should cause the administrator to be made a party, under section 121. (Id.)

In an appeal from a judgment against several defendants on their joint answer, as being frivolous, all may join, if it be sufficient as respects some of them. (*Bank of Cooperstown v. Corlies*, 1 Ab., N. S. 412.)

In case of the death of a party after judgment, his representatives may appeal. (*Martin v. Kanouse*, 2 Ab. 390; *Beach v. Gregory*, id. 203; S. C. 1 Hilt. 201; 3 Ab. 78.) Where a party dies after the return is filed in the court of appeals, the court, having obtained jurisdiction, has the power to allow his legal representatives to be substituted. (*Hastings v. McKinley*, 8 How. Pr. 175.)

In general, a party in whose favor a judgment is rendered cannot be said to be aggrieved by it, and therefore cannot apply to reverse it. (*Fairbanks v. Corlies*, 1 Ab. 155.) But this rule is not universally applicable; especially in equity cases, where it has always been the practice to allow an appeal from a part of a decree, where the residue thereof was favorable to the party appealing; and section 327 of the Code clearly recognizes the same practice. (Van Sant. Eq. Pr. 653; 1 Monell Pr. 737.) And a party who has judgments for less than he is entitled to is aggrieved, and may appeal. (*Rankin v. Pine*, 4 Ab. 309.)

A voluntary abandonment or dismissal of one appeal has been held, by the court of appeals, to be no bar to a further appeal, by the same party, within the time prescribed by statute. (*Craft v. Ives*, cited Voorhies' Code, 6th ed. 461, n.)

An appeal may be brought by the *people of the state*, or any *state officer* or *board of state officers*, from any judgment or order against them, in any court, without any undertaking or security whatever; and such appeals shall operate as a stay of proceedings on the judgment or order appealed from. (Laws of 1861, ch. 288, § 2.)

The statute authorizing prosecutions *in forma pauperis* does not include appeals, and a pauper cannot appeal as such. (*Ostrander v. Harper*, 14 How. Pr. 16. See, also, *McDonald v. Bank for Savings*, 2 How. Pr. 35; *Bolton v. Gardner*, 3 Paige 273; *Moore v. Cooley*, 2 Hill, 412.)

One who has waived his right to appeal cannot do so. A positive waiver of the right to appeal, by a stipulation between the parties, before judgment, in the subordinate courts, will be enforced in the appellate court, and the appeal dismissed. (*Townsend v. Masterson, &c.*, *Stone Dressing Co.* 15 N. Y. 587.)

A state bank, which has been converted into a national bank, under chapter 97 of the Laws of 1865, can take an appeal from a judgment against it, in its name as a state bank, if it be taken within three years. And it will be deemed to continue in existence as a state bank until the termination of such appeal. (*Claffin v. Farmers' & Citizens' Bank of Long Island*, 54 Barb. 228.) Under section 121 of the Code, a receiver appointed upon the failure of the national bank, into which such state bank was converted, would have the right to take and prosecute such appeal; since, in case the judgment was reversed, he would have the benefit of it as receiver. (Id.)

No one can appeal from an order or decree who is not injured thereby; and even

Neither can a person bring an appeal, in general, unless he was, or represents, a party in the matter in the court below; although he may have an interest in the question.(v)

Yet, it is not necessary that the person who appeals should be actually a party to the record; provided he has an interest in the question which may be affected by the decree or order appealed from. Even creditors coming in before the master under a decree, have been held entitled to appeal, although not parties to the bill, because the decree affected their interest.(w) In *Hungerford's case*,(x) the creditors complained that the property had not been applied as it ought; and it was objected that they could not come in under the decree and impeach it; but it was answered that they might, for if the decree contained in itself a wrong disposition of the property, they, coming in as creditors, had a right to appeal, because the decree bound their rights. In *Osborne v. Usher*,(y) the same principle is admitted; and it has been held that if the right of a remainderman, or of any person entitled to the estate, in any way, is bound by the decree, he must have a right to appeal from it, as well as the person against whom it was made.(z) Upon this ground it has been determined that a tenant in tail in remainder expectant, after the determination of a prior estate tail (who would not be a necessary party to a suit affecting the entailed estate, against the prior tenant in tail,) has a right to appeal against the decree in that suit; and that he may file a supplemental bill for the purpose of making himself a party to the suit, in order to appeal from it.(a)

It has also been determined that a purchaser under a decree, although not a party to the suit, may appeal from an order setting aside a bidding and ordering a new sale before the master.(b) And a creditor coming in before a master and having a claim disallowed on exceptions to the report, may appeal from the order disallowing the exceptions.(c)

(v) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, (New Series,) 17. *Palmer on Appeals*, 6. *Steele v. White*, 2 Paige, 478.

(w) *Gifford v. Hort*, 1 Sch. & Lef. 409.

(x) Cited *id. ib.*

(y) 6 Bro. C. C. 20.

(z) *Gifford v. Hort*, *supra*.

(a) *Id.* 411.

(b) *Ryder v. Earl Gower*, 6 Bro. P. C. 306.

(c) *Winchelsea v. Garretty*, 1 My. & Keen, 253.

a party who is aggrieved by one branch of a decree does not thereby acquire a right to call in question another portion of the decree which has no bearing or effect upon his rights or interests. (*Hackley v. Hope*, 4 Keyes, 123.) Thus, a plaintiff in an action for the settlement of partnership accounts and the division of the assets, who, after its commencement, has released all his interest therein to one of the defendants, has no right to appeal from a judgment dividing the funds between the defendants, which does not prejudice him, although it may be wrong as to the other parties. (*Id.*)

But an appeal cannot be sustained by a person who is not interested in the subject matter. Although there may have been an interest when the suit was commenced, if such interest is terminated during its progress, his right to interfere further in the litigation is at an end.(d) Therefore, when a party has released all his interest in the suit, he has no right to appeal from an order made therein which cannot prejudice him, although it may be wrong as against other parties.(e) Accordingly, where a party against whom a decree has been made, sells his right to the subject matter of the suit, an appeal from such decree in the name of such party cannot be sustained. But if the purchaser is entitled to appeal, he must make himself a party to the suit, and bring the appeal in his own name.(f) And it seems that after a decree against the right of a party has been made, such party cannot dispose of his claim to another, so as to give the latter a right to appeal from the decree.(g)

No person can appeal from a decree or order unless he is injured or aggrieved by it. And a party who is aggrieved by one part of a decree only, cannot, by appeal, call in question another part of the decree in which he is not interested, although the appeal is broad enough to embrace it.(h)

But it is not necessary a party should have appeared in the court below to entitle him to appeal. Thus it has been held that a party who is aggrieved by an erroneous decree or order of a vice chancellor, may appeal therefrom to the chancellor, although he did not appear to argue the case before the vice chancellor—unless the order or decree appealed from is irregularly obtained, so that it can be set aside on that ground, upon a proper application for that purpose.(hh)

It is to be observed, that it is only in cases in which the interest of the party wishing to appeal *will be bound by it*, that an appeal will be permitted at the instance of a party not on the record. In no other case can he have ground to complain of the decree or order.(i)

Any one of several against whom a decree is rendered, may appeal from it.(k)

An appeal cannot be prosecuted by the appellant *in forma pauperis*, but he must give security for costs. And if he succeeds, he may have

(d) *Idley v. Bowen*, 11 Wend. 238.

(e) *Steele v. White*, 2 Paige, 478. *Hackley v. Pope*, 4 Keyes, 123.

(f) *Mills v. Hoag*, 7 Paige, 18.

(g) *Id. ib.*

(h) *Cayler v. Moreland*, 6 Paige, 273. *Idley v. Bowen*, 11 Wend. 227. *Hone v. Van Schaick*, 7 Paige, 221. *Hackley v. Hope*, 4 Keyes, 123.

(hh) *Hyslop v. Powers*, 9 Paige, 322.

(i) *Winchelsea v. Garrett*, 1 My. & Keen, 253.

(k) *Johnson v. Johnson's heirs*, 1 Dana, 366.

dives costs on the appeal, although he sued as a poor person in the court below.(l)

SECTION III.

EVIDENCE UPON APPEAL.

Appellate courts which proceed according to the course of the civil law, may allow the parties to introduce new allegations or further proofs. Such is the settled practice of the ecclesiastical courts in England, and of the admiralty courts in this country.(7) But from the organization of the court for the correction of errors in this state, it is doubtful whether any such right exists on appeals from the sentences or decrees of the court of chancery in testamentary causes.(m) In those courts where the right does exist, it is not a matter of course to receive further proofs upon an appeal.(n) If the appellant wishes to offer new evidence, he should, in his petition of appeal, ask leave to produce further proofs, and state his excuse for not producing such evidence in the court below.(o)

On an appeal however, from the decree of a vice chancellor, the cause is not before the chancellor in the nature of a re-hearing, but is an appeal, strictly; and on such appeal, no other evidence or pleading can be received or read than that which was read upon the hearing before the vice chancellor.(p) And the rule is the same in the court for the correction of errors with respect to appeals from the chancellor.(q) Yet if the decree of a vice chancellor is reversed on appeal to the chancellor, it seems the chancellor may, in his discretion, allow the respondent to introduce new testimony as to facts discovered subsequently to the hearing before the vice chancellor, before he proceeds to make a final decree upon such appeal.(r) (8)

(l) *Bolton v. Gardner*, 3 Paige, 273.

(m) *Scribner v. Williams*, 1 Paige, 550.

(n) *Id. ib.*

(o) *Id. ib.*

(p) *Mitchell v. Lenox*, 14 Wend. 662. *Wendell v. Lewis*, 6 Paige, 233. *Studwell v. Palmer*, 5 id. 166. *Bloodgood v. Clark*, 4 id. 574.

(q) *Deas v. Thorne*, 3 John. 543.

(r) *Wendell v. Lewis*, *supra*.

(7) This rule, it has been held, is applicable to the present practice, in cases of appeal from a surrogate to the supreme court, (*matter of Carjolle's appeal*, 9 Ab. 893.) Upon such an appeal, from a final decree, the supreme court may receive newly discovered evidence in addition to the evidence which was before the surrogate. (*Id.*)

(8) After argument of a case on appeal from a judgment rendered by a referee, leave will not be given to a party, on motion, to introduce, as part of the case on the

When the case of *Mitchell v. Lenox*, just referred to, was heard before the chancellor, previous to its going to the court of errors, he suggested that where the newly discovered testimony was in favor of the respondent, the proper course probably would be to hear the appeal upon the original testimony; and if the decision of the court below was found to be erroneous, and was reversed on that ground, to ask the appellate court, instead of proceeding to make a final decree, to remit the cause to the vice chancellor, with permission to the respondents to open the rule for closing the proofs, so that the newly discovered evidence could be introduced before a final decree was made; or, that after the reversal of the decree by the chancellor, the cause should be retained before him with a similar permission.^(s)

Where a question arises upon the hearing of the appeal, as to what papers were before the court below, if such papers are not referred to in the order or decree appealed from, resort must be had to the minutes of the clerk, and to the papers marked by him as read, to ascertain what papers were read or used before the vice chancellor.^(t) And when a party opposing a motion or petition has papers to read in opposition thereto, and the application is decided in his favor upon the opening of the case, on the papers of the adverse party, if he desires to have the benefit of his papers in opposition to the application, upon appeal, he should have such papers entered in the minutes of the court below and marked as read.^(u)

It is the duty of the clerk, upon the hearing of a cause before the vice chancellor, to enter in his minutes all the papers read, or which are agreed to be considered as read, or which are offered in evidence and overruled by the court. And a certified copy of the clerk's minutes is the proper evidence of those facts, upon the hearing of an appeal to the chancellor. If the clerk, by mistake, neglects to enter in his minutes any paper which was read, or considered as marked and read, before the vice chancellor, the proper course is to apply to the court below to correct the minutes.^(v)

The party whose duty it is to furnish the papers on the hearing of

^(s) See 6 Paige, 235.

^(t) *Bloodgood v. Clark*, *supra*.

^(u) *Id. ib.*

^(v) *Studwell v. Palmer*, 5 Paige, 166.

appeal, exemplified, or other copies of proceedings on which a warrant of attachment was issued; where the paper was in existence, and known to be so, by the counsel for the applicant, at the time of the trial before the referee, and in the exercise of his discretion. he refused to produce them. (*Onderdonk v. Voorhis*, 2 Rob. 623.)

an appeal should be prepared with the proper evidence to show what papers were read before the vice chancellor, and, if required, to show that the papers furnished by him are correct copies.(w)

Depositions read on the hearing in the court below, without objection, cannot be rejected in the appellate court.(x)

SECTION IV.

EFFECT OF APPEAL.

What questions are brought up by it.] An appeal from the final decree only, does not bring before the appellate court, for review, a question which has been definitively adjudicated and disposed of by an interlocutory decree or order previous to such final decree.(y) (9) So

(w) *Id. ib.*

(x) *Johnson v. Rankin*, 3 Bibb, 87. *Pillow v. Shannon*, 3 Yerg. 508. *Respass v. Morton*, Hardin, 226.

(y) *Mapes v. Coffin*, 5 Paige, 296. *Ballit's heirs v. Thorp*, 1 A. K. Marsh, 604. *Kane v. Whittick*, 8 Wend. 219.

(9) Upon an appeal from a judgment, the court may review any interlocutory order, involving the merits, and necessarily affecting the judgment. (Code, § 329.)

The court of appeals has exclusive jurisdiction to review, upon appeal from a final order affecting a substantial right, made at a general term of the supreme court, in a special proceeding, or upon a summary application in an action, after judgment, any intermediate order involving the merits and necessarily affecting the order appealed from. (Code, § 11, sub. 3.)

An unrestricted appeal takes along with it the whole merits of the determination appealed from. (*Matter of Livingston*, 32 How. 20, 46; S. C. 34 N. Y. 555; 2 Ab., N. S. 3; *Bates v. Voorhees*, 20 N. Y. 525.) An order removing a trustee is appealable, and upon such appeal, the court of appeals will examine the affidavits and evidence, and the whole merits of the case. (*Matter of Livingston, supra.*)

On an appeal from a judgment, only, the appellate court will not enter into a consideration of the evidence, in order to determine the correctness of the verdict (*Bedell v. Commercial Ins. Co.* 3 Bosw. 147.)

The general provision of section 329, authorizing the court, upon an appeal from a judgment to review any intermediate order, embraces an order refusing a new trial. (*Prunpelly v. Village of Owego*, 22 How. 385; S. C. 13 Ab. 389; Aff'd, 26 How. 602; *Coyle v. City of Brooklyn*, 53 Barb. 41, 62, per GILBERT, J. See *Lane v. Bailey*, 1 Ab., N. S. 407; S. C. 45 Barb. 119; 30 How. 76.) Where an appeal is taken from a judgment, and there has also been an appeal from an order denying a new trial, it is the better course to hear both appeals together. (*Lane v. Bailey, supra.*)

On an appeal from a final judgment, an order of the court below, striking out a part of a pleading may be reviewed. (*Cowles v. Cowles*, 9 How. Pr. 361.)

On an appeal to the court of appeals from a final judgment, an order denying a motion to stay the trial of the cause until the decision of another cause is not reviewable, because it does not involve the merits. (*James v. Chalmers*, 6 N. Y. 209; S. C. 1 Code Rep., N. S. 413.) And upon an appeal to the court of appeals, an order made at a special term, or by a judge at chambers, cannot be reviewed unless

it has been reviewed at general term. (*Kanouse v. Martin*, 6 How. Pr. 240; S. C. 1 Code Rep., N. S. 385; *Lake v. Gilson*, 2 N. Y. 188; S. C. 3 How. Pr. 420; *Wiley v. Phillips*, 1 N. Y. 610; S. C. 1 Code Rep. 111; *Grover v. Coon*, 1 N. Y. 533; *Gracie v. Freeland*, id. 228; S. C. 3 How. Pr. 218.)

It is said by Mr. Van Santvoord, (Eq. Pr. 665, 657, 658,) that section 329 does not allow, on an appeal from the judgment, an indiscriminate review of all interlocutory orders, even such as may be said, in some sense, to "involve the merits." The orders which may be so reviewed must be also orders "*necessarily affecting the judgment*;" and also decisions and orders which are not a part of, or "included in" the judgment, according to the definition of an order given in section 400 of the Code.

The order from which an appeal is allowed by section 349, when it "involves the merits of the action, or some part thereof, or affects a substantial right," must be something different from a decision during the actual progress of the trial, disposing of some claim made by either party affecting the relief to be granted, and something other than a conclusion of law included in the decision on which the judgment, in whole or in part, is to be entered. (*Lawrence v. Farmers' Loan and Trust Co.* 15 How. Pr. 60, per Bosworth, J.) The interlocutory decision, therefore, to be embraced in, and to become a part of, the final judgment, can be reviewed only on appeal from the judgment. And on the same principle, the order founded on such decision must be reviewed in the same way, and is not directly appealable as an order; except, perhaps, for the purpose of reviewing the competency of the court to make the order. (Id. p. 62.)

The superior court of New York has decided that on an appeal to the general term of that court from a judgment, the court will not review an order made at a special term, denying a motion for a new trial. That such an order can only be reviewed on an appeal from the order itself. (*Marquat v. La Farge*, 5 Duer, 559; *Brown v. Richardson*, 1 Bosw. 402. And see *Fry v. Bennett*, 16 How. Pr. 385.)

But where the order *necessarily affects the judgment*, that is, where the erroneous judgment is, in whole or in part, the result of the erroneous order, the latter may be reviewed on an appeal from the judgment; as, for example, in case of an order overruling a demurrer as frivolous, or an order striking out a pleading as sham or irrelevant, and the like. (Van Sant. Eq. Pr. 666; *Cowles v. Cowles*, 9 How. Pr. 361.)

On an appeal from a judgment of the special term, the general term cannot review the question whether an order of arrest was properly granted. (*Ross v. Wert*, 2 Bosw. 360.)

It is not the policy of the Code, in respect to appeals to the court of appeals, to allow a review of intermediate orders, unless they are such as in effect terminate the action, and prevent a judgment from which an appeal would lie; or unless upon appeal; from a final judgment. (*Humphrey v. Chamberlain*, 11 N. Y. 274, 276.)

A party cannot take advantage of his own negligence in permitting the introduction of improper or incompetent evidence, to reverse a judgment rendered against him, thereon. (*Monk v. Union Mutual Life Ins. Co.* 6 Rob. 455.)

An appeal from a judgment does not bring up for review an order of reference made at a special term. If erroneous, an appeal should be taken directly from the order. (*Terry v. McNiel*, 58 Barb. 241.)

If the complaint, in an action for negligence, is dismissed on the sole ground that the defendant is not liable, as matter of law, and the question of contributory negligence, on the part of the plaintiff, is not passed upon, it will not be inquired into by the appellate court. (*Kimmel v. Burfeind*, 2 Daly, 155.)

Where a finding by the court adversely to a fact claimed by the unsuccessful party is necessary to support the judgment, and the evidence warrants it, such adverse finding will be presumed. (*Whittaker v. Chapman*, 3 Lans. 155.) But the appellate court cannot presume that a fact necessary to sustain the judgment was found by the referee, if the case expressly shows that it was not found. (*Fuller v. Rowe*, 59 Barb. 344.)

Where the court overrules exceptions to the report of a referee, to whom it was referred to state an account, &c., and renders judgment accordingly, upon appeal from the judgment, the court will not review such order, unless there are exceptions to conclusions of law. (*Russell v. Dufton*, 4 Lans. 399.)

Questions as to the amount of damages are not reviewable in the court of appeals; but only the question whether any, or more than nominal damages are recoverable. (*Ihl v. Forty Second street, &c.*, R. R. Co. 47 N. Y. 317.)

upon an appeal from an order carrying into effect a previous interlocutory order which has not been appealed from, the appellant is not entitled to have the order appealed from, reversed, upon the ground that the previous order, not appealed from by him, was erroneous.^(z)

But where the decree to be pronounced in the appellate court upon the matters appropriately brought up upon the appeal, requires the modification of some previous order to make it consistent with such decree, such order may be modified accordingly. That principle, however, applies only to cases where the different orders or decrees are so blended together that the decisions upon the one appealed from, necessarily involves the consideration of the other.^(a) And it has been held that no such necessary connection exists between a decree confirming a master's report upon a reference, and the previous order directing the reference and settling the principles upon which it is to be conducted.^(b)

The opinion of the court in the case of *Atkinson v. Manks*,^(c) seems to have been misunderstood by the reporter, or he would not have stated in the head note of that case, as one of the points decided, that "an appeal from the final decree necessarily opens for consideration all prior orders or decrees any way connected with the final decree." It appears from the statement of facts,^(d) that there *was* an appeal in that case not only from the final decree, but from the original decree also; so that the question as to the effect of an appeal from the final decree in bringing up prior interlocutory orders or decrees could not have arisen. The opinion of the court in that case, it should also be observed, which was delivered by Judge Sutherland, was subsequently explained by himself, in the case of *Whittick v. Kane*, before referred to, as having a different import from that conveyed by the report in *1st Cowen*.

And in the *Bank of Orange County v. Fink*,^(e) the chancellor came to the conclusion that on an appeal from a final decree, the merits of an interlocutory decree previously made in the same suit cannot be inquired into; especially where the time for appealing from the interlocutory decree has expired. The point was not exactly decided, however, as the case was disposed of upon another ground.

But the chancellor's opinion in that case, undoubtedly expresses the true rule. He observes: "The statute, for reasons which are perfectly

^(z) *Copons v. Kauffman*, 8 Paige, 583.

^(a) Per Sutherland, J. in *Kane v. Whittick*, 8 Wend. 235, 232.

^(b) *Id. ib.*

^(c) 1 Cowen, 691.

^(d) *Id.* 697.

^(e) 7 Paige, 87.

obvious, has limited the right of appeal from interlocutory orders and decrees to fifteen days. It is evident however, that this statutory limitation is a mere nullity if an appeal from the final decree in the cause necessarily brings up for review before the appellate court, every interlocutory order made in the course of a long litigation, which has had any effect whatever in producing the final result. It is a general rule that upon an appeal from any order or decree of the inferior tribunal, the appellate court is to make such a decree as the court below ought to have made when the decree or order appealed from was entered. Where the court below, therefore, upon the papers before it at the final hearing, is authorized to go back and correct an erroneous proceeding connected with the matter then under consideration, the appellate court may itself go back and correct such error; if the court below was called on by the appellant to make the correction but neglected to do so. But if the situation of the cause was such, at the final hearing, that the court below could not, upon the papers then before it, and according to the settled course of proceeding, go back for the purpose of looking into the alleged error in a previous order or decree, it would be a violation of all principle for the appellate court to reverse the final decree because the court below, at the time of making such decree, had not done what it had then no power to do."

Where a cause is brought to a hearing before a vice chancellor, upon pleadings and proofs, and there is an appeal from the whole decree or decretal order made on such hearing, the cause is before the chancellor until the decision upon the appeal; and an application to appoint a receiver may be made to the chancellor. It is otherwise, however, where there is an appeal from the decision of a vice chancellor, as to a collateral matter not embracing the whole cause (*f*)

An appeal from a decretal order consequent upon a final decree, will not authorize the appellate court to reverse or alter the final decree. (*g*)

The appellate court will decide on those parts only of the decree of the court below which are complained of in the petition or notice of appeal. (*h*)

Appeal from part of a decree.] A party cannot be allowed to appeal *piece-meal*, i. e. he cannot appeal from part of a decree at one time and afterwards appeal from another part. The rule is, that if a party appeals from a part of the decree, he admits the remainder to be correct. (*i*)

(*f*) *Jenkins v. Hinman*, 5 Paige, 309.

(*g*) *Taylor v. Read*, 4 Paige, 561.

(*h*) *Sands v. Codwise*, 5 John. 531.

(*i*) *Norbury v. Meade*, 3 Bligh, 261.

Appeal when a stay of proceedings.—1st. *Appeals to the court for the correction of errors.*] (10) The statute declares that an appeal to

(10) APPEAL TO COURT OF APPEALS; WHEN A STAY OF PROCEEDINGS.

The Code (§ 334), directs that to render an appeal effectual *for any purpose*, security for the payment of costs and damages to an amount not exceeding \$500, shall be given by the appellant.

Other sections direct as to the security which shall be given, in order to render the appeal a *stay of proceedings* on the judgment. See Code, sections 335, 336, 338, 339, 340, 341, 343, and the notes to those sections, in this chapter.

Section 337 provides that, if the order appealed from directs the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal, until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

Section 342 directs that, in the cases not provided for in sections 335, 336, 337, 338 and 339, the perfecting of an appeal, by giving the undertaking mentioned in § 334, shall stay proceedings in the court below, upon the judgment appealed from, except that, where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

Perfecting an appeal under § 334 from a judgment awarding a peremptory mandamus, stays the issuing of the mandamus, and all proceedings in the court below on the judgment. (*People ex rel. Thomas v. Com'rs of Highways of Milton*, 25 How. 257.) Therefore a peremptory mandamus, issued after the appeal is so perfected, will be set aside for irregularity. (*Id.*)

Where the judgment directs the delivery of personal property which will depreciate by time and use, and, on appeal, the appellant gives the undertaking mentioned in § 336, this will not stay proceedings, unless the respondent be also indemnified for the use and the depreciation of the property, in case the judgment appealed from shall be finally affirmed. (*Read v. Potter*, 11 Ab. 413.)

Where the judgment appealed from awards a perpetual injunction, and the appeal is perfected by giving the security required by § 334, the proceedings in pursuance of the injunction order are stayed. But the injunction itself is not vacated; and the party who proceeds to do the acts which the injunction is designed to restrain does so at the risk of being punished if the judgment is affirmed. (*Hove v. Searing*, 6 Bosw. 684.)

Appeals brought by the *people of the state*, or any *state officer or board of state officers*, from any judgment or order against them, in any court, without any undertaking or security whatever, shall operate as a stay of proceedings on the judgment or order appealed from. (Laws of 1861, ch. 288, § 2.)

All appeals by *municipal corporations* from the judgment or decree of any court of this state, shall be valid to stay proceedings on such judgment or decree, without security or undertaking being given, unless the court in which the judgment or decree is rendered shall otherwise direct. And in such case, an undertaking, executed in their official capacity, by either the mayor, comptroller or counsel to the corporation in the name and behalf of said corporation, shall be valid for the purpose of such appeal, and shall bind said corporation to the performance of the conditions of said undertaking. (Laws of 1859, ch. 662, § 1.)

It seems, that the giving of the required undertaking, on appeal to the court of appeals, from an order granting a new trial, does not stay the proceedings in the court below. A motion in the court below is necessary. (*McMahon v. Allen*, 22 How. Pr. 193; S. C. 13 Ab. 126.) And so of an order *denying* a motion for a new trial. (*Valton v. National Loan Fund Life Assurance Society*, 19 How. Pr. 515.)

An undertaking may be sufficient to accomplish the purpose of sustaining the appeal without effecting a stay of proceedings on the judgment. (*Coit v. Crane*, 1 Barb. Ch. R. 21.) The appeal will be effectual if the justification states that the sureties are worth double the amount of the judgment; but it will not be sufficient to stay proceedings, unless the sureties also justify in double the amount specified in § 334, relative to costs and damages. (*Hopnock v. Cottrell*, 13 How. Pr. 461; *Newton v. Harris*, 1 Code Rep., N. S. 191; S. C. 8 Barb. 306.)

Objections that the undertaking is insufficient to stay proceedings will be deemed waived by the silence of the respondent. (*Halsey v. Flint*, 15 Ab. 867.)

the court for the correction of errors shall not be effectual *for any purpose*, until the bond for costs required by the revised statutes shall be given.^(k)

The statute also declares that if the appeal be made from an order or decree directing the payment of money, such appeal shall not stay proceedings unless a bond be given by or on behalf of the appellant, to the adverse party, in a penalty at least double the sum decreed to be paid, with two sufficient sureties, conditioned that if the appellant shall fail to prosecute his appeal, or if the same be dismissed or discontinued, or if the decree appealed from, or any part thereof, be affirmed; then that such appellant will pay the amount directed to be paid by such decree, or the part of such amount as to which the decree shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant by the court for the correction of errors, upon the appeal.^(l)

If the decree appealed from directs the assignment or delivery of any securities, evidences of debt, documents, chattels, or things in action, the issuing and execution of process to enforce such decree will not be stayed by such appeal, unless the articles required to be assigned or delivered, be brought into court, or placed in the custody of such officers or receivers as the court shall appoint; or unless a bond in a penalty at least double the value of such articles, be given to the adverse party, with two sufficient sureties, conditioned that the appellant will abide and obey the order of the court of errors.^(m)

If the decree appealed from direct the execution of any conveyance or other instrument by any party, proceedings under it will not be stayed by the appeal until the appellant shall have executed the con-

(k) 2 R. S. 605, § 80.

(l) Id. ib. § 82.

(m) Id. 606, § 83.

An appeal from a decision of the general term affirming an order of the special term, overruling a demurrer to the complaint, although it be accompanied by the undertaking prescribed by § 334 of the Code, does not stay the proceedings on the part of the plaintiff. (*Ford v. David*, 3 Ab. 385.) So, where the defendant appealed to the court of appeals from a decision of the general term of the common pleas, affirming an order denying his motion to vacate a judgment, and filed an undertaking in the sum of \$250, for costs and damages, it was held that the appeal was not, *per se*, a stay of proceedings; that it was in the discretion of the court to grant a stay, in such a case. (*Tiers v. Carnahan*, 3 Ab. 69.)

And in all cases, where an undertaking is given under section 334, a motion to the court below is necessary, to effect the desired stay of proceedings. (*McMahon v. Allen*, 22 How. Pr. 193; S. C. 13 Ab. 126; *Valton v. National Loan Fund Life Assurance Society*, 19 How. Pr. 515; *Tiers v. Carnahan*, 3 Ab. 69.)

An appeal, taken by one of the parties to a suit, from a judgment between the other parties, which does not in any way affect his interests, cannot operate to stay execution upon the judgment, even though he gave the undertaking required by statute, to stay execution. (*Hackley v. Hope*, 4 Keyes, 123.)

veyance or instrument directed, and deposited the same with the register or assistant register, to abide the final order and decree of the court for the correction of errors.⁽ⁿ⁾

If the decree or order direct the sale, or the delivery of the possession of any real property, the issuing and execution of process to enforce the same shall not be stayed until a bond is given conditioned that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon; and that in case the appeal be dismissed or discontinued, or the order or decree be affirmed, the appellant will pay the value of the use and occupation of the property from the time of such appeal until the delivery of the possession thereof pursuant to such order or decree.^(o)

The chancellor has decided, under this section, that where the respondent has the legal estate in the lands decreed to be sold, and is in the possession thereof, and in the receipt of the rents and profits, it is not necessary for the appellant to give security for the payment of such rents and profits, or against waste.^(p)

Whenever, in the foregoing cases, an appeal shall be perfected by bringing into court, or depositing, pursuant to its order, any articles required to be so deposited, or any instrument required to be executed, or by giving of a bond as prescribed, such appeal shall stay all further proceedings in the court of chancery, upon the order or decree appealed from, and upon the subject matter embraced in such order or decree, but shall not prevent the court from proceeding upon any other matter included in the bill and not affected by such order or decree.^(q)

The 87th section of the statute further provides, that if an appeal be made from an *interlocutory order* of this court, in a cause brought either for the payment of any sum of money, or to compel the delivery or assignment of any securities, evidences of debt, &c., or to compel the execution of any conveyance or other instrument, or in causes in which a decree may be made for the delivery of the possession, or for the sale of any real property; this court may, in its discretion, require the doing of such other acts and things by the appellant as in similar cases are required to be done by him to stay the execution of a final decree, on an appeal therefrom. And until such acts or things so required to be done shall be performed, an appeal from an interlocutory order shall not stay any proceedings thereon.

In all other cases not provided for by the sections of the statute

(n) 2 R. S. 606, § 84.

(o) Id. ib. § 85.

(p) Quackenbush v. Leonard, 10 Paige, 131.

(q) 2 R. S. 607, § 86.

above referred to, the filing and perfecting an appeal by giving bond for payment of costs, shall stay all proceedings in the court of chancery, upon the order or decree appealed from, and upon the subject matter thereof, except, 1. Where the order directs the sale of perishable property, such property may be sold by a special order of the court, after the making of such appeal, and the proceeds thereof be brought into court; 2. When the order appealed from is interlocutory, either party may proceed at his own expense, under the direction of the court, upon proper cause shown, to take testimony in the cause conditionally, to be used thereafter, in the same cases in which testimony thus taken in an action at law may be used; or 3. When the order is for the commitment of any person for a contempt, or for the purpose of enforcing the rights or remedies of any party, proceedings on such order shall be had notwithstanding such appeal, or the same shall be stayed as the court may direct, on such terms as it shall think proper to impose.^(r)

It has been decided by the court for the correction of errors, that a decree of the court of chancery appointing a receiver, on the petition of the stockholders of an insurance company, is equivalent to an order for the assignment and delivery of the securities, evidences of debt, &c., of such corporation; and that to stay the execution of such a decree, for the purpose of prosecuting an appeal, the party against whom the decree is made must bring the property into court, or execute a bond to the opposite party, with two sufficient sureties, in a penalty at least double the value of the property, conditioned to abide the order of the court of errors. And that a bond conditioned only for the prosecution of the appeal, and for the payment of the costs and damages that may be awarded against the appellant, is not enough to stay the issuing or execution of process to enforce the decree.^(s)

The act of May 2d, 1839, repealing the act to regulate the trial by jury, &c., contains a provision that an appeal from any decision or order made by the chancellor, either in awarding or refusing an issue, shall not stay proceedings in the cause pending the appeal, unless specially directed by the chancellor.^(t)

2d. *Appeals to the chancellor from a vice chancellor—when a stay of proceedings.*](11) The revised statutes contain a provision that the

(r) 2 R. S. 607, § 89.

(s) *Sea Ins. Co. v. Ward*, 20 Wend. 588.

(t) *Laws of N. Y. 1839*, p. 292, § 3.

(11.) APPEAL TO GENERAL TERM, &C., WHEN A STAY OF PROCEEDINGS.

By the Code, an appeal to the general term of the supreme court, the superior court of the city of New York, or the court of common pleas of the city and county of New York, does not stay the proceedings, unless security be given as upon an

appeal to the court of appeals, and such security be renewed as in cases required by section 335, [i. e., when the sureties have become insolvent,] on motion to the court at special term, or unless the court, or a judge thereof, so order; which order may be made upon such terms, as to security or otherwise, as may be just; such security not to exceed the amount required on an appeal to the court of appeals. (Code, § 348.)

The appeal may be taken from the judgment, to the general term, without giving any security whatever. (*Parsons v. Suydam*, 4 Ab. 134; *Boyd v. Bigelow*, 14 How. Pr. 511; *Van Sant. Eq. Pr.* 660; *Niles v. Battershall*, 26 How. 93; S. C. 13 Ab. 161; 27 How. 381; *Genter v. Fields*, 1 Keyes, 483; *Halsey v. Flint*, 15 Ab. 367; *Kitching v. Dohl*, 40 Barb. 433; *Ten Broeck v. Hudson River R. R. Co.* 7 How. Pr. 137.) But in order to make the appeal effectual as a stay of proceedings, the appellant must either give the security or obtain an order for a stay, from the court or a judge. (*Staring v. Jones*, 13 How. Pr. 423; *Arnoux v. Homans*, 32 id. 382; *Niles v. Battershall*, 26 How. 93; S. C. 13 Ab. 161; 27 How. 381; 2 Rob. 146; *Smith v. Heermance*, 18 How. Pr. 261.) And an appeal to the general term from an order does not operate, *per se*, as a stay of proceedings. (*Storn v. Duffy*, 8 How. Pr. 487; *Forbes v. Oaks*, 2 Ab. 120; *Bacon v. Reading*, 1 Duer, 622; S. C. 11 N. Y. Leg. Obs. 122; *Hicks v. Smith*, 4 Ab. 285; *Johnson v. Scriven*, 3 Ab. 208; *Freeman v. Young*, 3 Rob. 666; *Christy v. Litby*, 3 Ab., N. S. 423.)

The sections of the Code, (336, 337, 338,) which prescribe the security to be given, as a condition of staying the proceedings upon a judgment, and the terms upon which such proceedings will be stayed, correspond, substantially, with the provisions of the revised statutes relative to appeals from orders and decrees in equity. (2 R. S. 605, §§ 82 to 85; *Van Sant. Eq. Pr.* 661.)

In *Mills v. Thursby*, (11 How. Pr. 129,) it was held that the court has a discretion to order a stay of proceedings, on appeal from the special to the general term, although no proper undertaking has been filed and served. It was also held that where it appears that an appeal was taken in good faith, and that it is not frivolous the court, although no proper undertaking has been filed and served with the notice of appeal, will allow an undertaking to be filed, and a copy of it served as of the day when the notice was served, with liberty to the respondent to except to the sureties; with a stay of proceedings until the appeal is decided.

An application to order an undertaking to be filed *nunc pro tunc* is in the discretion of the court. (Id.)

In *Polhamus v. Moser*, (7 Rob. 443,) where, on a motion for a stay, without security of proceedings upon a judgment for over \$131,700, pending an appeal therefrom to the general term, it appeared that the defendant was worth much more than double the amount of the judgment; that his property was of a fixed character, and not liable to much fluctuation or depreciation in price or value; that he was engaged in a permanent business of long standing, and was free from debt; and his real estate, worth about \$100,000, was already subjected to the lien of the judgment, and could not be discharged from it; it was held that it was a proper case for staying the proceedings without exacting security from the defendant.

And, on a motion to set aside an execution, and for a stay of proceedings pending an appeal, where a judgment has been entered without a written notice served, it seems that the requisite undertaking to stay may be given. (*Staring v. Jones*, 13 How. Pr. 423.)

Although in ordinary cases, the court should grant a stay of proceedings, to enable a party to review its decision, by appeal, yet where the property in controversy includes the good will of a business, which is continued by a receiver pending the proceedings, the court will not grant a stay of the sale, after protracted litigation, without some guaranty on the part of the party asking it, against depreciation in the value of the property pending the stay. (*Clark v. Brooks*, 2 Ab., N. S. 385.)

An undertaking required as a condition of granting a stay of proceedings, pending an appeal from an order, is an available security to the respondent, if the order be affirmed. (*Winterhoff v. Siegert*, 13 Ab. 182.)

As respects appeals from judgments of the special term, not coming within either of the four classes embraced in §§ 335, 336, 337 and 338 of the Code, the proper course to pursue, if a stay of proceedings is desired, is for the appellant to obtain an order for such stay, from the court or judge, under the provisions of § 348, upon such terms as to security, &c., as such court or judge may think proper to impose. (*Van Sant. Eq. Pr.* 661.) But if the order is granted by a judge out of court, it cannot be *ex parte*, if the stay be for more than twenty days. Notice to the opposite party

chancellor, by general rules to be varied as occasion may require, shall prescribe the effect of all orders and decrees made by a vice chancellor, either before or after notice of an appeal shall be given, in what cases, to what extent, and on what terms, any such order or decree shall be suspended or affected by an appeal, &c.(u)

Under this section of the statute, the 116th rule has been framed ; which requires the same bond or security for costs as upon an appeal from the chancellor, and adopts the provisions of the statute respecting appeals to the court for the correction of errors, which have been already given,(v) as applicable to appeals from a vice chancellor, with the necessary variations as to form merely. This rule also contains an additional requirement, that the appellant can, in no case, stay the proceedings upon an interlocutory order in any other way than by a special application to the chancellor himself, unless he gets the certificate of probable cause hereafter mentioned.

In the case of *Gregory v. Dodge*,(w) the chancellor decided that a suit brought to compel the defendant to pay over to the complainants a balance alleged to be due on certain joint dealings, comes within the 87th section of that statute; and that upon an appeal from an interlocutory order in such a suit, the court may require the doing of such other acts and things by the appellant as is specified in that section, to make such appeal operate as a stay of proceedings.

(u) 2 R. S. 178, § 67, (orig. § 61.)

(v) Ante, p. 388, 389.

(w) 3 Paige, 90.

must be given, or an order to show cause obtained. (*Steam Navigation Company v. Weed*, 8 How. Pr. 50.) The same course should be taken if the party desires a stay on appeal from an order. An appeal does not stay the proceedings unless security be given. (*Bacon v. Reading*, 6 Duer, 622;) or unless the court, or a judge so order. (*Van Sant*, Eq. Pr. 662.)

Chapter 288 of the Laws of 1861 provides that an appeal may be brought by the people of the state, or any state officer or board of state officers, from any judgment or order against them, in any court, without any undertaking or security whatever; and that such appeal shall operate as a stay of proceedings on the judgment or order appealed from.

Chapter 652 of the Laws of 1859 provides that all appeals by municipal corporations, from the judgment or decree of any court of this state, shall be valid to stay proceedings on such judgment or decree, without security or undertaking being given; unless the court in which such judgment or decree is rendered shall otherwise direct. And in such case, an undertaking, executed in their official capacity, by either the mayor, comptroller or counsel to the corporation, shall be valid for the purpose of such appeal, and shall bind said corporation to the performance of the conditions of said undertaking.

An order staying proceedings on the judgment will not extend the time for appealing. (*Renouil v. Harris*, 2 Code R. 71; S. C. 2 Sand. 641; 1 Code R. 125.) After the plaintiff's proceedings have been stayed, except that leave is reserved to him to enter judgment, a notice of the entry of judgment served by him, is in violation of the stay, and is a nullity, and will not limit the time within which an appeal may be taken. (*Wbite v. Klinken*, 16 Ab. 109.)

It was also decided in that case, that in all the cases coming within the 87th section, the making the deposit or giving the bond as required by the 80th section, and the filing the certificate of the vice chancellor as required by the 116th rule, will stay the proceedings under the order appealed from, in the first instance; but that the respondent may afterwards apply to the court for an order requiring the appellant to give the further security specified in the 87th section.

The 116th rule also provides that no appeal by a defendant from any interlocutory order or decree of a vice chancellor, in a suit for the payment of money, or to compel the delivery or assignment of any securities, evidences of debt, documents, chattels, or things in action, or for the delivery of possession of real estate, or a sale thereof, shall operate as a stay of proceedings for more than fifteen days from the time of perfecting such appeal, unless a special order for the stay of proceedings be made by the vice chancellor, or the appellant shall, within the fifteen days, have executed and filed a bond, with two sufficient sureties, in such penalty as the vice chancellor shall direct, and conditioned to pay the debt or damages which may finally be decreed against him in case the appeal shall be dismissed, or the order or decree shall be affirmed.

And no appeal from any interlocutory order or decree of a vice chancellor shall operate as a stay of proceedings for any time, unless a special order to that effect be made by the chancellor, or unless the appellant, at the time of entering the appeal shall, in addition to the deposit or security required in such cases, procure and file with the clerk a certificate of the vice chancellor that there is probable cause for appealing; that the order or decree appealed from involves the merits of the cause, or some part thereof; and that it is reasonable and proper that the questions arising on such appeal should be decided by the chancellor before the final decree in the cause, and before any further proceedings are had on such interlocutory order or decree, before the vice chancellor.(x)

The certificate of probable cause, authorized by the above rule, is a mere chamber proceeding, like the approval of the sureties in an appeal bond, and cannot be vacated by the court below.(y)

Such certificate, upon an appeal from an interlocutory order of a vice chancellor, will not stay proceedings which would not be stayed upon a similar appeal from an interlocutory order of the chancellor. Therefore it will not deprive the respondent of the right to apply for

(x) Rule 116.

(y) *Graves v. Maguire*, 6 Paige, 379.

security for the debt, &c., as a condition of the further stay of proceedings.(z)

It has been settled that an appeal from an order refusing a re-sale of premises sold by a master will not, of itself, prevent the purchaser from completing his purchase. And the appellant will not be entitled to an order staying the purchaser from completing his purchase, and taking possession of the premises, without giving security for the payment of the rents and profits of the premises in the meantime, and that no waste shall be committed.(zz)

And it has been decided that where the whole fund which is the subject of litigation is in court, and a decree is made directing its payment to one of the parties, from which decree the adverse party appeals, it is not necessary for the appellant to give security for the payment of the money which is in court, in order to make the appeal a stay of proceedings.(a)

A decree or order directing the appellant to pay costs to the adverse party, is a decree directing the payment of money, within the meaning of the statute. And to make the appeal a stay of proceedings, so far as relates to the collection of such costs, a bond must be given to the adverse party, in double the amount of the costs, either separately or in connection with the usual appeal bond.(b)

Where the costs awarded to the adverse party have not been taxed at the time of entering an appeal, if the appellant wishes to stay the proceedings for the collection of such costs, the officer who approves the bond for the stay of proceedings should fix the penalty at such sum as he shall consider to be at least equal to double the probable amount of the costs.(c)

In the case of *Hart v. The Mayor, &c., of Albany*,(d) where an appeal from an order dissolving an injunction involved an important question of right between the parties, and there was probable cause for appealing, and no particular injury could arise to the respondents from the delay, the chancellor, after hearing both parties upon the application for such relief, granted a temporary injunction restraining the further proceedings of the defendants in relation to the subject matter of the first injunction, until the appellants had a reasonable time to be heard before the appellate court.

It was also held in that case that an appeal from the decision of the

(z) *Id. ib.*

(zz) *American Ins. Co. v. Oakley*, 9 Paige, 496.

(a) *City Bank v. Bangs*, 4 Paige, 235.

(b) *City Bank v. Bangs*, 4 Paige, 235.

(c) *Id. ib.*

(d) 3 Paige, 381.

chancellor denying an application for an injunction, or for an order to stay proceedings in another suit, does not operate as an injunction or as a stay of such proceedings pending the appeal.

The act of 1839, amending the act relative to trial by jury and the taking of testimony in chancery, declares that an appeal from any decision or order made by the chancellor, either in awarding or refusing an issue, shall not stay proceedings in the cause pending the appeal, unless specially directed by the chancellor or vice chancellor before whom the cause is pending.(e)

Effect of appeal upon injunction.] Where an injunction is dissolved by a vice chancellor, an appeal from his order does not uphold the injunction or suspend the operation of the order; nor will even the certificate of such vice chancellor have that effect.(f)

If an order granting an injunction is appealed from, the injunction will not be dissolved by the appeal, although the present or immediate power of the court below to punish the party for a breach of injunction pending the appeal would probably be suspended until after the appeal was disposed of.(g)

Effect of, as to power of court below.] The court below cannot correct, on motion, or by bill of review, any error apparent on the face of the proceedings in a decree which has been appealed from and affirmed by the appellate court.(h) (12)

Where the respondent draws up and enters the order which is appealed from by the adverse party, it does not lie with the respondent to object that such order is not in conformity to the decision of the court as to the part thereof which is appealed from. But the court by

(e) Laws of 1839, p. 292, § 3.

(f) *Hart v. Mayor, &c., of Albany*, *supra*. *Graves v. Maguire*, 6 Paige, 379.

(g) *Graves v. Maguire*, *supra*.

(h) *Campbell v. Price*, 3 Munf. 227.

(12) The court below, while an appeal is pending in the court of appeals, have, as they formerly had after writ of error brought, control over the judgment in regard to making amendments; and the judgment is still regarded as remaining in that court, for all the purposes of amendment. (*Judson v. Gray*, 17 How. Pr. 289, per MASON, J.) In *New York Ice Co. v. Northwestern Ins. Co.* (21 How. Pr. 296; S. C. 23 N. Y. 357,) it is said, by COMSROCK, Ch. J., that a judgment may be amended by the court below, at any time before the period for appealing has expired, and probably afterwards. That so long as a judgment is subject to an appeal, it is subject to such corrections and modifications as the court which pronounced it may, in its discretion, think proper to make.

Where a creditor has obtained a judgment against his debtor, in the supreme court, and upon an appeal to the general term an order denying a motion to set aside the judgment is subsequently made, and from that order an appeal is taken, by the executor of the defendant, after the death of the latter, to the court of appeals, the surrogate cannot, while such appeal is pending and undetermined, entertain jurisdiction for the purpose of enforcing payment of the judgment. (*Curtis v. Stilwell*, 33 Barb. 354.)

whom the order was made may direct the order to be corrected, so as to conform to the decision, notwithstanding the appeal. And if the order is thus amended, the appellant is at liberty to elect either to abandon the appeal, or to consider it as applicable to the order as amended.(i)

If a party who has appealed from an order of the court below is proceeding to carry it into effect, notwithstanding the appeal, application may be made to the court below, by the other party, to stay such irregular proceedings.(k)

After proceedings have been instituted for the purpose of bringing an appeal, and before the appeal has been perfected, the court below will sometimes interfere. Thus where, upon an appeal to the court for the correction of errors from a decree of the court of chancery directing the payment of money, the appeal bond, through inadvertence, was defective in the condition thereof, so as not to operate as a stay of proceedings upon the decree, and in consequence thereof an execution was taken out and levied upon the property of the appellants before they had time to get the appeal bond amended in pursuance of a permission of the court to that effect, the chancellor ordered the proceedings upon the execution to be stayed, upon filing the amended bond with sufficient security, and that the execution be suspended upon payment of the sheriff's fees thereon.(l)

After a decree in chancery has been appealed from to the court for the correction of errors, it seems that the chancellor has no longer any jurisdiction over the matter; so that he cannot modify an injunction which by the decree appealed from was ordered to be issued.(m)

The chancellor has no power to re-hear or modify an order or decree which has been affirmed on appeal to the court for the correction of errors upon the same point as to which the re-hearing or modification is sought, unless the right to alter or modify is reserved in the original order or decree, or in the decree of affirmance.(n)

An appeal from an order refusing a re-sale of premises sold by a master will not, of itself, prevent the purchaser from completing his purchase, without a special order obtained upon giving security for the payment of the rents and profits of the premises in the meantime, and that no waste shall be committed.(o)

(i) *Hunt v. Wallis*, 6 Paige, 371.

(k) *Vail v. Remsen*, 7 Paige, 206.

(l) *Clark v. Clark*, 7 Paige, 607.

(m) *Sea Ins. Co. v. Ward*, 20 Wend. 588.

(n) *Lyon v. Merritt*, 6 Paige, 473.

(o) *American Ins. Co. v. Oakley*, 9 Paige, 496.

SECTION V.

MISCELLANEOUS PROVISIONS.

On an appeal, the burthen lies upon the appellant. He must show the decree or order appealed from to be clearly wrong; otherwise it will be affirmed. (*p*) (13)

Where the appellate court reverses the decree appealed from, it exercises, as it were, an original equity jurisdiction, and places that decree upon the record which the court below ought to have made. (*q*) (14)

(*p*) Lloyd v. Trimleston, 2 Molloy, 81.

(*q*) Diffenderffer v. Winder, 3 Gill & John, 311.

(13) Statutes giving the right of appeal are always liberally construed in furtherance of justice; and such an interpretation as will work a forfeiture is not to be favored. (*Pearson v. Lovejou*, 53 Barb. 407; S. C. 35 How. 193.)

(14) TIME FOR APPEALING.

The appeal to the court of appeals, under subd. 2 of § 11 of the Code, must be taken within *sixty days* after written notice of the order shall have been given to the party appealing. Every other appeal allowed by the 2d and 3d chapters of title XI, part II, must be taken within *two years* after the judgment shall be perfected, by filing the judgment roll. (Code, § 331.)

The appeal allowed by chapter 4 of title XI, part II, (that is, appeals upon the law, to the general term from a judgment entered upon the report of referees or the direction of a single judge in the *supreme court*, and the *superior court* and court of *common pleas* of New York, in all cases, and upon the fact when the trial is by the court or referees, and from orders made by a single judge at a special term, or out of court, upon notice, in the cases specified in §§ 349, 350,) must be taken within *thirty days* after written notice of the judgment or order shall have been given to the party appealing. (Code, § 332.)

Section 349 includes orders made out of court, upon notice; but in such a case the order must first be entered with the clerk, and for the purpose of an appeal, any party affected by such order may require it to be entered with the clerk, who is bound to enter it. (Code, § 350.)

Section 332 applies to appeals from orders made in *special proceedings*. (Laws of 1854, p. 592, § 2.)

An appeal to the supreme court from an inferior court must be taken within *two years* after the judgment shall be perfected by filing the judgment roll. (Code, § 331.)

There can be no appeal until the judgment is perfected in form, and entered, (*Sherman v. Wells*, 14 How. Pr. 527;) and the judgment roll filed. (*McMahon v. Harrison*, 5 How. Pr. 360; *Bradley v. Van Zandt*, 3 Code Rep. 217.) But in a case where the appeal was taken on the same day, but before the filing of the roll, this was held sufficient. (*Bludenburgh v. Cotheal*, 5 How. Pr. 200; S. C. 4 N. Y. 418; approved in *Jones v. Porter*, 6 How. Pr. 286.) The time to appeal must be computed from the date of the entry of the order or judgment. (*Gallt v. Finch*, 24 How. 193.) And in computing that time, the first day is excluded, by § 407 of the Code. Hence an order entered May 27, is appealed from in time by serving notice of appeal on the 27th of June. (*Id.*)

If the party obtaining the judgment omits to perfect it, the other party may compel him to do so, in order that an appeal may be taken. (*Bank of Geneva v. Hotchkiss*, 5 How. Pr. 478; *McMahon v. Harrison*, *id.* 360; *Purdy v. Peters*, 15 Ab. 160; S. C. 23 How. 328; *Peet v. Cowenhoven*, 14 Ab. 56; *Lentilhon v. Mayor, &c.*, of New York, 1 Code Rep., N. S. 111; S. C. 3 Sandf. 721.)

In like manner there can be no appeal from an order until it is entered and the moving papers filed with the clerk. (*Smith v. Dodd*, 3 E. D. Smith, 215; *Marshall v. Francisco*, 10 How. Pr. 147.) This is equally true in respect to an order made out of court, on notice, which, under section 350 of the Code, we have just seen, any party affected by it may, for the purpose of an appeal, require the clerk to enter.

An order made on an application to set aside a judicial sale, under a judgment of

foreclosure, on the ground of fraud, is appealable within the two years prescribed in section 331. (*King v. Platt's ex'rs*, 34 How. 26; S. C. 3 Ab., N. S. 174.)

A judgment, in a foreclosure suit directing a sale of the premises and payment of any deficiency is final, and may be appealed from before the coming in of the report of s.a.c. The time of appealing from it is reckoned from the date when notice thereof is given to the defendant. (*Morris v. Morange*, 4 Ab., N. S. 447; S. C. 38 N. Y. 172.) Where notice of such a judgment was served on the defendant on the 16th of February, and his notice of appeal was not served within 30 days from notice of the judgment, it was held that the right to appeal was lost; although the report of sale was not confirmed until May 26, and notice of the order confirming the report was not served until November 25, of the same year. (Id.)

If a party moves to set aside a proceeding for irregularity, and fails in his motion, and if, during the pendency of the motion, the time to appeal expires, the right of appeal will be lost. (*Renouil v. Harris*, 2 Code Rep. 71; S. C. 1 id. 125; 2 Sandf. 641.)

Where service of notice of the judgment or order is by mail, double the thirty days is allowed the party in which to bring his appeal, by § 412. (*Dorlon v. Lewis*, 7 How. Pr. 132.)

Notice of appeal must be served on the clerk, as well as on the adverse party, within the thirty days. (*Westcott v. Platt*, 1 Code Rep. 100.) Where notice of appeal was mailed to the clerk, on the 30th day, but not actually received until four days afterwards, it was held that the appeal was of no effect. (*Morris v. Morange*, 26 How. 247; S. C. 17 Ab. 86; 38 N. Y. 172; 4 Ab., N. S. 447.)

Where the time for appealing is fixed by statute, the court has no power to extend the period so fixed. (*Salles v. Butler*, 27 N. Y. 638; S. C. 27 How. 638; *Wait v. Van Allen*, 22 N. Y. 319; *Humphrey v. Chamberlain*, 11 N. Y. 274; *Bryant v. Bryant*, 4 Ab., N. S. 138; S. C. 7 Rob. 49; *Cotes v. Carroll*, 28 How. 436; *Morris v. Morange*, 26 id. 247; S. C. 17 Ab. 86; 38 N. Y. 172; 4 Ab., N. S. 447; *Gallt v. Finch*, 24 How. 193; *Ellsworth v. Fulton*, id. 20; *Fry v. Bennett*, 16 id. 385; S. C. 7 Ab. 352; 2 Bosw. 684; *Marston v. Johnson*, 13 How. Pr. 93; *Van Sant*, Eq. Pr. 654; *Sherwood v. Platt*, 11 Ab., N. S. 115. But see *Toll v. Thomas*, 18 How. Pr. 324.) Nor can the court effect the same result, indirectly, by ordering a new date to the judgment. (*Humphrey v. Chamberlain*, 11 N. Y. 274; *Bryant v. Bryant*, 7 Rob. 49; S. C. 4 Ab., N. S. 138.) And the court has refused to set aside a judgment, for the mere purpose of relieving a party from the loss of the remedy by appeal, although it occurred without any fault or neglect on his part. (*Marston v. Johnson*, 13 How. Pr. 93. And see *Fry v. Bennett*, 16 id. 385.)

The extension of the time to file and serve exceptions, or to serve a case with exceptions, does not also extend the time to serve a notice of appeal. (*Salles v. Butler*, 27 How. 233; S. C. 27 N. Y. 638. But see *Sherman v. Wells*, 14 How. Pr. 522; *Jackson v. Fussitt*, 33 Barb. 645; S. C. 21 How. Pr. 279; 12 Ab. 281.)

An admission of due service of notice of appeal will be regarded as a waiver of the right to object that such notice was not served within the period limited by law. (*Struver v. Ocean Ins. Co.* 9 Ab. 23; S. C. 2 Hilt. 475.)

Notice of judgment or order.—A party seeking to avail himself of the statutory limitation of his adversary's right to appeal should be held to strict practice. (*Champion v. The Plymouth Cong. Society*, 42 Barb. 441; *Sherman v. Wells*, 14 How. Pr. 522; *Yorks v. Peck*, 17 id. 192.) A notice of the entry of a judgment, rendered upon the report of a referee, directing the payment of money, served before the costs are finally adjusted, will not have the effect to limit the right of the opposite party to appeal to the general term. (Id.) The practice allowing a party to enter and docket his judgment, without notice of taxation, is allowed merely to prevent delay in obtaining his lien and securing his demand. It would be unjust to permit him so to use the privilege as to shorten the time within which his opponent may appeal, or embarrass him in the exercise of that important right. (Per. J. C. SMITH, J., id.)

Where there has been laches in moving, a motion to dismiss an appeal on the ground that it was brought after the time allowed by law for appealing had expired, will be denied. (*Stevenson v. McNitt*, 27 How. 335.)

Where the form of a judgment had been drawn up and settled before the judge who tried the cause, and he had directed the clerk, in writing, to enter it, and had signed it with his initials, according to the customary practice, but the judgment roll had not been made up and filed—held, that while the judgment remained thus incomplete, notice of it could not be given to the unsuccessful party, which would have the effect to limit his time for appealing. (*Sherman v. Postley*, 45 Barb. 348.) Notice

Who entitled to be heard.] All parties interested in supporting the decree or order appealed from are entitled to be heard in support of the decree; but no party, except the appellant, can be heard in support of the appeal. If, therefore, any party who is not included as a co-appellant, in a petition or notice of appeal, is desirous of appealing, he must present a separate petition or give a separate notice;^(r) otherwise he will be precluded from all benefit of the appeal, even though the result of it should be to show that the decree was completely wrong, as well against him as against the appellant. Thus where one of several defendants appealed, and an order was made dismissing the bill, upon grounds which were equally applicable to other defendants who did not join in the appeal, it was held that such other defendants could have no benefit of the order, although it rendered the decree useless.^(s)

(r) 2 Smith, 30. 3 Dan. 124.

(s) Tasker v. Small, 1 C. P. Coop. Rep. 255.

cannot be given until the judgment has arrived at that state of completeness which is a final determination of the rights of the parties by record evidence, and when also an appeal can be taken. (*Id.*; *Sherman v. Wells*, 14 How. Pr. 522.)

An order made out of court upon notice, must be entered with the clerk before the notice thereof will begin to limit the time for appealing. (*Gallt v. Finch*, 24 How. 193.) Until written notice of the judgment or order is served, the time for appealing continues without limitation. (*Fry v. Bennett*, 6 How. Pr. 402.) In order to limit the time for appealing to thirty days, after notice of the judgment or order, there must, in all cases, be a service of *written notice*. Actual knowledge is not sufficient. (*Staring v. Jones*, 18 How. Pr. 423; *Rankin v. Pine*, 4 Ab. 309; *Fry v. Bennett*, *supra*. And see *Leary v. Roberts*, 8 Ab. 310; S. C. 2 Hilt. 285; *Gay v. Gay*, 10 Paige, 370; *People ex rel. Backus v. Spaulding*, 9 id. 607.)

A party is not limited, as to the time for appealing from his own judgment, entered by himself, until served with written notice thereof, by the adverse party. (*Rankin v. Pine*, 4 Ab. 309.)

A notice of judgment, served by the attorney, without being signed by him, or mentioning his place of business, is a nullity. (*Yorks v. Peck*, 17 How. Pr. 192.) So of a notice which omits to state in what clerk's office the judgment is entered. (*Valton v. National Loan Fund Life Assurance Society*, 19 id. 515.)

Notice of a judgment of foreclosure and sale, and for payment of the deficiency, if any, may be given, so as to limit the time for appealing, immediately on the entry thereof. (*Morris v. Morange*, 38 N. Y. 172; S. C. 4 Ab., N. S. 447; 17 Ab. 86; 24 How. 247.)

Where an order is made, settled and entered, and a copy served on the opposite party, but is afterwards modified and re-settled by order of the judge, the party obtaining the order, if he would limit the time in which the opposite party may appeal, must cause it to be entered as finally settled, and serve a copy of it. (*Bouman v. Earle*, 3 Duer, 691.)

After the plaintiff's proceedings have been stayed, except that leave is reserved to him to enter judgment, a notice of the entry of judgment, served by him, is in violation of the stay, and will not limit the time within which an appeal may be taken. (*White v. Klinken*, 16 Ab. 209.)

The insertion, by leave of the court, in the judgment in an action for the return of personal property, of an award of the return of the property claimed, as an alternative, it having been omitted when the judgment was entered, is a material alteration, and the defendants are entitled to notice of the change having actually been made, or the entry of the new judgment. Mere notice of leave to make such amendment is not sufficient to start the running of the time for bringing an appeal. (*Brown v. Hardie*, 5 Rob. 678.)

Nor can the appellate court reverse a decree against a party who has not appealed, even though the court below had no jurisdiction to make the decree against him.(t)

It seems, however, that if the result of the appeal had been otherwise, and the appeal had been dismissed, or the decree only slightly varied, the defendants who did not appeal would, if they had been heard in support of the decree, have been entitled to their costs, either to be paid directly by the defendant who appealed, or by the complainant; such costs to be added to the complainant's own costs, and reimbursed to him by the appellant.(u)

What points may be raised upon appeal.] An appellate court will not decide an appeal upon a ground which has not been passed upon or submitted to the court below.(v) Nor will it allow new points to be raised upon the hearing of the appeal;(w) (15) that is, no party shall be

(t) *Tate v. Liggot*, 2 Leigh, 84.

(u) Vide *Stocken v. Stocken*, and *Stnobs v. Sargon*, cited 2 Leigh, 257.

(v) 2 Hoff. Ch. Pr. 53. *Frankland v. McGnsty*, 1 Knapp, 274. *Ringgold's case*, 1 Bland. 14, 21.

(w) *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 712. *Barnes v. Lee*, 1 Bibb, 528. *Morgan v. Currie*, 3 A. K. Marsh. 294.

(15) Nor will an appeal be heard and decided upon exceptions taken on the trial, to which the attention of the court was not directed on the argument of an appeal from the judgment. (*Cummings v. Morris*, 3 Bosw. 560.)

Formal and preliminary objections, not involving the merits of a motion, will not be considered upon appeal unless it appears, affirmatively, that they were taken and overruled at the hearing of the motion. (*Merritt v. Thompson*, 1 Hilt. 551.) The objection that an order does not conform to the decision actually made, cannot be considered, on appeal therefrom. (*Ehle v. Haller*, 6 Bosw. 661; S. C. 10 Ab. 287.) So, objections to motion papers which might have been remedied, by amendment, at special term, cannot be considered on the argument of the appeal. (*Jackson v. Smith*, 16 Ab. 201; S. C. 25 How. 476.)

On an appeal from a judgment where there is conflicting evidence, the appellant cannot raise the question that the verdict was against evidence. That can be done only on a motion for a new trial, (*Anthony v. Smith*, 4 Bosw. 503; *Hoxie v. Greene*, 37 How. 97; *Flote v. Roberts*, 7 Rob. 17,) except where the evidence on one side is mere information and belief, while on the other it is positive knowledge. (*Durant v. Einstein*, 5 Rob. 424; S. C. 35 How. 223.)

The court, at general term, cannot find the facts on which to base a final judgment. They must either have been conceded on the trial, or found by a jury. (*Purchase v. Matteson*, 25 N. Y. 211; S. C. 25 How. 161.) Nor, on appeal from a judgment of the special term, can the general term review the question whether an order of arrest was properly granted. (*Ross v. West*, 2 Bosw. 360.)

A question as to the jurisdiction of the court, it seems, cannot be raised for the first time on appeal. (*Mosselman v. Caen*, 21 How. Pr. 248; S. C. 34 Barb. 66. See, also, *Bidwell v. Astor Mutual Ins. Co.* 16 N. Y. 263.)

Where the complaint fails to state a cause of action, and the defect is not remedied by proof on the trial, the objection may be taken on appeal from the judgment, although not raised on the trial. (*Cole v. Blunt*, 2 Bosw. 117. But see, *contra*, *Pope v. Dinsmore*, 29 Barb. 367; S. C. 8 Ab. 429; *Brewer v. Irish*, 12 How. Pr. 481.)

An appellate court may, and ought to take an objection apparent on the record, and which goes to the merits of the cause, although not taken in the court below, especially where the rights of infants are concerned. (*Sanford v. Granger*, 12 Barb. 392.)

An objection which was not raised at the trial, and which, if it had been, might possibly have been obviated, cannot be used as a ground of appeal, (*Stewart v.*

Smith, 14 Ab. 75;) or raised upon the appeal. (*Colwell v. Lawrence*, 24 How. 324; *Smith v. Floyd*, 18 Barb. 523; *Emerson v. Booth*, 51 id. 40; *Sutherland v. Rose*, 47 id. 144; *Sipperly v. Stewart*, 50 id. 62; *Van Deusen v. Charter Oak Fire and Marine Ins. Co.* 1 Rob. 55; S. C. 1 Ab., N. S. 349; *Jackson v. Smith*, 16 Ab. 201; *Crooke v. Mali*, 11 Barb. 205; *Union Bank of Troy v. Sargeant*, 35 How. 87; S. C. 53 Barb. 422; *Forrest v. Havens*, 38 N. Y. 469; *Hazard v. Spears*, 4 Keyes, 469; *Wolfe v. Security Fire Ins. Co.* 39 N. Y. 49; *Reed v. Gannon*, 3 Daly, 414.)

An appeal to the general term from a judgment at special term, duly taken by the unsuccessful party, is a waiver by him of all irregularities in the judgment of which he was aware and might have taken advantage by motion, at special term, before taking his appeal. (*People v. Allam & Susquehanna R. R. Co.* 39 How. 49; S. C. 8 Ab., N. S. 122; S. C. 2 Lans. 459.)

But objections may be urged on an argument at general term which were not raised on the trial, if they are such as could not have been obviated at the trial. (*Pepper v. Haight*, 20 Barb. 429.) The appellate court will intend that everything necessary to sustain the verdict was proved, unless the omission was taken advantage of by exception in the court below. (*Crooke v. Mali*, 11 Barb. 205.) On appeal from an order made on motion, where no papers are read in opposition to the moving affidavit, every intendment is in favor of the statements contained in such affidavit. (*Jackson v. Smith*, 16 Ab. 201.) When, on the trial of an action, a fact is assumed by the court and counsel to exist, and the case is disposed of upon that assumption, the non-existence of the fact in the case presented to the court, on a motion for a new trial, cannot be urged in opposition to the application for a new trial. (*Sipperly v. Stewart*, 50 Barb. 62.) What is assumed as true, on the trial, cannot be called in question on appeal. (*Munson v. Hegeman*, 10 Barb. 112; S. C. 5 How. Pr. 223; *Paige v. Fazackerly*, 36 Barb. 392; *Fake v. Whipple*, 39 id. 339; affirmed, 39 N. Y. 394.)

Where, on the trial, no request is made that a certain question of fact be submitted to the jury, or objection taken to the insufficiency of proof of a demand before suit brought, the party cannot avail himself of such omissions upon appeal to the general term. (*Shaffer v. Gust*, 35 How. 184; S. C. 6 Rob. 264; *Carnes v. Platt*, 6 Rob. 270.)

On appeal, the respondents are entitled to the benefit of any presumption which will uphold the judgment, in the absence of evidence properly in the case, upon the point in question. (*Lee Bank v. Satterlee*, 1 Rob. 1; S. C. 17 Ab. 6.) Where the charge of the judge, in submitting special questions of fact to the jury, is omitted in the case, it will be presumed on appeal, when it does not appear to the contrary, that the charge was correct. (*Marine Bank v. Clements*, 6 Bosw. 166; S. C. 31 N. Y. 33. See, also, *Parsons v. Brown*, 15 Barb. 590; *Winterson v. Eighth Avenue R. R. Co.* 2 Hilt. 389; *Carnes v. Platt*, 6 Rob. 270; *Hogan v. Cregan*, id. 138.)

On appeal, the court will assume that the circumstances properly bearing on a question of negligence were submitted to the jury as a question of fact, and were duly considered by them; and after a verdict in favor of the plaintiff, it cannot say that on the facts proved, negligence was imputable to him. (*Kenny v. First National Bank of Albany*, 50 Barb. 112.)

Where the objection that there is a failure to prove the cause of action in its entire scope and meaning is taken, on a motion, at the trial before a referee, to dismiss the complaint upon the plaintiff's evidence, it is available on appeal from a judgment for the plaintiff upon the referee's report in his favor, although no exceptions were taken to the report, upon the ground that the cause of action, as found, was not that set forth in the complaint. (*Patterson v. Patterson*, 1 Rob. 184; S. C. 1 Ab. N. S. 262; *contra*, *Doyle v. Mulran*, 7 Ab., N. S. 258; S. C. 1 Sweeney, 517.) Where the issue is such as to entitle a party, on proper demand, to a trial by jury, and he omits to claim such right, he cannot afterwards, on appeal, object to the mode of trial. (*Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.* 1 Keyes, 72.)

If an objection that the judgment is erroneous in form is not made in the court below, or by application to that court, it cannot be raised in the court of appeals. (*Buck v. Remsen*, 34 N. Y. 383.) So, as to an objection that the verdict was against evidence. (*Id.*)

As a rule, a party cannot, on appeal, raise a point which was not raised in the court below, nor insist on an objection not taken there, and rely upon it for reversal of the judgment. (*Talcott v. Rosenberg*, 8 Ab., N. S. 287; S. C. 3 Daly, 203.) Nor can he raise questions upon the charge of the court below, which are neither affirmed nor denied thereby. To bring up such questions, he should call the atten-

tion of the court thereto, by specifically requesting the judge to charge as to them, and excepting to his refusal to do so. (*Hogan v. Cregan*, 6 Rob. 138.) General exceptions to the charge of the judge are not available upon appeal. (*Paige v. Willett*, 38 N. Y. 28; S. C. 5 Trans. Ap. 27.)

A general exception to all the findings, both of law and fact, except as to some which are enumerated, does not bring up for review an objection to the allowance of interest on the plaintiff's account for too long a period. To avail anything, the exception should point out the precise objection, so that the plaintiffs may have their election to remit the excess of interest. (*Graham v. Christa*, 37 How. 279; S. C. 2 Keyes, 21; 1 Ab., N. S. 121; 32 How. 287. See, also, *Erickson v. Smith*, 38 How. 454; *Chubbuck v. Vernam*, 42 N. Y. 432; *Philbin v. Patrick*, 6 Ab., N. S. 284.)

The decision of the supreme court upon an application for a new trial, based, not upon alleged errors in law, but upon considerations addressed to the discretion of the court, or its favor—such as newly discovered evidence, or surprise—cannot be reviewed on appeal to the court of appeals. (*Marvin v. Marvin*, 4 Keyes, 9; S. C. 41 N. Y. 619, n.)

An appeal from a judgment reversing the decision of a referee, not stated therein to be based upon questions of fact, brings up for review questions of law, only. (*Case v. Phelps*, 39 N. Y. 164.) The findings of a referee upon questions of fact, when not without evidence to support them, are conclusive upon the court of appeals, and are not subject to review there. (*Ostrander v. Fellows*, 29 N. Y. 350; S. C. 5 Trans. Ap. 131.) But when the finding of a fact is wholly unsupported by the evidence, the error is one of law, and may be reviewed by the court of appeals. (*Mason v. Lord*, 40 N. Y. 476; *Wyman v. Childs*, 41 id. 159.) And this is so, even though the judgment upon the referee's report has been affirmed, and none of the findings of facts have been reversed by the general term. (*Putnam v. Hubbell*, 42 N. Y. 106.) If there is no competent evidence to sustain the findings of fact, or if the undisputed evidence establishes the contrary, it then becomes a question of law, and may be examined on appeal. (*Fellows v. Northrup*, 39 N. Y. 117.)

When the appeal is from an order refusing a new trial, questions of law, only, can arise on the hearing. (*East River Bank v. Kennedy*, 4 Keyes, 279; S. C. 9 Bosw. 543.)

Upon appeal from an order of the supreme court at general term, reversing a judgment and ordering a new trial, made upon questions of both law and fact, it is, by § 264 of the Code, made the duty of the court of appeals to determine whether it was correctly made upon either ground. (*Coleman v. Second Avenue R. R. Co.* 38 N. Y. 201; S. C. 6 Trans. Ap. 146; 35 How. 643; 48 Barb. 371.)

Where the testimony in a case was conflicting, the finding of a referee, thereon, cannot be reviewed on appeal. If wholly without evidence to sustain it, the finding may be reversed. (*Porter v. Ruckman*, 38 N. Y. 20.) Findings of fact are not open to review in the court of appeals, when there is any evidence sustaining them; unless it appears from the order directing a new trial that it was granted upon questions of fact and law. (*Drayer v. Stouvenel*, 38 N. Y. 219; S. C. 7 Trans. Ap. 9; *Austin v. New Jersey Steamboat Co.* 43 N. Y. 75.) Upon exceptions to a referee's findings of fact, the supreme court is to inquire whether the finding is against the weight of evidence; but upon appeal to the court of appeals, such exception only raises the question whether there was any evidence to sustain it. (*McCabe v. Brayton*, 38 N. Y. 196; S. C. 6 Trans. Ap. 227.)

Upon appeal from a judgment in an equitable action tried before a referee, the court of appeals can only review questions of law raised in the court below, upon rulings to which proper exceptions were taken. (*Shaw v. Smith*, 5 Ab., N. S. 129; S. C. 3 Keyes, 306; 1 Trans. Ap. 238.)

The question as to the validity of the contract on which the suit is brought cannot be raised on appeal, if not raised in the court below, either by the answer, or by motion, or presented by some finding or exception. (*Cummings v. Barkalow*, 4 Keyes, 514.)

An objection to the right of the plaintiff to maintain his action, which, if raised on the trial, was capable of being obviated, by the introduction of new or additional evidence, cannot be raised for the first time on appeal. But an objection to the unconstitutionality of an act of the legislature is one which could not have been obviated by any action of the plaintiff, and therefore need not be first raised on the trial. (*Brookman v. Hamill*, 54 Barb. 209; S. C. aff'd, 43 N. Y. 554.)

Where a cause has been tried on the assumption, by both parties, that a particular

allowed to surprise or mislead his adversary. Therefore if counsel raise a point for the first time upon the hearing, which might have been obviated had it been made in the court below, he will not be allowed to do so. But where a cause has been defended in the court below, and upon appeal a point is made which could not be obviated in the court below by proof or amendment, the appellate court ought not to refuse cognizance of it.(x)

The court will decide on those parts only of the decree of the court below which are complained of in the petition or notice of appeal.(y) And the appellant cannot allege error in the decree as against another party who has not appealed.(z)

Neither can parties avail themselves, upon appeal, of any irregularity in the court below, which they have consented to, or waived.(a)

Appeals may embrace more than one order, &c.] Where two distinct orders are made in the same cause, they may be both included in one notice of appeal and in the same appeal bond; provided the penalty of the bond is sufficiently large, and the condition of the bond is broad enough to secure the payment of the whole amount required to be secured on both appeals.(b) In the case of *Bouchier v. Dillon*,(c) after a petition of appeal had been presented complaining only of one order of the court below, leave was given by the house of lords to extend the appeal to other orders.

Cross appeals.] Sometimes, where there is an appeal against a part of a decree, the respondent, or some other party, may feel himself aggrieved by another part. In such cases the proper course is to bring a cross appeal. Where that is done, the two appeals may be brought

(x) *Beekman v. Frost*, 18 John. 558.

(y) *Sands v. Codwise*, 5 John. 531. *Kelsey v. Western*, 2 N. Y. 500. *Mapes v. Coffin*, 5 Paige, 296.

(z) *Oldham v. Rowan*, 4 Bibb, 544.

(a) *Wickliffe v. Clay*, 1 Dana, 589.

(b) *Tyler v. Simmons*, 6 Paige, 127.

(c) 5 Bligh, (New Series,) 688.

fact existed, neither will be allowed to assert its non-existence, on appeal. (*Shaw v. Davis*, 55 Barb. 389.) Thus, the appellate court will assume that an execution, on which the defense was based, was formal and valid, if treated as being so and not objected to as informal or invalid, on the trial below, although it does not appear in the case. (Id.) On appeal, all such facts as might legally be found to be established by the evidence, and are necessary to the support of the judgment, are to be assumed to have been found by the court in conformity with the judgment directed, when nothing can be found in its conclusions in conflict with that assumption. (*Sheridan v. Andrews*, 3 Lans. 129.)

Where the judge charged that the defendants were liable, even if the jury should find the facts precisely as the defendants' witnesses testified, and thereupon directed a verdict for the plaintiffs, to which the defendants excepted; it was held, that the defendants might, on appeal, raise the question of the correctness of the charge and direction, although they had not requested the court to submit any question of fact. (*Low v. Hall*, 47 N. Y. 104.)

on to be heard at the same time, and one order be made in both.(d) As the appellant, in the original appeal, seeks a reversal or variation of the decree or order, on the ground of its having taken from him too much, or given him too little, so the respondent, by the cross appeal, aims at a reversal or variation of such decree or order, on the ground of its having given the appellant too much or too little to the respondent.(e) The following case is given by Mr. Urquhart,(f) as one proper for a cross appeal. A. files a bill to recover an estate, insisting that he is entitled to it under a conveyance made by B., and also under another deed made by C. The defendant avers that he is in possession, under a title derived from D. the admitted original owner, from whom all make title, and that neither B. nor C. had power to make the conveyances under which the complainant claims. The court below decrees that the complainant is entitled under the deed of B. who was not restrained from aliening, but not under the deed of C. who was so restrained. The defendant appeals, complaining of the decree for declaring that the complainant is entitled under the deed of B. On this appeal nothing can be argued but the validity of the claim under the deed of B. If the complainant wishes to bring his right to the estate before the court, under the deed of C. he must file a cross appeal.

In fact, unless the respondent is satisfied with the decree appealed from, he should, in all cases, bring a cross appeal. Where the appellant does not succeed in reversing any part of the decree, and the respondent has not brought a cross appeal, the appellate court cannot reverse or modify the decree in a part thereof which is erroneous as to such respondents.(g)

There are cases where the original appeal has been dismissed and relief granted under the cross appeal. And sometimes both appellants have succeeded in part, in their respective appeals.(h)

Another proper case for a cross appeal is where one party appeals from the substance of the decree, and the other appeals from the decree for giving or refusing costs.

Amendment of bill by adding parties.] The appellate court will give the complainant leave to amend by adding parties, in the same manner as upon an original hearing; and will order the hearing of the appeal to stand over for that purpose. And it has gone to the extent of allowing the complainant to add the attorney general as a party, either by

(d) *Blackburn v. Jepson*, 2 Ves. & B. 359. *Hawley v. James*, 16 Wend. 61, 85. In this case there were eight several appeals, and only one decree in the appellate court.

(e) *Palmer's Prac.* 33.

(f) *Urquhart*, 37.

(g) *Mapes v. Coffin*, 5 Paige, 296. *Clowes v. Dickenson*, 8 Cowen, 330.

(h) *Palmer's Prac.* 33.

converting the bill into an information and bill, or into an information only.⁽ⁱ⁾

Indeed, if the court perceives that it cannot make the proper decree for want of the necessary parties, the objection is never too late. It may not only be made at the hearing, by a party, but the court may make it of its own accord, at or after the hearing.^(k)

Order or decree by consent.] If the order or decree appealed from purport, on its face, to have been taken by consent of the party appealing, it will be deemed by the court above, on appeal, to have been so taken; and they will not hear evidence upon the question whether it was so taken.^(l) If it was, in fact, not taken by consent, the party should have applied to the court below, to have the mistake in the entry corrected.^(m)

Waiver of appeal.] (16) If a party proceeds to carry into effect an order from which he has appealed, it will be considered as a waiver of

(i) *President of St. Mary Magdalen v. Sibthorp*, 1 Russ. 154.

(k) 2 Hoff. Pr. 38.

(l) *Atkinson v. Manks*, 1 Cowen, 691.

(m) *Id. ib.*

(16) A positive waiver of the right to appeal, by a stipulation between the parties, before judgment in the subordinate court, will be enforced in the appellate court, and the appeal dismissed. (*Townsend v. Masterson, &c.*, *Stone Dressing Co.* 15 N. Y. 587.) But an appeal by the plaintiffs from a judgment in their favor is not waived by their acceptance from the defendants of the amount of the verdict in favor of the plaintiffs, with costs. (*Benkard v. Babcock*, 27 How. 391; S. C. 17 Ab. 421; 2 Rob. 175.) If the defendant voluntarily tenders the amount of the verdict in favor of the plaintiff, with costs, the acceptance of such amount does not preclude the plaintiff from appealing. (*Id.*; *Higbie v. Westlake*, 14 N. Y. 281; *Cloues v. Dickinson*, 8 Cowen, 328.) In *Bennett v. Van Syckel*, (18 N. Y. 481,) where a party took proceedings on one part of a judgment in his favor, and then appealed from the residue, it was *held*, that all the provisions of the judgment being connected and dependent, the appellant must be deemed to have waived his right to appeal.

In *Lewis v. Irving Fire Ins. Co.* (15 Ab. 140, n.) where an order was granted to one party, upon his paying costs, it was *held* that the other, by accepting such costs, waived his right to appeal from the order. (See *Radway v. Graham*, 4 Ab. 468.)

A sheriff does not waive his right to appeal from a judgment rendered against him for an escape, although he has, in the meantime, prosecuted to judgment and execution the limit bond, and although he has collected a portion of the judgment against the sureties. (*Lawrence v. Campbell*, 32 N. Y. 455.)

Where a party, on the denial of a motion, avails himself of the privilege to renew, he cannot appeal from the order denying the motion, in the first instance. (*Noble v. Prescott*, 4 E. D. Smith, 189.) And the renewal of such motion *after* appeal, precludes the hearing of the appeal while the renewed motion is pending. (*Peel v. Elliott*, 16 How. Pr. 483.)

A general appearance in the appellate court by the respondent, on an appeal from a justice's judgment, and noticing such appeal for argument, are positive acts of submission to that tribunal, and amount to a waiver of his right to have the appeal dismissed because not taken in time. (*Pearson v. Lovejoy*, 53 Barb. 407; S. C. 35 How. 193.)

Where an order was granted, dismissing an appeal, on condition that the respondent should consent to a modification of the decree appealed from and pay costs of the motion, and he consented and paid costs, which were accepted by the appellant; it was *held* that the latter had thereby waived his right to appeal from the order of dismissal. (*Marvin v. Marvin*, 11 Ab. N. S. 97.) So, collecting by execution,

the appeal; as the two proceedings are inconsistent with each other.⁽ⁿ⁾ So where, upon the dismissal of a bill by the court below, leave is given to the complainant to amend, which he proceeds to do, it will be considered a waiver of his right to appeal from the order dismissing his bill.^(o)

Dismissing appeal.] If a party who has appealed from an order, is proceeding to carry it into effect, notwithstanding the appeal, the respondent may apply to the appellate court to dismiss the appeal, on the ground that the proceeding under the order, by the appellant, is a waiver of the appeal, or to compel him to elect in which court he will proceed.^(p) (17) And where a party drew up and entered an order not warranted by the decision of the court, and appealed therefrom, and the court afterwards set aside the order as improperly entered, the appellate court, upon the application of the respondent, ordered the appeal to be dismissed.^(q)

If an appeal is dismissed, it is generally dismissed with costs.^(r)

Where the appeal bond is not duly acknowledged according to the provisions of the 172d rule, the appeal is irregular, and may be dismissed for that cause.^(s) (18)

(n) Vail v. Remsen, 7 Paige, 206. Lansing v. Caswell, 4 id. 519.

(o) McElwain v. Willis, 9 Wend. 548. See, also, Brooks v. Hunt, 17 John. 484.

(p) Vail v. Remsen, 7 Paige, 206.

(q) Hunt v. Wallis, 6 Paige, 371.

(r) 3 Dan. 127.

(s) Ridabock v. Levy, 8 Paige, 197.

the amount of a judgment, is a waiver of an appeal prosecuted to procure a reversal of the judgment for alleged error. (*Knapp v. Brown*, id. 118.)

An appearance by the appellant at general term, and resisting the reversal of the order of the special term sustaining his demurrer to the answer of the respondent, is not a waiver of the appellant's appeal from the order of the special term setting aside the plaintiff's judgment. Sustaining the demurrer is a proceeding having no connection with, or dependence upon the order setting aside the judgment. (*Pistor v. Brundutt*, 42 How. 5; S. C. as *Pistor v. Hatfield*, 46 N. Y. 249.)

(17) An appellant can dismiss his own appeal, on payment of costs, at pleasure. (*Warren v. Eddy*, 13 Ab. 28; S. C. 32 Barb. 664.)

A dismissal or abandonment of the appeal, if voluntary, does not preclude the party from renewing the appeal within the time limited by law. (*Crafts v. Ives*, court of appeals, cited Wait's Code, p. 644.) So, if an appeal becomes a nullity by the omission of the sureties in the undertaking to justify, the appellant may bring a new appeal. (*Kelsey v. Campbell*, 14 Ab. 368; S. C. 38 Barb. 238; *Langley v. Warner*, 1 N. Y. 606; S. C. 3 How. Pr. 363; 1 Code Rep. 111.) But the non-payment of costs of dismissing an appeal is ground for staying the proceedings on a second appeal in the same cause, until such costs are paid. (*Dresser v. Brooks*, 5 How. Pr. 75.)

If the appellant offers to dismiss his appeal on reasonable conditions, he is entitled to an order to that effect. (*Porter v. Jones*, 7 How. Pr. 192; *Burnett v. Harkness*, 4 id. 158; S. C. 2 Code Rep. 100.)

(18) APPEAL, HOW MADE; EXCEPTIONS OR CASE; NOTICE OF; PARTIES, HOW DESIGNATED; TITLE OF ACTION; PAPERS, HOW ENTITLED; TRANSMISSION OF PAPERS TO APPELLATE COURT; JUDGMENT.

1. *Exceptions or case.*] The Code, (§ 268.) provides that for the purposes of an appeal, either party may except to a decision on a matter of law, arising upon a

trial by the court, within ten days after notice in writing, of the judgment, in the same manner and with the same effect as upon a trial by jury. (sec § 265,) &c. And when a party desires a review, upon the evidence, either of the questions of fact or law, he may, at any time within ten days, or such further time as may be prescribed by the rules of the court, make a case or exceptions, &c.

For the purpose of a review in the court of appeals, the question of law must be distinctly raised; and if it arises from the evidence, the fact which the evidence proves, or tends to prove, must be distinctly found. The party appealing must make his case and have it settled, with such a statement of facts as will show, necessarily, that the law is in his favor. If he does not do so, every intendment, not absolutely unreasonable in itself, will be against him. (*Manley v. Ins. Co. of North America*, 1 Lans. 20.) In a case tried before a referee, the party appealing prepares a case, and inserts the findings of facts by the referee, and if he thinks the issues are not all passed upon, he may propose the finding of additional facts; and the other party may do the same in proposing amendments. (Id.)

2. *Notice of.*] An appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof. (Code, § 327.)

When a party shall give, in good faith, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment, on such terms as may be just. (Id.)

A notice of appeal from a judgment at the circuit, or special term, which states that the appeal is taken to the "supreme court," instead of, to the "general term of the supreme court," as required by chapter 270 of the Laws of 1854, is sufficient; especially if the undertaking recites that the defendant has appealed to the "supreme court at general term." (*People ex rel. Boulston v. Tarbell*, 17 How. Pr. 120.) A notice which merely states that the defendants appeal "from the judgment entered in this action to the general term of this court," is a sufficient compliance with the requirement of § 327. (*Wilson v. Allen*, 3 How. Pr. 369.) It is not necessary that the notice should specify the grounds upon which the appeal is brought. It is enough if it states what part of the judgment it is intended to review on appeal. (Id.; *Van Sant. Eq. Pr.* 659.) If the whole judgment or order is appealed from, and the party appealing intends to review only a part of it, he should specify, accurately, the part or portion appealed from. (1 Monell Pr. 739.)

The notice must be in writing, and must contain correctly the names of the parties, and should describe the judgment accurately. (*Van Sant. Eq. Pr.* 659.)

A copy of the case and exceptions, served upon the adverse party, is equivalent to a formal notice of appeal. (*Jackson v. Fassett*, 33 Barb. 645; S. C. 12 Ab. 281; 21 How. Pr. 279; *Sherman v. Wells*, 14 id. 522.)

Although the language of the Code is, that the notice must be served on the adverse party, yet, if he has an attorney, in the action, the notice must be served upon such attorney, and not upon the party. (*Crittenden v. Adams*, 1 Code Rep., N. S. 51; S. C. 5 How. Pr. 310; *Tripp v. DeBow*, 5 How. Pr. 114; S. C. 3 Code Rep. 163.)

The "adverse party," within the intent of the statute, is the party whose interest in the subject of the appeal is in conflict with the reversal or modification sought (*Cotes v. Carroll*, 28 How. 436.) In an action brought by executors, for the construction of a will, where several heirs and devisees are made defendants, and the decree of the court allows the claims of some of the defendants, but not those of others, the latter defendants, in bringing their appeal from such judgment, should serve their notice of appeal and other papers, not only upon the plaintiffs, but upon the defendants in whose favor the judgment was pronounced, as those defendants are "adverse" parties, within the meaning of the Code. (Id.)

Every party to an action, whether as plaintiff or defendant, who has an interest in sustaining the judgment or determination appealed from is an "adverse" party, within the meaning of section 327, and as such, is entitled to notice of appeal. (*Hiscock v. Phelps*, 2 Lans. 106.)

Unless notice of appeal is served on the clerk, within the time specified in §§ 331 and 332, the right to appeal is lost. (*Morris v. Morance*, 26 How. 247; S. C. 17 Ab. 86; 31 How. 639; *Van Clief v. Mersereau*, 8 Ab., N. S. 193.) The omission to serve the notice within the time limited cannot be supplied, or rectified. (Id.; *Ellsworth v. Fulton*, 24 How. 20; *People ex rel. Gannill v. Eldridge*, 7 How. Pr. 108; *Tripp v. DeBow*, 5 id. 114; S. C. 3 Code Rep. 163.) In *Tripp v. DeBow*,

supra, where such service was made upon the party only, and not on the attorney of record, the party not appearing, so as to give the court jurisdiction, it was held that the appeal was a nullity.

And where the notice of appeal from a justice's court was served on the justice, but not on the party, within the time limited for such service, it was held, that the appeal was not perfected, so as to give the appellate court jurisdiction. (*People ex rel. Gammill v. Eldridge*, 7 How. Pr. 108.) The service of notice is a jurisdictional question, which can be taken advantage of at any time before there is a positive act of submission to the tribunal whose jurisdiction is called in question. (Id.) On appeal from a justice's court to a court of record, the statute requirement of service of notice of appeal on the respondent is not merely directory; it is imperative. A verbal notice amounts to nothing. (Id.)

The service of notice of appeal may be either personal or by mail. It may be upon the attorney, by mail, on the last day for bringing the appeal, though it should fail to reach him until after the time has expired. (Van Sant. Eq. Pr. 659.) Such a service upon the clerk of the court, however, has been held irregular, though the court has power under the last clause of § 327, and will allow an amendment, in such a case, so as to give the party the benefit of his appeal. (Id.; *Crittenden v. Adams*, 1 Code Rep., N. S. 51; S. C. 5 How. Pr. 310; 1 Monell Pr. 2d ed. 740.) That clause authorizes an amendment in all cases of an appeal from an order or judgment, when there are particular defects in the appeal, which do not destroy its substantial character. (*Fry v. Bennett*, 16 How. Pr. 385. See, also, *Mills v. Thursby*, 11 How. Pr. 129; *Sternhaus v. Schmidt*, 5 Ab. 66.) But when there is a failure to give notice of appeal in good faith, there can be no amendment. (*The People v. Eldridge*, 7 How. Pr. 168.) Nor will an amendment be allowed, of a notice of appeal from a judgment, so as to make it also a notice of appeal from an intermediate order, after the time for appealing from such order has expired. This would be indirectly extending the time to appeal from such order, which it is held the court has no power to do. (Van Sant. Eq. Pr. 660; *Fry v. Bennett*, 16 How. Pr. 385.)

A notice of appeal from an order, when actually given, in due season, if there be particular defects therein which do not destroy its substantial character, may be amended; and so of an appeal from a judgment. (*Fry v. Bennett*, 2 Bosw. 684; S. C. 16 How. Pr. 385; aff'd, 26 id. 599.) But where notice of appeal from a judgment has been given, in all respects perfect, and containing nothing more, the court will not allow an amendment so as to make the appeal also an appeal from an order denying a motion for a new trial. (Id.)

The court has not the power to amend a notice of appeal, the effect of which will be, not merely to correct a mistake, but to enlarge the time for appealing. (*Bryant v. Bryant*, 7 Rob. 49; S. C. 4 Ab., N. S. 138; *Hunnheven v. Chamberlain*, 11 N. Y. 274; *Fry v. Bennett*, 2 Bosw. 684; S. C. 16 How. Pr. 385; *Wait v. Van Allen*, 22 N. Y. 319; *Cotes v. Carroll*, 28 How. 436; *People ex rel. Gammill v. Eldridge*, 7 id. 108; *Sherman v. Wells*, 14 id. 522; *Rowell v. McCormick*, 5 id. 357; *Enos v. Thomas*, id. 361; *Lindsley v. Almy*, 1 Code Rep., N. S. 139; *Renouil v. Harris*, 2 Sandf. 641; S. C. 2 Code Rep. 71. *Contra*, *Seeley v. Prichard*, 3 Duer, 669; S. C. 12 Leg. Obs. 245; *Haase v. N. Y. Central R. R. Co.* 14 How. Pr. 430; *Crittenden v. Adams*, 1 Code Rep., N. S. 21; S. C. 5 How. Pr. 310; *Traver v. Silvernail*, 2 Code Rep. 96.)

But, although the court has no power to extend the time in which a party may appeal, yet if he has appealed in due time, and given an informal notice of it, the court may allow him to amend his notice, *nunc pro tunc*. (*Sherman v. Wells*, 14 How. Pr. 522.) Thus if the reference to the judgment were incorrect; or if there were a mistake in the title, in the amount mentioned, in the date, or in any other circumstance; so that the court could be satisfied that it was intended for an appeal in the action in question, the necessary amendment would be allowed. (Id.)

Where the appellant has given an undertaking, but it is insufficient to stay proceedings, he may be allowed to file a further undertaking under the last clause of § 328. (*Sternhaus v. Schmidt*, 5 Ab. 66; *New York Central Ins. Co. v. Safford*, 10 How. Pr. 344, 347.) And when it appears that an appeal from the special to the general term is taken in good faith, and that the appeal does not, upon its merits, appear to be frivolous, although no proper undertaking may have been filed and served with the notice of appeal, the court will allow the undertaking to be filed, and a copy of it served as of the day when the notice was served, with liberty to the respondent to except to the sureties, with a stay of proceedings until the appeal be decided. (*Mills v. Thursby*, 11 How. Pr. 129.) But this is discretionary. (Id.)

Where an appeal has been perfected, without any stay of proceedings, the respondent, by serving a notice of argument after receiving notice of the appeal, will not preclude himself from enforcing the payment of the judgment. (*Arnoux v. Homans*, 32 How. 382.)

The appellant must serve his notice of appeal on the clerk in time; otherwise no appeal is taken. Filing his exceptions in time is not sufficient. (*Van Clief v. Mersereau*, 8 Ab., N. S. 193.) The court will not allow the exceptions so filed to be amended, after the time for appealing has expired, so as to include a notice of appeal, and thus perfect the appeal. (Id.) Service of the notice of appeal and undertaking on the clerk, by mail, on the last day allowed for service, is not sufficient. (Id.)

A defect in a notice of appeal, in not stating that the appeal is taken to the court at general term, or in what county clerk's office the judgment was entered, is a mere irregularity, and does not affect the jurisdiction of the general term. And it is not sufficient cause for dismissing the appeal, if the party objecting was not misled thereby. (*Silsbee v. Gillespie*, 9 Ab., N. S. 139.) Such a defect is waived by the respondent's subsequently noticing the cause, and stipulating as to the time for the hearing. (Id.)

3. *Parties, how designated; title of action; papers, how entitled.*] The Code, (§ 326) directs that the party appealing shall be known as the "appellant," and the adverse party as the "respondent."

But the title of the action is not to be changed, in consequence of the appeal. (Id.)

Where the affidavits and notice, for a motion in the court of appeals, were entitled "supreme court," they were held defective, and the motion denied, on that ground. They should have been entitled "court of appeals." (*Clickman v. Clickman*, 1 N. Y. 511; S. C. 3 How. Pr. 365; 1 Code Rep. 98.)

4. *Transmission of papers to appellate court.*] Section 328 of the Code directs that if the appellant shall not, within twenty days after his appeal is perfected, cause a certified copy of the notice of appeal and of the judgment roll, or, if the appeal be from an order, or any part thereof, a certified copy of such order, and the papers upon which the order was granted, to be transmitted to the appellate court by the clerk with whom the notice of appeal is filed, the respondent may cause such certified copy to be transmitted by such clerk, to the appellate court, and recover the expenses thereof, as a disbursement on such appeal, in case the judgment or order appealed from shall be in whole or in part affirmed.

It has been held, that in equity suits commenced prior to the Code, the return to an appeal will be sufficient if it contain a copy of the notice of appeal, and of the decree according to the former practice, without the pleadings or proofs. (*Farmers' Loan and Trust Co. v. Carroll*, 2 N. Y. 566.) An appeal will not be dismissed for a formal omission to insert, in the printed case, the certificate of the clerk of the court below, verifying the papers returned by him to the appeal. (Id.)

By rule 2 of the court of appeals, the appellant must cause the proper return to be made and filed with the clerk of that court, within twenty days after the appeal is perfected. If he fails to do so, the respondent may, by notice in writing, require the return to be filed within ten days after service of the notice. If the return be not so filed, the appellant will be deemed to have waived the appeal, and the appeal may be dismissed.

A default taken under this rule, for not making the return within twenty days after the appeal was perfected, or, under rule 7, for default in not serving printed copies of the case, may be relieved against upon terms, when it appears that the appeal was brought in good faith; unless the respondent can show some delay or inconvenience arising from such default. (*Waterman v. Whitney*, 7 How. Pr. 407.)

5. *Judgment on appeal.*] Section 330 of the Code directs that upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and as to all or any of the parties; and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

Section 366 of the Code directs that on appeal from a justice's court, to either of the other courts specified in § 352, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. And the court may affirm or reverse the judgment of the court below, in whole or in part, and as to all or any of the parties, and for errors of law or fact.

It is a general rule that upon an appeal from a judgment or order, the appellate

court is to make such a judgment as the court below ought to have made, when the judgment or order appealed from was entered. (*Bank of Orange v. Fink*, 7 Paige. 87.) By § 330 of the Code, the court is clothed with the power, not only to render a simple judgment of affirmance or of reversal, ordering, if necessary or proper, a new trial, but also to *modify* the judgment or order appealed from, and as to all or any of the parties. It may be reversed as to one defendant who appeals, without affecting the judgment as to another defendant who does not appeal, in cases where a several judgment below would be proper. (Van Sant. Eq. Pr. 666; *Geraud v. Stagg*, 10 How. Pr. 369; S. C. 4 E. D. Smith, 27.) Where a judgment is not entire, but is for different things separable in their nature, and separated on the record, the supreme court, under its common law powers, may reverse in part and affirm in part. (*Story v. The N. Y. and Harlem R. R. Co.* 6 N. Y. 85, 89; *Tillou v. Kingston Mu. Ins. Co.* 5 id. 405.) But it cannot be affirmed as to a part of the amount recovered, and reversed as to the residue, when a new trial is ordered as to the part which is reversed. (Id.)

On appeal from a decision made at a special term, the supreme court at general term has authority, under § 366 of the Code, to modify the judgment, according to the justice of the case, without regard to technical errors. (*Brownell v. Winnie*, 29 N. Y. 400; S. C. 29 How. Pr. 193.) The court of appeals also possesses the same power. (Id.) Where two or three independent causes of action are prosecuted in a justice's court, and the judgment is right as to one, and erroneous as to the others, which fact distinctly and plainly appears on appeal, it is the right and duty of the county court to reverse as to the erroneous and affirm as to the legal part of the judgment. (*Staats v. The Hudson River R. R. Co.* 39 Barb. 298; S. C. 23 How. Pr. 463.) The county court, on such an appeal, has authority, under § 366 of the Code, to modify the judgment, according to the justice of the case. (*Brownell v. Winnie*, *supra*.) Where there is a clear mistake as to the amount of damages for which a judgment is rendered, an appellate court, having power to affirm or reverse in whole or in part, (Code, § 366,) may reverse as to the part inserted in the judgment by mistake, and affirm as to the residue. (*Fields v. Moul*, 15 Ab. 6.) Where a judgment appealed from consists of distinct matters, and those matters are so presented that a final judgment may be rendered by the appellate court upon each, the judgment may be affirmed as to part, and reversed as to the residue. (Id.)

On appeal to the court of appeals, that court may reverse, affirm or modify the judgment or order appealed from, in whole or in part, and as to all or any of the parties. (Code, § 12.) It can modify the judgment appealed from by reversing it as to the sum assessed as damages, and affirming it as to the interest allowed as damages, and may direct that the judgment be so amended as to grant to the relator a writ of mandamus. (*The People ex rel. Aspinwall v. The Supervisors of Richmond*, 28 N. Y. 112.)

Where a jury has fixed the amount of damages at a specified sum, it is competent for the general term of the supreme court, on appeal, if, in its judgment, such damages are excessive, to order a new trial, or, in its discretion, to affirm, in case the appellant remits the amount adjudged excessive. (*Sears v. Conover*, 33 How. Pr. 324, 326.) It has long been the settled practice of the court, on a motion for a new trial, to refuse to set aside the verdict, if the parties would consent to deduct any amount deemed excessive. (Id.) Such a proceeding was recognized and approved by the court of appeals in *Chouteau v. Suydam*, (21 N. Y. 179.) See, also, *Boyd v. Foot*, (5 Bosw. 110.)

If, on appeal to the general term, a judgment of the special term is *affirmed*, a new judgment should not be entered. A simple judgment of affirmance, with the award of costs, (if any,) should be attached to the original judgment roll. (*Eno v. Crooke*, 6 How. Pr. 462; approved in *DeAgreda v. Mantel*, 1 Ab. 130.) It is improper to enter up two judgments in the same court, for the same demand. (Id.) But it seems that the old practice of entering a new judgment upon an appeal will still apply, where the appeal is brought from a judgment of an *inferior* court to the supreme court.

A judgment of affirmance should not embrace any sum secured by the judgment appealed from. (*Halsey v. Flint*, 15 Ab. 367.) In general, where a judgment is *reversed*, on appeal, a new trial should be awarded. (Id. And see *Dutch Reformed Church of Canajoharie v. Wood*, 8 Barb. 42; *Meyer v. City of Louisville*, 26 Barb. 609; S. C. 7 Ab. 6.) But when the appellate court sees that no possible proof applicable to the issues can entitle the party to a recovery, it is not necessary, or

even proper, that a new trial should be awarded. (*Edmonston v. McLoud*, 16 N. Y. 543; S. C. 19 Barb. 356; approved in *Griffin v. Marquardt*, 17 N. Y. 28.)

On reversing a judgment, the appellate court has no power to order a re-trial, in whole or in part, upon evidence given on the former trial. (*Bissell v. Hamlin*, 13 Ab. 22.)

Upon appeal to the supreme court, at general term, upon a case, from a judgment at special term upon the validity of a transfer of personal property, the appellate court may reverse or affirm, according to the conclusion at which it may arrive from the whole evidence upon the question of fraud; and its decision is not reviewable by the court of appeals. (*Griffin v. Marquardt*, 17 N. Y. 28.) Where, however, the judgment at special term is reversed for error in law, a new trial should be awarded, unless it be entirely plain, from the pleadings, or the very nature of the controversy, that the party against whom the judgment of reversal is pronounced, cannot, upon any fresh evidence, prevail in the suit. (Id.) The improper refusal of a new trial, in such a case, is error, reviewable in the court of appeals. The question does not rest merely in the discretion of the supreme court. (Id.)

When there are several defendants, and the judgment appealed from is in their favor, it may be affirmed as to some of the defendants, and reversed and a new trial ordered as to others, when it would have been proper to render separate judgments in the inferior court. (*Geraud v. Stagg*, 10 How. Pr. 369; S. C. 4 E. D. Smith, 27; sub nom. *Giraud v. Stagg*; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Campbell v. Perkins*, 6 N. Y. 86 n.)

Where a judgment for the plaintiff, in the marine or justice's court, is reversed in the court of common pleas of New York, without an award of final judgment for the defendant, upon the merits, such reversal is not conclusive as to the rights of the parties. (*Eliert v. Kelly*, 10 How. Pr. 392; S. C. 4 E. D. Smith, 12.) In such a case, the costs incurred by the defendant in the inferior court cannot be allowed him and embraced in the judgment of reversal. Otherwise, perhaps, if the judgment of reversal had been final. (Id.)

A judgment rendered at a general term, on appeal from a judgment of the special term, which merely affirms the latter, and does not award a new judgment for the whole amount recovered, but only for the costs of the appeal, is a judgment for such costs only; and a satisfaction of it only discharges such costs, and neither operates as nor warrants a discharge of the judgment appealed from, or of a prior judgment, which was allowed to stand as security. (*Beers v. Hendrickson*, 6 Rob. 53.)

A mere order of the general term, affirming the judgment appealed from, (on demurrer,) except that the appellant have leave to answer the complaint, is not sufficient to authorize a recovery upon the undertaking. (*Poypenhusen v. Seeley*, 41 Barb. 450; S. C. 3 Keyes, 150; 31 How. 639.)

Judgments should not be reversed to enable a party to recover, when, under the evidence, he could recover only nominal damages. (*Hogan v. Cregan*, 6 Rob. 138.) The verdict of a jury upon questions of fact properly submitted to them, on which there is conflicting evidence, should not be disturbed on appeal. (*Bishop v. Jackson*, 6 Rob. 287.)

Although section 122 of the Code authorizes the court to determine any controversy between the parties before it, yet, after an appeal from the judgment in an action against several defendants, where each, in his answer, merely asks that the complaint be dismissed, as against him, and neither demands any relief as against the others, it is too late to ask for such relief. (*Garvey v. Jarvis*, 54 Barb. 179.)

Restitution.—The language of section 330, in regard to *restitution*, is not imperative, and leaves much to the discretion of the court. (*Coster v. Peters*, 7 Rob. 386; S. C. 4 Ab., N. S. 53; *Estus v. Baldwin*, 9 How. Pr. 80.) It is irregular to permit a judgment or order of restitution to be entered where it has not been directed in the remittitur, without notice to the party to be affected by the order. (*Young v. Brush*, 18 Ab. 171; S. C. 28 N. Y. 667; 41 N. Y. 620.) Restitution is to be directed where property or rights have been lost by an erroneous judgment. It will not be ordered unless it is clear that the party to whom the money has been paid holds it without right. (Id.)

In case of an attachment issued under sections 227, &c., of the Code, and also in case of a judgment recovered in such attachment suit, where it appears that the judgment has been executed and paid, notwithstanding the pendency of an appeal, the appellate court, under section 330, has power to order, on reversal of the judgment appealed from, a restitution to the appellant of the moneys so collected, notwithstanding such reversal is accompanied by an order granting a new trial, and

notwithstanding the attachment is so pending. (*Britton v. Phillips*, 34 How. Pr. 111.) The restitution in such a case will be effected by ordering the moneys to be deposited in court, to abide the result of the new trial, and subject to the lien of the attachment. (Id.)

The restitution to which a party is entitled, upon the reversal of a judgment, is not restitution of everything he has lost thereby; he recovers only what is still in possession of his adversary. The rights of third parties must be respected. (*Lovett v. German Reformed Church*, 12 Barb. 67.) Where the rights of third parties have intervened, who have been misled by the appearance of things, which has been the result of an omission to procure a stay, the court ought not to permit them to be prejudiced by an order for restitution. (Per ROBERTSON, J., in *Coster v. Peters*, 7 Rob. 386; S. C. 4 Ab., N. S. 53.)

When a judgment has been paid, before appeal brought, but is not satisfied of record, the appellate court, on reversal, cannot order a restitution of the amount paid. (*Sheridan v. Mann*, 5 How. Pr. 201; S. C. 3 Code Rep. 213.)

On appeal to the supreme court, where judgments of a county court and justice are both reversed, complete restitution cannot be made to the appellant short of paying him his costs of defending the action before the justice, and of prosecuting the appeal before the county court, together with costs in the supreme court. (*Estus v. Baldwin*, 9 How. Pr. 80; approved in *Jacks v. Darrin*, 1 Ab. 232. See, also, *Whitbeck v. Patterson*, 22 Barb. 83.)

The power to order restitution of all property and rights lost by an erroneous judgment is cumulative, and does not take away the common law rights of a successful appellant, who has paid over money upon the erroneous judgment. (*Lott v. Swezey*, 29 Barb. 87.)

Entering and docketing.—Judgment on appeal must be entered and docketed with the clerk in whose office the judgment roll is filed. When the appeal is heard in a county other than that where the judgment roll is filed, or is not from a judgment of a county court, the judgment upon the appeal must be certified to the clerk with whom the roll is filed, to be there entered and docketed. (Code, § 347.)

The Code, (§ 311,) also provides that "the clerk shall insert, in the entry of judgment, on the application of the prevailing party, upon two days' notice to the other, the sum of the charges for costs, as above provided, and the necessary disbursements and fees of officers allowed by law, including the compensation of the referees and the expense of printing the papers upon any appeal."

Under these provisions it has been held that in all cases of appeal from the circuit court, the judgment on the appeal should be certified to the clerk with whom the roll is filed, to be there entered and docketed. (*Andrews v. Durant*, 6 How. Pr. 191.) Thus, where the defendants entered judgment of nonsuit, and filed the roll in Ulster county, where the venue was laid, and on appeal to the general term at Albany, judgment was affirmed, and the defendants entered judgment and filed another roll in Albany county, it was held that the latter judgment was irregular; that it was the clerk of Ulster and not the clerk of Albany who had the power to adjust the costs, and file the roll and perfect judgment. (Id.)

If the party appellant or respondent dies, after appeal perfected but before judgment, the judgment may be entered as of a day anterior to his death. (*Beach v. Gregory*, 2 Ab. 203; S. C. aff'd 1 Hilt. 201; 3 Ab. 78; *D'Arreda v. Mantel*, 1 Ab. 130; *Holmes v. Honie*, 8 How. Pr. 383; *Miller v. Gunn*, 7 id. 159; *Rogers v. Patterson*, 4 Paige, 409; *Vroom v. Ditmas*, 5 id. 528.) If a party dies after the argument of an appeal, but before the decision and judgment is entered against him *nunc pro tunc*, as of a day before his death, the prevailing party may proceed to collect his judgment, and the representatives of the deceased party must, at their peril, cause themselves to be made parties, or the judgment may be enforced against them. (Id.)

An order of affirmance, by default, founded upon a notice of argument addressed to and served upon the attorney of a defendant, after the death of the latter, and after the attorney for the appellant has been notified of his death, is irregular. (*Warren v. Eddy*, 32 Barb. 664; S. C. 13 Ab. 28.)

SECTION VI.

APPEAL TO THE CHANCELLOR FROM A VICE CHANCELLOR.(19)

Within what time to be brought.] Any party complaining of any *interlocutory* or other order, previous to a final decree made by any

(19) APPEAL TO THE GENERAL TERM FROM JUDGMENTS ENTERED UPON A REPORT OF REFEREES, OR THE DIRECTION OF A SINGLE JUDGE.

In the supreme court, the superior court of the city of New York, and the court of common pleas for the city and county of New York, an appeal upon the *law* may be taken to the general term, from a judgment entered upon the report of referees, or the direction of a single judge of the same court, in all cases, and upon the *fact* when the trial is by the court or referees. (Code, § 348.)

Such an appeal, however, does not stay the proceedings, unless security be given as upon an appeal to the court of appeals, and such security be renewed as in cases required by § 335, on motion to the court at special term, or unless the court or a judge thereof, so order; which order may be made upon such terms, as to security or otherwise, as may be just; such security not to exceed the amount required on an appeal to the court of appeals. (Id.)

An appeal will not lie in the first instance, to the general term, upon a case containing questions of fact alone. In such a case, application must first be made at special term. (*Collins v. Albany & Schenectady R. R. Co.* 5 How. Pr. 435; *Lotach v. Hotchkiss*, 17 Ab. 88.) A decision upon questions of fact, found by a judge at special term, may be reversed by the supreme court, on appeal; but if the court affirms the decision of such questions, the court of appeals will regard that determination of the questions of fact as final, and affirm the judgment. (*Waters v. Green*, 3 Keyes. 385.)

The "judgment" from which an appeal may be taken to the general term, means the same thing as a judgment from which an appeal may be taken to the court of appeals. (*Lawrence v. The Farmers' Loan and Trust Co.* 15 How. Pr. 57; S. C. 6 Duer, 618.) There can be an appeal only from a *final* judgment. (*The People ex rel. McSpedon v. Haws*, 34 Barb. 69; S. C. 21 How. Pr. 178; 12 Ab. 204.) Whenever a case is referred, at a special term, even when the order of reference settles all the essential points at issue, it is nothing but an *interlocutory* order; and no *final* judgment can be entered until the coming in of the report. If the party appeals from the order of reference, the appeal will be dismissed. (Id.) If, on a trial, whether by the court or by a referee, a decision or report is made in favor of one party, and a reference to take an account is ordered, which is necessary in order to ascertain the amount for which judgment is to be rendered, judgment cannot be entered until the accounting has been had, and everything essential to the judgment has been ascertained. (*McMahon v. Allen*, 7 Ab. 1; *Griffin v. Cranston*, 5 Bosw. 658.) If the unsuccessful party wishes to appeal, he must wait until after the accounting has been had, and a final judgment thereon entered. (Id.)

A judgment is deemed entered by the direction of a single judge when it is entered by the clerk, at the circuit, upon the verdict of a jury, under § 264 of the Code; and from such a judgment, § 348 authorizes an appeal upon the law to the general term, without any motion having been previously made at a special term, for a new trial. (*Morris v. The N. Y. and New Haven R. R. Co.* 32 Barb. 568; *Morange v. Morris*, id. 650; S. C. 12 Ab. 164; *Jackson v. Fassitt*, 12 Ab. 281; S. C. 20 How. Pr. 279; 33 Barb. 645.) Such an appeal brings up the *law* of the case, as presented by exceptions taken on the trial. (Id.) To present a question of *fact* upon the evidence, or the right of the unsuccessful party to a new trial, for the reason that the verdict is against evidence, or upon the ground of surprise or newly discovered evidence, or the like, a motion must be made at a special term, and from the order made thereon, an appeal to the general term lies. (Id.)

Where, on a frivolous demurrer to the complaint, judgment is ordered for the plaintiff, and, on appeal, such order is affirmed at general term, and judgment entered, such judgment is appealable to the general term, and must be heard there before a review can be had in the court of appeals. (*Hollister Bank of Buffalo v. Vail*, 15 N. Y. 593.)

If, without objection from either party, the general term entertains an appeal, in a case which is not properly appealable, the decision is binding. (*D'Ivernois v. Lavitt*, 8 Ab. 59; *Griffin v. Cranston*, 5 Bosw. 658.)

An appeal from a judgment which has been subsequently settled by the parties and satisfaction acknowledged, will not be heard by the court merely to protect the rights of the respondent's attorney to costs. (*Cock v. Palmer*, 1 Rob. 658; S. C. 19 Ab. 372.)

No undertaking is necessary, on an appeal to the general term from a judgment rendered at a special term, or on the report of a referee, to *sustain the appeal*. (*Niles v. Battershall*, 26 How. 93; S. C. 18 Ab. 161; *Parsons v. Suydam*, 4 Ab. 134; *Genter v. Fields*, 1 Keyes, 483; *Halsey v. Flint*, 15 Ab. 367; *Kitching v. Diehl*, 40 Barb. 433; *Ten Broeck v. Hudson River R. R. Co.* 7 How. Pr. 137.) If a stay of proceedings is desired by the appellant, he must either obtain an order of the court, or of a judge, for that purpose; or he must file and serve with the notice of appeal a copy of an undertaking, as required on an appeal to the court of appeals. (Id.; *Smith v. Heermance*, 18 How. Pr. 261; *Staring v. Jones*, 13 id. 423; *Arnoux v. Homans*, 32 id. 382.)

On an appeal from a judgment, under this section, the undertaking, in order to stay proceedings, must provide for the payment of all costs, as well as the damages which may be awarded against the defendant, on the appeal, not exceeding \$250, (as now amended, \$500.) If the undertaking omits to provide for the costs on appeal, it is good so far as it goes, and the respondent is not bound to return it; but it does not stay the proceedings. (*Chemung Canal Bank v. Judson*, 10 How. Pr. 133; *Hulsey v. Flint*, 15 Ab. 367.)

A stay of proceedings may be ordered without an undertaking. (*Mills v. Thursby*, 11 How. Pr. 129; *Staring v. Jones*, 13 id. 423; *Polhamus v. Moser*, 7 Rob. 443.)

Where an appellant has given security on appeal to the general term, and his sureties have become insolvent, his failure to comply with an order directing new sureties to be given is not ground for dismissing his appeal. (*Genter v. Fields*, 1 Keyes, 483.)

Sureties to an undertaking on appeal are not liable thereon, when the judgment on such appeal is merely interlocutory, and not final; or where there is no judgment of affirmance. (*Poppenhusen v. Seeley*, 3 Keyes, 150; S. C. 41 Barb. 450.)

Where, on appeal to the general term, the appellant fails to serve a case, and the appeal is regularly noticed, and reached on the calendar, the respondent may, if the appellant does not appear, take a judgment of affirmance. He is not limited to a motion to dismiss the appeal or to strike it from the calendar. (*Peters v. Groupe*, 15 Ab. 263; S. C. 9 Bosw. 638. But see *Warren v. Eddy*, 32 Barb. 644; S. C. 13 Ab. 28.)

A motion to dismiss an appeal should be made at the general term. (*Barnum v. Seneca County Bank*, 6 How. Pr. 82; S. C. 1 Code Rep., N. S. 405.) Where a party, instead of moving to dismiss an appeal, immediately on its being brought, waits until the final hearing before he raises the question, he will not be allowed costs. (*Williams v. Fitch*, 15 Barb. 654.)

The respondent may, it seems, notice the appeal for argument as soon as the case or exceptions are settled. (*Anderson v. Dickie*, 26 How. 199; S. C. 17 Ab. 83; 1 Rob. 700.)

The court will not hear an appeal out of its order on the calendar, on the ground that it is frivolous. (*Wilder v. Lane*, 34 Barb. 54; S. C. 12 Ab. 351.)

A mere order of the general term, affirming the judgment appealed from (on demurrer,) except that the appellant have leave to answer the complaint, is not sufficient to authorize a recovery upon the undertaking. (*Poppenhusen v. Seeley*, 41 Barb. 450; S. C. 3 Keyes, 150.)

Where an appeal is duly taken from a judgment at special term to the general term, by the unsuccessful party, it is a waiver of all irregularities in the judgment which might have been objected to at special term, if a motion had been made before the appeal was taken. (*People v. Albany & Susquehanna R. R. Co.* 39 How. 49; S. C. 8 Ab., N. S. 122; 2 Lans. 459.)

Section 348 of the Code directs that no action shall be commenced upon any undertaking given in pursuance of the provisions of that section until ten days after the service of notice on the adverse party of the entry of the order or judgment affirming the judgment appealed from. And in case of an appeal to the court of appeals from such order or judgment of affirmance, and security given according to law, so as to stay the issuing of execution, no action shall be commenced or recovery had upon any undertaking given in pursuance of the provisions of that section, until after the final determination of such appeal.

vice chancellor, may, within fifteen days after notice of such order, appeal therefrom to the chancellor.(*t*)

And any party complaining of any *final* decree made by a vice chancellor, may appeal therefrom to the chancellor within six months after such decree shall have been entered in the minutes of the court. And such appeal may be made notwithstanding the decree may have been enrolled.(*u*)

If a party in whose favor an interlocutory decision of a vice chancellor is made, wishes to limit the time for appealing, he should have the order entered, and serve a copy, or give formal notice thereof, to the adverse party, without delay; as the latter has fifteen days after the receipt of notice of such order, to appeal from the decision.(*v*) Parol notice, where a copy of the order has not been served, is not sufficient.(*w*)

As a party cannot have legal notice of an order until it is drawn up and perfected, the time for appealing from it does not begin to run against the party entering the order until the actual entry thereof, although the caption of the order bears date as of a previous day.(*x*) Where, however, the appellant draws and enters the order, he is deemed to have had notice of such order from the time it is actually entered by him.(*y*) And where the party who is entitled to draw up the order, enters it as of the time the decision of the court was pronounced, he cannot afterwards object that it was not actually entered at that time.(*z*)

The court has no power to extend the time for appealing; not even upon the ground of the mistake of the party, it being fixed by statute; and the lapse of time is an absolute bar to the appeal.(*a*) Nor can the court vacate the order, and cause it to be entered as of a more recent date, to enable a party to appeal therefrom.(*b*) But if a party to a suit before a vice chancellor, is misled by any mistake or neglect of the clerk, as to the time of the entry of a final decree, whereby he does not perfect his appeal until after the expiration of the time for appealing, it would be sufficient ground for an application to the vice chancellor to have the decree re-entered, so as to give him an opportunity of appealing within the time fixed by statute.(*c*)

(*t*) 2 R. S. 178, § 65, (orig. § 59.) Eldridge v. Howell, 4 Paige, 457.

(*u*) Id. ib. 4 Paige, 457.

(*v*) Stadwell v. Palmer, 5 Paige, 57. Tyler v. Simmons, 6 id. 127. People v. Spalding, 9 id. 607.

(*w*) Tyler v. Simmons, *supra*.

(*x*) North American Coal Co. v. Dyett, 4 Paige, 273. Whitney v. Belden, id. 140.

(*y*) Id. ib.

(*z*) Whitney v. Belden, *supra*.

(*a*) Townsend v. Townsend, 2 Paige, 413. Barclay v. Brown, 7 id. 245. Cadwell v. Mayor, &c. of Albany, 9 id. 572.

(*b*) Id. ib. Cadwell v. Mayor, &c. of Albany, 9 Paige, 572.

(*c*) Barclay v. Brown, *supra*.

But where the time for appealing depends upon a rule of the appellate court, such court, upon a sufficient excuse shown, may suspend its rule and allow an appeal, although such appeal was not brought within the time prescribed by the rule for appealing.(d)

It seems, that an order directing an issue, cannot be appealed from after the trial has taken place.(e)

An appeal to the chancellor from a final decree of a vice chancellor as to the general costs in the cause, may be made at any time within six months from the time of entering the decree.(f)

Method of appealing—notice.] (20) The statute declares that appeals to the chancellor from a vice chancellor, shall be made by serving notice thereof on the solicitor of the adverse party, and on the register, assistant register, or clerk with whom the decree or order appealed from was entered.(g) This is done by delivering to the register, &c., a written notice stating that such decree or order, or some particular part thereof, to be specified in the notice, is appealed from.(h) The notice required to be served on the solicitor of the adverse party, must be served within the time limited by the statute for appealing.(i)

This notice must be served upon the solicitors of the several parties, whose interests, as to such appeal, are adverse to the appellant.(k) A mere constructive notice is not sufficient.(l)

The notice above mentioned, takes the place of the petition of appeal which is used in our court for the correction of errors and in the English courts. The 119th rule declares that no petition of appeal addressed to the chancellor need be presented on appeals from orders or decrees of vice chancellors; and that no transcript need be returned; but that the original pleadings and other papers in the cause may, by order of the chancellor, and at the expense of the party procuring such order, be transferred from one office to another as occasion may require; and that the expense of such transfer may be taxed as a necessary disbursement.

(d) *Cadwell v. Mayor, &c. of Albany*, 9 Paige, 572. *Smith v. Smith*, 1 id. 391.

(e) *DeTastet v. Borlenave, Jacob*, 516.

(f) *Fulton Bank v. New York and Sharon Canal Co.* 4 Paige, 127.

(g) 2 R. S. 178, § 66, (orig. § 60.)

(h) Rule 117.

(i) *Eldridge v. Howell*, 4 Paige, 457.

(k) *Potter v. Baker*, 4 Paige, 290.

(l) *Id. ib.*

(20) The Code, (§ 327,) provides that an appeal shall be made by the service of a notice in writing, on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof. When a party shall give, in good faith, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to effect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just.

Under this rule, it has been decided that it is not necessary to obtain an order for the transfer of the papers, except where the inspection of original papers may become necessary on the hearing. And that where a transfer of the papers becomes necessary, the party applying for it must, by affidavit, state the particular reasons which render a removal of the papers necessary.(*m*)

Bond and deposit. Within the time limited by statute for appealing, the appellant must make the necessary deposit, or file the bond required to be given as security for costs on the appeal.(*n*) The bond here spoken of is required to be in the penalty of at least \$250, with surties, to be approved of by such officer as the chancellor shall designate for that purpose, conditioned for the diligent prosecution of the appeal, and for the payment of all costs and damages that may be awarded against the appellant thereon.(*o*)

The approval of an appeal bond is an act requiring the exercise of judgment and discretion on the part of the approving officer; and under the prohibition of the statute, (2 R. S. 204, § 6,) a master who has acted as solicitor or counsel in the cause or matter in which the appeal is taken, or whose law partner has thus acted, cannot regularly approve such bond.(*p*)

If a bond is not given, the appellant must deposit the sum of \$250 with the register, assistant register or clerk, to be applied, under the direction of the court, for the payment of all costs and damages that may be awarded against the appellant on the appeal.(*q*) But a deposit is not necessary if a bond is given.(*r*)

The bond may be approved of by any vice chancellor or injunction master, or by the register, assistant register or clerk with whom the appeal is entered: to be signified by his approval endorsed thereon.(*s*) But if the bond is approved of by the register, instead of the clerk of the vice chancellor with whom the appeal is entered, it is a mere irregularity which will be considered as waived if the adverse party does not apply to the chancellor to dismiss the appeal within a reasonable time after notice of such irregularity.(*t*) The power of the court to dispense with the usual formality with respect to the approval of bonds on appeals from vice chancellors, arises from the fact that the form and manner of giving the security upon such appeals are regulated by a

(*m*) *Eames v. Sanger*, 3 Paige, 556

(*n*) Rule 117.

(*o*) 2 R. S. 605, § 80. Rule 116.

(*p*) *McLaren v. Charrier*, 5 Paige, 530.

(*q*) 2 R. S. 605, § 80.

(*r*) *Id. ib.* § 81.

(*s*) Rule 116.

(*t*) *Hawley v. Bennett*, 5 Paige, 104.

rule of the court, and not by statute.(u) It is otherwise as to appeals to the court of errors, which are regulated by statute.(v)

The bond must be executed by at least two responsible sureties who are residents of the state, and householders.(w) They should justify in double the amount of the penalty of the bond. And the officer who approves the bond should, in his certificate, state that he approves of the sufficiency of the sureties as well as of the form of the bond.(x)

It is not necessary that the appellant should join in the bond.(y)

The appellant's solicitor may be one of the sureties.(z)

If the officer who approves of the bond does not know that the sureties offered are responsible, it is his duty to examine them as to the nature of their property and the place of their residence, and to require them to justify in at least double the penalty of the bond. And he should annex the affidavit of justification to the bond, and require it to be filed therewith.(a)

The appellate court has power to authorize an amendment of the bond, either as to the amount, or as to the approval thereof;(b) or, with the consent of the obligors therein, by adding the name of another surety.(c)

Where two distinct orders are made in the same cause, they may both be included in the same appeal bond; provided the penalty of the bond is sufficiently large, and the condition is broad enough to secure the payment of the whole amount required to be secured on both appeals.(d)

It has been mentioned that an appeal bond cannot regularly be approved by a master who has acted as solicitor in the cause or matter in which the appeal is taken, or whose law partner has thus acted.(e)

But liberty will be given by the appellate court to amend, by filing a new bond *nunc pro tunc*, or by procuring the same bond to be approved of by the proper officer.(f)

The Revised Statutes contain a general provision that whenever a bond is required by law to be given by any person in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, it shall not be necessary for such bond to conform in all

(u) Id. ib.

(v) Rogers v. Patterson, 4 Paige, 453.

(w) Van Wezel v. Van Wezel, 3 Paige, 38.

(x) Eldridge v. Howell, 4 Paige, 457.

(y) North American Coal Co. v. Dyett, 4 Paige, 273.

(z) Stadwell v. Palmer, 5 Paige, 57.

(a) Van Wezel v. Van Wezel, *supra*.

(b) Eldridge v. Howell, 4 Paige, 457.

(c) Potter v. Baker, 4 Paige, 290.

(d) Tyler v. Simmons, 6 Paige, 127.

(e) Ante, p. 401.

(f) McLareu v. Charrier, 5 Paige, 530.

respects to the form thereof prescribed by any statute; but the same shall be sufficient if it conform thereto substantially, and does not vary in any matter to the prejudice of the rights of the party to whom or for whose benefit such bond shall have been given.(g)

Whenever such bond is defective in any respect, the court, officer or body who would be authorized to receive the same, or to entertain any proceedings in consequence thereof, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect. And such bond shall thereupon be deemed valid from the time of the execution thereof.(h)

The 172d rule requires appeal bonds to be duly proved or acknowledged in the manner prescribed by law for the proof or acknowledgment of deeds of real estate, before the same shall be received or filed.

Under this rule it has been decided by the chancellor that where, by mistake, a bond has not been acknowledged before a proper officer, the error may be corrected by a new acknowledgment of the bond filed. But where the object of the appeal is to take advantage of a mere technical error on the part of the respondent, the court will not allow such a mistake in the acknowledgment of the appeal bond to be corrected.(i)

Where the appeal bond is not duly acknowledged according to the provisions of the 172d rule, the appeal is irregular, and may be dismissed for that cause.(k)

Papers on appeal.] In the 3d section of the present chapter, and in the 11th chapter of the 1st BOOK, relative to Hearings, we have mentioned what papers are to be furnished,(l) and by whom,(m) and what papers may be read upon the hearing of an appeal.(n)

Place of appeal cause on the calendar.] In making up the chancellor's calendar, appeal causes are to be placed thereon as of the same date at which they were entitled to be placed on the calendar of the court below.(o)

Hearing of appeal.] When an appeal is in readiness to be heard, it may be noticed for hearing by either party.(p) (21)

(g) 2 R. S. 556, § 33.

(h) *Id. ib.* § 34.

(i) *Ridabock v. Levy*, 8 Paige, 197.

(k) *Id. ib.*

(l) *Ante*, p. 314, 384.

(m) *Ante*, p. 315.

(n) *Ante*, p. 315, 384.

(o) *Belknap v. Tremble*, 2 Paige, 277. Rule 91.

(p) Rule 120.

(21) HEARING OF APPEAL.

Appeals in the supreme court are to be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered,

or in a county adjoining that county; except that where the judgment or order was entered in the city and county of New York, the appeal must be heard in the first district. (Code, § 346.)

Rule 50 of the supreme court directs that where an appeal is noticed for the general term in cases embraced in chapter 3 of title 11 and § 348 of the Code, the appellant shall furnish the papers for the court; and specifies the papers to be furnished. It also directs that at the commencement of the argument, a printed copy of such papers, and of the points, shall be furnished to each of the judges, and that three printed copies of said papers shall be delivered to the attorney of the adverse party, at least eight days before the commencement of the term. And each party must serve upon his adversary a printed copy of his points and authorities on which he intends to rely. In case of the appellant's neglect to furnish to the respondent the said number of copies of the papers, the latter may move to strike the cause from the calendar, and that judgment be rendered in his favor.

This rule, it has been held, applies to appeals from orders of a county court, granting a new trial. (*Harper v. Allyn*, 3 Ab., N. S. 186.) The court will disregard all papers in manuscript. (*Wheeler v. Eblower*, 7 Rob. 45.) Where all the necessary papers, on appeal, are not furnished to the court, by the appellant, the appeal will be dismissed. (*San Mutual Ins. Co. v. Dwight*, 1 Hilt. 50.) Where no case is made or served, the respondent may, on the calling of the case, take a judgment of affirmance by default. He is not restricted to a motion to dismiss the appeal, or to strike the cause from the calendar. (*Peters v. Groupe*, 15 Ab. 233; S. C. 9 Bosw. 638.)

On appeal from an order, where no affidavits were read in opposition to those in support of the motion, the presumption will be in favor of the statements in the affidavits read. (*Jackson v. Smith*, 16 Ab. 201; S. C. 25 How. 476.) On appeal from an order denying a motion to vacate a judgment, for irregularity, if the irregularity is not specified in the notice of motion, the appellate court may presume that the motion was denied on the ground of the defect in the notice. (*Lewis v. Graham*, 16 Ab. 126.) So, on appeal from an order proper to be granted only as a matter of favor, the court at general term, in support of the order, will presume, until the contrary appears, that it was so granted. (*Leighton v. Wood*, 17 Ab. 177.)

Where an appeal is taken from a judgment, and there is also an appeal from an order denying a motion for a new trial on the judge's minutes, it is the better course to hear both appeals argued on the appeal from the judgment. (*Lane v. Bailey*, 30 How. 76; S. C. 45 Barb. 119; 1 Ab., N. S. 497.)

A motion for a re-argument of an appeal will not be granted in a case where the plaintiff and defendant were the only witnesses on the trial in the court below and their testimony was conflicting. (*Ester v. Merwin*, 25 How. 284.)

Section 256 of the Code, which provides that in the first judicial district there need be but one notice of trial from either party, does not apply to notice of argument on an appeal to the general term. A default cannot be taken at a general term for which the appeal is not noticed. (*Walsh v. Gregory*, 19 Ab. 363.)

Appeals from orders are, as a general rule, brought on as motions, at the general term. The appeal being perfected by the service of notices, either party may give notice of the argument, and bring the cause on, as any other special motion. (Van Sant, Eq. Pr. 671.)

The cases and points, and all other papers furnished to the court at a general term in calendar cases, must be printed on white writing paper, with a margin on the outer edge of the leaf, not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference must be seven inches long and three and a half inches wide. The folio, numbering from the commencement to the end of the paper, must be printed on the outer margin of the page. (Rule 52 of supreme court.)

Either party may notice an appeal for argument, or hearing. The notice must be served eight days before the first day of the term at which it is intended to bring on the argument, (or double that time if the service be by mail,) and must specify the time when and the place where the appeal will be heard. (Van Sant, Eq. Pr. 718.)

The party noticing the appeal for argument must prepare and file with the clerk of the county where the general term is to be held, at least eight days before the commencement of the court, a note of issue. This is a brief note of the title of the cause, the nature of the question, the date of the issue, (that is, the date of the service of the notice of appeal,) and the names of the attorneys for the respective parties. (Rule 48; Van Sant, Eq. Pr. 718.)

The clerk is to prepare a calendar for the general term, and cause the same to be

printed for each of the justices holding the court. Appeals are to be placed on the calendar according to the date of the service of the notice of appeal. (Rule 18.)

The following additional rule was adopted for the *third* judicial department, on the 7th of February, 1871. "The attorney for either party to an appeal from an order shall file it with the clerk of the county in which the term of the court for which notice of argument of such appeal has been served is to be held, on or before Tuesday of the week preceding the term, a note of issue, in which shall be specified the day of the service of the notice of appeal, on the respondent or his attorney. The clerk shall prepare a calendar of the cases in which such notes of issue shall be filed, and shall enter the cases thereon, in the order of the time of service of notice of the appeal. No appeals from orders will be heard unless notes of issue have been duly filed and entered on the calendar."

It has been decided that where an attorney waits, without a sufficient excuse, until the last day but one for filing notice of argument or issue, before sending it to the clerk to file for the calendar, and circumstances then transpire, which prevent his sending his notice in season for the calendar, he will not be allowed to put it on, after that time, whatever his excuse may be. (*Wilkin v. Pearce*, 4 How. Pr. 26.)

When the party who is to furnish the papers has noticed the cause for argument without serving a copy of the papers in due time, the other party may move to strike the cause off the calendar, without noticing it himself. But when the cause has been noticed by the party who is to furnish the papers, the other party must show, in his affidavit for the motion, that he has noticed the cause for argument. (*Herkimer County Bank v. Derreurs*, 5 Hill, 9.)

Causes are called in their order upon the calendar, except in the cases where they have a preference, by statute, or some rule of the court; as in the cases specified in the act of 1860, chapter 167, in which executors and administrators are sole plaintiffs or sole defendants; or in cases of appeals which prevent the issuing of letters testamentary or of administration, which cases have a preference, both in the court of appeals and at the general terms of the supreme court, over all actions except criminal cases, and may be moved out of their order on the calendar. (Van Sant, Eq. Pr. 119.) Appeals from orders allowing a provisional remedy have preference over all other motions. (Code, § 401, subd. 5.)

In some of the judicial districts, special rules have been adopted in regard to the calendars of both general and special terms. Thus in the first district, fifteen causes a day, and no more, are called at the general and special terms; and in the second district, ten causes only, are called at the general terms. And in the first district, if a cause is regularly called and passed, without a postponement by the court, for good cause shown, it thenceforth takes its place on the same or any future calendar, as if the date of the issue was the time when it was thus passed. (Voorhies Code, 6th ed. 448, 650; Laws of 1849, p. 708, § 16.)

When the appeal is reached on the calendar, or regularly moved, the counsel for the appellant opens the argument, the counsel for the respondent replies, and the counsel for the appellant closes the argument.

On the hearing of causes at a general or special term, not more than one counsel can be heard on each side, and then not more than one hour each, except when the court shall otherwise order. (Rule 58 supreme court.)

Upon an appeal to the court of common pleas of the city and county of New York, or to a county court, the appeal must be heard on the original papers, or certified copies thereof; and no copies need be furnished for the use of the court. (Code, § 365.)

An appeal to the general term of the supreme court from a judgment entered upon the report of referees, or the direction of a single judge of the same court, must be heard in the same manner as if it were an appeal from an inferior court. (Code, § 348.)

By chapter 483 of the Laws of 1869, whenever a widow, bringing an action for dower, shall make it appear to the court, or a justice thereof, in which such action or appeal is pending, that she has no sufficient means of support aside from the property admeasured to her, such action or appeal shall have a preference upon the calendar of the court in which the same is pending. (§ 5.)

By chapter 49 of the Laws of 1870, actions in which executors and administrators are sole plaintiffs, or sole defendants, and actions for the construction of or adjudication upon a will in which the administrators with such will annexed, or the executors of such will, are joined as plaintiffs or defendants with other parties, shall have a preference in the court of appeals, and in the supreme court at the general, special and circuit terms thereof, over all actions, except in criminal cases, and may be moved out of their order accordingly.

The appellant's counsel is entitled to open and close the argument.(g)

If the appellant makes default at the hearing, the decree or order appealed from will be affirmed with costs. But if the respondent makes default, the cause must be heard *ex parte*; and the decree or order will not be reversed or modified, unless it is shown to be erroneous.(r)

The only effect of the respondent's default is to deprive him of costs, if the decision of the vice chancellor is affirmed; or to preclude him from the right of appealing to the court of errors if the decision is reversed.(s) Where the appellant fails to appear, the court will presume the decision of the vice chancellor to be correct, and will affirm the same, with costs, without any argument upon the merits.(t)

The statute provides that on the hearing of an appeal the chancellor shall annul, affirm, modify, or alter the order or decree appealed from, or make such other order in the cause, as justice shall require, and may remit the cause to the vice chancellor, for further proceedings, or may direct the same to be had before himself, as the circumstances of the case may require.(u)

It has been decided under this section that where, by an appeal, the whole cause is brought before the court, if the chancellor does not make a final decree, the whole case will remain before him for a decision upon the equity reserved, unless he shall think proper to remit it to the vice chancellor.(v) But when the appeal is upon a collateral matter not embracing the whole suit, the case is otherwise.(w) In this case the vice chancellor had directed an issue, upon the hearing; from which both parties appealed. And the chancellor entertained a motion for a receiver.

In *Brockway v. Copp*,(x) it was decided that where, upon an appeal from an interlocutory order of a vice chancellor, the same is reversed with costs, and no order is obtained to remit the proceedings to the vice chancellor, the defendant may either cause the order of the chancellor to be enrolled, and obtain an execution for his costs on the appeal, or he may proceed as for a contempt, and apply for an attachment against the complainant for the non-payment of the costs.

Appeals from interlocutory orders of the vice chancellors, made on motion or petition, need not be placed on the calendar, but may be heard on any regular motion day or in term.(y)

(g) Rule 120.

(r) *Stiles v. Burch*, 5 Paige, 132.

(s) *Id. ib.*

(t) *Id. ib.*

(u) 2 R. S. 178, § 63, (orig. § 62.)

(v) *Jenkins v. Hinman*, 5 Paige, 309.

(w) *Id. ib.*

(x) 2 Paige, 578.

(y) Rule 120.

Interest.] Where a decree for costs is appealed from after the costs have been taxed, and security is given by which the proceedings for the collection of the costs is stayed pending the appeal, the respondent, upon an affirmance of the decree appealed from, is entitled to interest on the taxed bill of costs, as damages for the delay caused by the appeal.(z) And the rule is the same with respect to a decree directing the payment of money.(a)

Effect of the death of a party.] The chancellor will not proceed to the hearing of a cause upon appeal, after the fact of the death of one of the parties is known, until the suit is revived; unless it is heard with the consent of those who have succeeded to the rights of the deceased party. But where, after the entry of an appeal from the vice chancellor, and after the cause was ready for a hearing, the complainant died, but the fact of his death being unknown, the cause was heard and decided by the chancellor upon the appeal, it was *held* that the decree upon the appeal might be entered *nunc pro tunc*, as of a day previous to the death of the complainant, and after the entering of the appeal.(b)

New solicitor on appeal.] The appellant may prosecute his appeal by a new solicitor, without any order of the court below to change the solicitor.(c) And where this is done, the service of papers in the appeal cause while it is pending before the chancellor, need not be made upon the original solicitor.(d)

Papers, how entitled.] Upon an appeal from an order or decree of a vice chancellor, the proceedings should be entitled as in the original suit.(e) But in appeals from the decisions of surrogates and circuit judges, the proceedings in the court of chancery, after the filing of the petition of appeal, must be entitled in the appeal cause.(ee) (22)

(z) *Belknap v. Tremble*, in Chan. Dec. 24th, 1832. *Lady Dacre v. Chute*, 2 Rep. in Ch. 245.

(a) *Van Valkenburgh v. Fuller*, 6 Paige, 10.

(b) *Vroom v. Ditmas*, 5 Paige, 528.

(c) *McLaren v. Charrier*, 5 Paige, 530.

(d) *Id. ib.*

(e) *Hawley v. Donnelly*, 8 Paige, 415.

(ee) *Gardner v. Gardner*, 5 Paige, 170.

(22) APPEAL TO THE GENERAL TERM, FROM ORDERS MADE AT A SPECIAL TERM, BY A SINGLE JUDGE, OR OUT OF COURT, UPON NOTICE.

Section 349 of the Code directs that an appeal may, in like manner, and within the same time, (that is, the same as in case of appeal from a *judgment*, thirty days, § 332,) be taken from an *order* made at a special term, or by a single judge of the same court, or a county or a special county judge, in any stage of the action, including proceedings supplementary to execution; and may be thereupon reviewed in the following cases:

1. When the order grants or refuses, continues or modifies a provisional remedy.
2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer.
3. When it involves the merits of the action, or some part thereof, or affects a substantial right.
4. When the order in effect determines the action, and prevents a judgment from which an appeal may be taken.

5. When the order is made upon a summary application in an action, after judgment, and affects a substantial right.

The next section of the Code, (§ 350.) provides that § 349 "shall include an order made out of court upon notice; but in such case, the order must be first entered with the clerk. And for the purpose of an appeal, any party affected by such order may require it to be entered with the clerk, and it shall be entered accordingly."

Section 403 of the Code, after giving to a county judge, within his county, all the powers of a judge of the supreme court at chambers, in actions in the supreme court, further provides that "in all cases where an order is made by a county judge, it may be reviewed in the same manner as if it had been made by a judge of the supreme court."

As respects *ex parte* orders, it is provided by § 324 of the Code, that "an order made out of court, without notice to the adverse party, may be vacated or modified on notice, by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made."

It has been held that special proceedings are not regulated by § 349 of the Code, but depend upon the pre-existing laws and practice. (*Bedell v. Stickles*, 4 How. Pr. 432; S. C. 3 Code Rep. 105; *Matter of Fort Plain, &c., Plank Road Co.* id. 148.)

Where an action is tried before the court, without a jury, and the decision does not dispose of all the questions in controversy, but directs a reference to state an account, no appeal regularly lies to the general term, from the order or decree, until after such reference, and final judgment thereon. (*Griffin v. Cranston*, 5 Bosw. 658.) An order of reference, even if it settles all the material questions, is not appealable. (*The People ex rel. McSpedon v. Hays*, 12 Ab. 204.) An appeal does not lie from an order of reference, made in a proceeding upon mandamus. (Id.)

The provision of § 349 of the Code, allowing an appeal from an order made at a special term "when it sustains or overrules a demurrer," applies to all cases in which leave to amend is given, in connection with the decision on a demurrer, and also to decisions on demurrer to a part of a pleading containing several causes of action or defences. (*Cook v. Pomroy*, 10 How. Pr. 221; *Bauman v. New York Central R. R. Co.* id. 208,) as well as to all cases where the appeal from a decision on demurrer is taken before judgment is entered. (*Nolton v. Western Railway Co.* 10 How. Pr. 97; S. C. 15 N. Y. 444; *Nellis v. DeForest*, 6 How. Pr. 413; *Sutherland v. Tyler*, 11 id. 251; *Mattoon v. Baker*, 24 id. 329; *Lee v. Ainslie*, 1 Hilt. 277; S. C. 4 Ab. 463; *Reynolds v. Freeman*, 4 Sandf. 702; *Phipps v. Van Cott*, 4 Ab. 90; *Ives v. Miller*, 19 Barb. 197.)

By the words a "substantial right," as used in subdivision three of § 349, is intended a fixed, determinate right, independent of the discretion of the court, and of some value. Such a right must exist, and be injuriously affected by an order, to bring a case within that subdivision. A party cannot be said to have a right to what a court has a discretion to grant or withhold. (*Tillman v. Hinman*, 10 How. Pr. 89.)

In the following cases orders have been held to affect substantial rights:

An order for an extra allowance exceeding the prescribed limits, (*People v. N. Y. Central R. R. Co.* 29 N. Y. 418; *Wilkinson v. Tiffanv.*, 4 Ab. 98; *Union Bank v. Mott*, 13 Ab. 247;) an order allowing an action to be continued in the name of surviving plaintiffs, and admitting others in the place of a deceased plaintiff, (*St. John v. Croel*, 10 How. Pr. 353;) a final order providing that the plaintiff recover of the defendants, \$42.65 damages, without costs, and that the defendants recover of the plaintiffs a like sum for costs, and that the judgments be offset against each other, (*Howland v. Coffin*, 32 How. 300; S. C. 47 Barb. 653;) an order denying to a party the exclusive right to a large sum of money, (*Artizans' Bank v. Trearwell*, 34 Barb. 563; S. C. 25 N. Y. 489;) an order that in default of discovery, the party required to make it shall be nonsuited, (*Broderick v. Suckton*, 18 Ab. 213;) an order denying a motion to correct an illegal adjustment of costs, (*Sluyter v. Smith*, 2 Bosw. 673.)

The Code, (§ 11, subd. 4.) also provides that whenever the decision of any motion made in the supreme court, at a special term, involves the constitutionality of any law of this state, or is placed, in the opinion or reasons for such decision, of the justice making such decision, upon the unconstitutionality of such law, then an appeal shall lie, and may be made, from such decision, or from the order entered upon such decision, to the general term of said court; provided, however, that the time for appealing from such decision or order shall not be extended, by that subdivision.

On appeals from orders made upon special motions, as distinguished from judg-

SECTION VII.

APPEALS, FROM THE CHANCELLOR TO THE COURT FOR THE CORRECTION OF ERRORS. (23)

Power of the court on appeal.] The court has full power to correct

ments, no security is required, (*Beach v. Southworth*, 6 Barb. 173; S. C. 1 Code Rep. 99; *Allen v. Johnson*, 2 Sandf. 629; *Nicholson v. Dunham*, 1 Code Rep. 119; *Emerson v. Burnen*, 6 How. Pr. 32; S. C. 1 Code Rep., N. S. 189; *Cook v. Pomeroy*, 10 How. Pr. 103,) unless a stay of proceedings is wanted. (*Bacon v. Reading*, 1 Duer, 622; S. C. 11 N. Y. Leg. Obs. 122.)

Notice of appeal to the general term, from an order, should specify the part of the order sought to be reviewed, if the order be appealed from in part, only. Such notice must be served on the clerk of the county where the order is entered, as well as on the opposite attorney.

Appeals from orders are, as a general rule, brought on as motions, at the general term. The appeal being perfected by the service of notice, either party may give notice of argument, and bring on the same, in the same manner as any other special motion. (*Van Sant. Eq. Pr. 671.*)

Section 400 of the Code was not intended as a strict definition of an order, and does not make every decision or resolution of a court or judge an order upon its being put in writing, when it otherwise would not be. The term *direction*, so far as any right of appeal is concerned, properly includes only mandates on parties or officers, or final determinations of rights. (*Howard v. Freeman*, 6 Rob. 511; S. C. 7 id. 25; 3 Ab., N. S. 292.)

Orders which impose upon a party to an action such a charge as the payment of money, not as a condition to the granting of some favor or relief to which he is entitled as a matter of right, but as an obligation and duty, affect a substantial right, if he ought not to pay it, or the whole of it, and are therefore appealable. The making of such an order is not in the sole discretion of the judge who makes it, but is the exercise of a legal discretion, which, if erroneous, may be reviewed and corrected. (*Leslie v. Leslie*, 6 Ab., N. S. 193; S. C. 10 id. 64.) An order made at a special term, in an action for divorce, requiring the husband to pay an allowance for the support of his wife pending the litigation, affects a substantial right, and is appealable to the general term. (Id.)

An order giving an allowance in addition to costs is appealable. (*Gori v. Smith*, 6 Rob. 563; S. C. 3 Ab., N. S. 51.)

An application for leave to amend a pleading, on the trial, is always addressed to the discretion of the court; and the denial of such an application is not the subject of appeal or review. (*Dennis v. Snell*, 54 Barb. 411.) And an order allowing a defendant to amend his answer by setting up an additional defence, is an exercise of the discretion of the court, and does not affect a substantial right. It is therefore not appealable to the general term. (*Bowman v. DePeyster*, 2 Daly, 203.) So, as to the allowance of an amendment to the complaint in order to enlarge the claim for damages. (*Johnson v. Brown*, 57 Barb. 118.) And the terms on which an amendment to a complaint on a promissory note, by inserting a count on the original consideration should be allowed, are wholly discretionary, and are not the subject of review on exception. (*Vilbard v. Roderick*, 51 Barb. 616.)

An order denying the removal of a cause from a state to a United States court, in a case where the petitioner is strictly entitled to it, since it may be pleaded as a defence, affects a substantial right, and is appealable, at least to the general term. (*DeCamp v. New York Mu. Ins. Co.* 2 Sweetney, 481.)

If a case is referable, the discretion of a judge, exercised in ordering a reference, will not be reviewed on appeal. (*Ludlow v. American Exchange National Bank*, 59 Barb. 409.)

See, further, as to what orders are appealable, Wait's Digest, vol. 4, pp. 108, 104, 105.

(23) APPEALS TO THE COURT OF APPEALS.

Section 333 of the Code provides that an appeal may be taken to the court of appeals in the cases mentioned in section 11. Section 11 enacts that the court of appeals shall have exclusive jurisdiction to review, upon appeal, every actual deter-

mination made at a general term, by the supreme court, or by the superior court of the city of New York, or the court of common pleas for the city and county of New York, or the superior court of the city of Buffalo, in the cases specified in that section, and no other. And it declares that in an order affecting a substantial right, not involving any question of discretion arising upon any interlocutory proceeding, or upon any question of practice in the action, including an order to strike out an answer, or any part of an answer, or any pleading in an action, such appeals may be heard as a motion, and noticed for hearing for any regular motion day of the court.

Section 333 also directs that when any of the courts mentioned in section 11 shall, at general term, render judgment upon a verdict taken subject to the opinion of the court, the questions or conclusions of law, together with a concise statement of the facts upon which they arose, shall be prepared, by and under the direction of the court, and shall be filed with the judgment roll, and be deemed a part thereof, for the purposes of a review in the court of appeals.

What decisions are reviewable.] No appeal lies from a judgment, as such, to the court of appeals, except where the judgment is final. (*Butler v. Lee*, 3 Keyes, 70; S. C. 33 How. 251; *Clark v. Brooks*, 2 Ab., N. S. 385; S. C. 2 Daly, 159; *Adams v. Fox*, 27 N. Y. 640; S. C. 40 Barb. 442; *Paddock v. Springfield Fire, &c., Ins. Co.* 12 N. Y. 591; *Harris v. Clark*, 4 How. Pr. 78; S. C. 2 Code Rep. 47. See also, *People ex rel. McSpedon v. Hays*, 34 Barb. 99; *Ford v. David*, 3 Ab. 385.) When it is necessary to make another application to the court, in order that the parties may obtain the entire benefit of the judgment, the decree or judgment cannot be regarded as final. (*Butler v. Lee*, 3 Keyes, 70; S. C. 33 How. 251.) An order for judgment, which requires a reference, and a report, before a final determination of the cause, is not the subject of an appeal. (*Clark v. Brooks*, 2 Ab., N. S. 385; S. C. 2 Daly, 159; *Belmont v. Ponvert*, 3 Rob. 693; *Dous v. Congdon*, 28 N. Y. 122; *Tompkins v. Hyatt*, 19 id. 534; *Lawrence v. Farmers' Loan and Trust Co.* 15 How. Pr. 57; S. C. 6 Duer, 689.)

The court of appeals has authority to review, upon appeal, only *actual determinations*—questions upon which the court below has actually passed. (*Rayner v. Clark*, 3 Code Rep. 230; S. C. 7 Barb. 581; *Wilkins v. Earle*, 46 N. Y. 358; *Hackett v. Belden*, 47 N. Y. 624.) Thus, where a cause was submitted to the court below on stipulation of the parties, and judgment entered *pro forma*, for the purpose of bringing an appeal to the court of appeals, the latter court would not hear it, RUGGLES, Ch. J. saying: "The court are of opinion that they have no discretion; the statute is imperative. There must be an actual determination of the court below." (*Gridley v. Daggett*, 6 How. Pr. 280; S. C. 1 Code Rep., N. S. 386. See *Strong v. Hardenburgh*, 25 How. 438.) So where a judgment, entered upon the order of the general term, does not conform to that order, the proper remedy is by motion to the court below, to correct the judgment, and not by appeal to the court of appeals in the first instance. (*Hackett v. Belden*, 47 N. Y. 624.) A judgment entered in pursuance of a remittitur is not an actual determination. The remittitur is controlling both upon the special and general terms of the court below, and it is their duty and power simply to enforce the judgment of the appellate court. (*Wilkins v. Earle*, 46 N. Y. 358; S. C. 42 How. 257.)

An appeal to the court of appeals from a judgment by default will lie in no instance. (*Maltby v. Greene*, 1 Keyes, 548; *Strong v. Hardenburgh*, 25 How. 438; and see *Perkins v. Farnham*, 10 How. Pr. 120; *Dorr v. Birze*, 5 id. 323; S. C. 1 Code Rep., N. S. 74; 8 Barb. 351.) Nor from a judgment of a special term, which has never passed under review at a general term. (*Potter v. Van Vranken*, 36 N. Y. 619; S. C. 2 Trans. Ap. 73; *N. Y. & New Haven R. R. Co. v. Schuyler*, 34 N. Y. 30; S. C. 38 Barb. 524; and see *White v. Delaware, &c., R. R. Co.* 41 N. Y. 520; S. C. 39 How. 479.) Nor from a decision of the general term, reversing an order of the special term, adjudging a party guilty of a contempt in violating an injunction order, will an appeal lie, before final judgment in the action. (*Batterman v. Finn*, 40 N. Y. 340; S. C. 34 N. Y. 108.)

An appeal from a judgment of the supreme court, in summary proceedings to recover the possession of land, will lie; such proceedings being "special proceedings," within the meaning of § 11 of the Code. (*The People ex rel. Clute v. Boardman*, 4 Keyes, 59.) But the *provisional* remedies specified in the Code are not "special proceedings," within the meaning of § 11, and orders made therein are not appealable as such to the court of appeals. (*Genin v. Tompkins*, 1 Code Rep. N. S. 415.)

Where a case is sent back to the special term, by the appellate court, for a new

trial and disposition of the issues, the practice requires a new formal appeal to the general term and a new judgment by that court, before an appeal will lie to the court of appeals. (*N. Y. & New Haven R. R. Co. v. Schuyler*, 34 N. Y. 30, 48; S. C. 38 Barb. 534.) Where a cause was tried at the circuit, and a verdict rendered for the plaintiff; whereupon the defendant moved, at special term, for a new trial, which motion was denied, and an appeal taken to the general term, and the order denying a new trial was affirmed, from which the defendant appealed to the court of appeals; it was held that the judgment was a judgment entered upon the determination of the special term, and not a general term judgment; and that the appeal must be dismissed. (*Id.*)

A judgment rendered before the Code took effect cannot be taken to the court of appeals, by appeal, under the provisions of the Code. It can only be reviewed by writ of error according to the former law. (*Rice v. Floyd* 1. N. Y. 608; S. C. 3 How. Pr. 366; 1 Code Rep. 122.)

An order granting or refusing a new trial, where a judgment has been entered, is appealable to the court of appeals. (*Clark v. Brooks*, 2 Ab., N. S. 385; S. C. 2 Daly, 159; *Macy v. Wheeler*, 30 N. Y. 231; S. C. 18 Ab. 73.) But this rule does not apply to the case of a trial of special issues, which may or may not embrace the merits of the case. (*Id.*) No appeal from orders granting new trials will be heard, unless the appellant consents that, if the order be affirmed, judgment absolute shall be rendered against him. (*Langman v. Leviston R. R. Co.* 18 N. Y. 493.) Where the appellant stipulated that in case the order for a new trial should be affirmed in the court of appeals, the judgment should be reduced, it was held that such an alternative was inadmissible, and the appeal was dismissed. (*Id.*)

In reviewing trials, the court of appeals is confined to the correction of errors of law, only. Having no power to review any questions of fact determined in the subordinate courts, that court, when a new trial is granted, is obliged to affirm the order, if it can stand consistently with any view to be taken of the evidence given at the trial, where the trial has been by jury. (*Macy v. Wheeler*, 30 N. Y. 231; *Sanford v. Eighth Avenue R. R. Co.* 23 id. 343.) Upon an appeal from an order granting a new trial, the judgment cannot be reversed unless the case negatives any inference that the court below may have granted the new trial because it came to a different conclusion, upon the facts, from that found on the original trial. (*Miller v. Schuyler*, 20 N. Y. 522.) The party defeated must go down to trial, unless he can show, by a statement of the facts considered as established at general term, that the judgment was founded upon an erroneous conclusion of law. (*Id.*)

An order punishing a party as for a contempt, by fine, to indemnify the party injured by the refusal to obey the order of the court, and by imprisonment to compel obedience to the order, is appealable to the court of appeals. It is "a final order affecting a substantial right in a special proceeding," within the meaning of subdivision three of § 11. (*Ludlow v. Knox*, 7 Ab., N. S. 411.) But the court has not jurisdiction of an appeal from an order made at a general term, which affirms or reverses an order for an attachment against a party for violating an injunction. (*New York & New Haven R. R. Co. v. Ketchum*, 3 Keyes, 24; *Batterman v. Finn*, 40 N. Y. 340.) Nor of an appeal from an order confirming an election under the statute relating to the election of trustees of corporations, made at general term, in special proceedings. (*Matter of the election of the Pioneer Paper Company*, 36 How. 110.)

Judgment in an action to foreclose an equity of redemption in mortgaged premises, is a final judgment, for the purposes of appeal. (*Morris v. Morange*, 38 N. Y. 172; S. C. 4 Ab., N. S. 447; 6 Trans. Ap. 1.)

Under subd. two of § 11, an appeal will lie from an order denying a motion for a new trial made on the ground of newly discovered evidence. (*Adams v. Bush*, 2 Ab., N. S. 104; contra, *Moore v. Westervelt*, 1 Code Rep., N. S. 415; *East River Bank v. Kennedy*, 4 Keyes, 279.)

An order, made after verdict, granting leave to renew a motion made before trial, and denied, to set aside an order of arrest, &c., and staying judgment in the meantime, is not appealable to the court of appeals under the second or third subdivisions of § 11. (*Miannay v. Blogg*, 41 N. Y. 521.)

Where the supreme court, at special term, grants a new trial, on a case, after verdict, and even after judgment, and the general term affirms such decision, an appeal from the order of affirmance will be dismissed. (*Folger v. Fitzhugh*, 41 N. Y. 223.)

An order of discontinuance, without costs, even of a legal action, commenced in

the supreme court, for the recovery of money only, against a sole defendant, though made after the cause is at issue and referred, unconditionally and without the consent of the defendant, is within the power and in the discretion of that court, and although expressly made appealable to the court of appeals, by the Code, is not reviewable there. And an appeal from the affirmance of such order by the general term, will be dismissed. (*DeBarante v. Deyermann*, 41 N. Y. 355.)

Where a verdict is set aside, and a new trial ordered, for errors in law, the court of appeals may review the order. (*East River Bank v. Kennedy*, 4 Keyes, 479.)

The time fixed by statute for the allowance of an appeal to the court of appeals, in an action originating in a justice's court, cannot be enlarged. Accordingly, where one general term of the supreme court had elapsed after a justice's judgment, and at the next term the court allowed an appeal, and directed the order to be entered as of the preceding term, the appeal was dismissed. (*Wait v. Van Allen*, 22 N. Y. 319.) An order allowing an appeal to the court of appeals will not be granted because counsel were not fully prepared to argue on the hearing. (*Drucker v. Patterson*, 2 Hilt. 135.)

From a judgment upon a review of summary proceedings under the landlord and tenant act, an appeal lies to the court of appeals. (*People ex rel. Clute v. Boardman*, 4 Keyes, 59.)

The New York common pleas will not allow an appeal to the court of appeals, in an action brought from an inferior court, unless the case involves great interests, or a principle of law upon which several cases depend. (*Purchase v. Jackson*, 14 How. Pr. 230; S. C. 1 Hilt. 357; *Palmer v. Mueller*, 9 Ab. 20, n.; S. C. 19 How. Pr. 322; 2 Hilt. 421.) But where the decision of the common pleas, on the question presented, is in conflict with a decision of the supreme court, an appeal to the court of appeals should be allowed. (*Clapp v. Graves*, 2 Hilt. 243; S. C. 9 Ab. 20.)

An order of the supreme court, denying a motion to set aside a regular judgment in that court, on the ground that the defendant was not served with process, and the appearance for him was wholly unauthorized, is not appealable to the court of appeals. (*Foot v. Lathrop*, 41 N. Y. 358.) No party has a "substantial right," within the meaning of § 11 of the Code, to have a regular judgment against him set aside on motion. (*Id.*)

An appeal lies to the court of appeals, from an order denying a motion to change the place of trial, where the action is an equitable one, brought for an injunction to restrain the erection of a bridge across a public street, and where the plaintiff alleges an apprehended injury to his premises. (*Leland v. Hathorn*, 9 Ab. N. S. 97.) An appeal also lies from an order of the supreme court reversing a final decree of a surrogate, in a proceeding for an account, and directing the proceedings to be remitted to the surrogate with instructions to proceed and settle upon certain specified principles. (*Wagener v. Reiley*, 4 How. Pr. 195; S. C. 2 Code Rep. 130.) And where, for an error in law, the supreme court reverses a decree of a surrogate, admitting a will to probate, and remits the proceedings back to the surrogate, the order of reversal is a final determination of the proceedings, and is appealable to the court of appeals. (*Talbot v. Tallot*, 23 N. Y. 17.)

A judgment of the supreme court, affirming an order of a surrogate, denying a motion to discontinue proceedings for accounting by a guardian, and directing that the proofs be closed, is not an order or judgment from which appeal lies to the court of appeals, because the surrogate's order was not a final order. (*Tompkins v. Soulier*, 7 How. Pr. 194.)

A motion to open a judgment of divorce, on the ground that it was obtained by a collusive agreement of the parties, is addressed to the discretion of the court; and even an order made at general term reversing an order of the special term, granting such relief, is not appealable to the court of appeals. (*Birdsall v. Birdsall*, 41 N. Y. 389.)

It seems that under the Code, (§ 11 as amended in 1870,) an order setting aside an attachment issued as a provisional remedy, is appealable to the court of appeals. (*Gates v. North*, 44 N. Y. 271.) If the successful party fails to enter judgment, the other party, if he desires to appeal, may have an order requiring the former to enter judgment against him; and may appeal from the judgment entered pursuant to such an order. This is not an entry of judgment by consent. (*Skinner v. Quinn*, 43 N. Y. 99.)

An appeal does not lie to review a judgment on an award, and a refusal to set aside the award on a statute arbitration. The remedy is by writ of error. (*Turnbull v. Martin*, 45 N. Y. 600.)

An order appointing commissioners in proceedings by a railroad company to take lands, is a special proceeding, from which an appeal to the general term lies, under chapter 270 of the Laws of 1854, and is a final order affecting a substantial right, made in a special proceeding, within subdivision three of § 11 of the Code, and appealable to the court of appeals. (*Rensselaer & Saratoga Railroad Company v. Davis*, 43 N. Y. 137.)

It seems that an order, upon an appeal, heard irregularly in a wrong district, and after acts by the appellant which the court might think, if they were proved, and not excused or explained, would operate as a waiver of the appeal, is not the subject of an appeal to the court of appeals. (*Birdsall v. Birdsall*, 41 How. Pr. 389.)

No appeal lies to the court of appeals from an order of the general term of the supreme court, made upon appeal from an order in an action in the county court. This is not an action commenced in the supreme court, nor brought there from another court. (*Youngblood v. Fingar*, 47 N. Y. 99.)

A traverse of forcible entry and detainer is not an action, and an order of the general term, granting a new trial therein, is not appealable to the court of appeals. (*People ex rel. Robinson v. McManus*, 47 N. Y. 661.)

An order made at general term, reversing a judgment of the special term, without granting a new trial, cannot be appealed from as an order. Judgment of reversal must be perfected, and then appealed from. (*Mehle v. Vanderkulleke*, 46 N. Y. 539.)

In a case tried before a jury, an order of the general term, granting a new trial, upon questions of fact, is not appealable. (*Wright v. Hunter*, 46 N. Y. 409.) And an order setting aside (on any ground) the verdict of a jury on questions of fact ordered to be tried in an equity action, and ordering a new trial, is an order made in the discretion of the court, and not appealable to the court of appeals, under § 25 of the Code. The mode of trial of issues of fact, in equitable actions, is discretionary with the court. (*Coble v. Tiff*, 47 N. Y. 119.)

An order denying a motion to vacate a judgment as irregular, *e. g.*, a personal judgment entered in a mechanic's lien case after the lien has failed by the lapse of a year, is not applicable to the court of appeals. (*Schattler v. Gardiner*, 47 N. Y. 404.)

An appeal from an order granting a new trial, to the court of appeals, with a stipulation for judgment absolute against the appellant in case the order is affirmed, is only proper and advisable where the sole question that can be presented upon the record relates to and will determine the merits of the controversy. (*Cobb v. Hatfield*, 46 N. Y. 533.)

In *Dickson v. Broadway & Seventh Avenue R. R. Co.* (47 N. Y. 507,) it is said it is not advisable to appeal to the court of appeals from an order granting a new trial, and to stipulate, as provided by subd. two of § 11 of the Code, except where there are presented for decision no questions, except such as, if decided adversely, would be conclusive against the case of the party appealing.

An order under § 317 of the Code, requiring the plaintiff to give security for costs, is discretionary, and not reviewable in the court of appeals. (*Adney v. Purdy*, 47 N. Y. 676.) For the same reason an order sustaining or overruling a demurrer, is not appealable to that court. (*People ex rel. Kilborne v. Benedict*, 47 N. Y. 667.)

If a charge, as a whole conveys to the jury the correct rule of law on a given question, the judgment will not be reversed on appeal, although detached sentences may be erroneous; and if the language employed is capable of different constructions, that one will be adopted which will lead to an affirmation of the judgment, unless it fairly appears that the jury were, or, at least, might have been, misled. (*Caldwell v. New Jersey Steamboat Co.* 282; S. C. 56 Barb. 425.)

No appeal lies to the court of appeals from an order denying a motion for a new trial on the ground of surprise or newly discovered evidence: the question being one of discretion in the court below. (*Donley v. Grathom*, 48 N. Y. 658.)

See, further, as to the cases in which an appeal lies, or the contrary, to the court of appeals, *Hackett v. Belden*, 47 N. Y. 624; *Paul v. Muzger*, id. 469; *Leffler v. Field*, id. 407; *Bennett v. Lake*, id. 93; *Dannen v. Greeley*, 12 Ab., N. S. 191; *Brinklee v. Brinklee*, 47 N. Y. 40. See, also, Wait's Code, pp. 654, &c., 664 to 670, where the decisions on this subject are collected; and Wait's Digest, vol. 4, pp. 94 to 97, for the later decisions.

Statement of facts, by general term.] Section 333 of the Code directs that when any of the courts mentioned in § 11 shall, at general term, render judgment upon a verdict taken subject to the opinion of the court, the questions or conclusions of law, together with a concise statement of the facts upon which they arose, shall be pre-

and redress all errors that may happen in the court of chancery. (f) (24)

Upon any order or decree of the court of chancery being brought by appeal to this court, the court shall examine all errors that shall be assigned, or found, in such order or decree; and shall hear and determine such appeal, and all matters concerning the same; and shall have

(f) 2 R. S. 166, § 25, (orig. § 24.)

pared by and under the direction of the court, and shall be filed with the judgment roll, and be deemed a part thereof, for the purposes of a review in the court of appeals.

It has been held there is not to be a finding of facts from the evidence, by the court at general term, but only a statement of the facts that were uncontroverted and conceded on the trial. (*Purchase v. Mattison*, 15 Ab. 402; S. C. 25 How. 161; 25 N. Y. 211; *Brower v. Orser*, 2 Bosw. 365.) When a case is sent back from the court of appeals, for re-settlement of the facts, the general term has no power to remit the case to the special term for a re-statement of the facts on which the judgment was there rendered. (*Smith v. Grant*, 17 How. Pr. 381.) The court of appeals is to be furnished with precisely the same facts as those on which the general term founded its determination. (Id.) The return of the court below is the only place where the appellate court can look for the facts upon which the judgment was rendered. Facts stated in the opinion, or elsewhere found, are not to be regarded. (*McGregor v. Buell*, 1 Keyes, 153; S. C. 17 Ab. 31.) Where the record and the papers present no findings of facts, nothing will be intended or presumed against the correctness of the judgment. (*Viele v. Troy & Boston R. R. Co.* 20 N. Y. 184.) Or, if from the meagre facts presented in the papers it cannot be ascertained whether the judgment is correct or not, it will be allowed to stand. (*Rice v. Isham*, 1 Keyes, 44; *Carman v. Pultz*, 21 N. Y. 547.) But if the party desires to have the case re-settled, and the facts re-stated, the cause may sometimes be suspended until application can be made to the inferior court for that purpose. (Id.) But only under peculiar circumstances, or where the appellate court cannot do justice to the parties, from the case presented, and does not find it expedient to dismiss the appeal. (Id.; *Catlin v. Cole*, 10 Ab. 387; S. C. 19 How. 82.)

(24) POWER OF THE COURT OF APPEALS; JUDGMENT.

The Code (§ 12) provides that the court of appeals may reverse, affirm or modify the judgment or order appealed from, in whole or in part, and as to all or any of the parties.

Section 14 provides that the concurrence of five judges shall be necessary to pronounce a judgment. If five do not concur, the case must be re-heard. But no more than two re-hearings shall be had; and if, on the second re-hearing, five judges do not concur, the judgment shall be affirmed.

By the new Constitution, art. VI, § 2, five judges form a quorum, and the concurrence of four of them is necessary to a decision.

The powers of the court, as the supreme appellate court of the state, are defined by article VI of the Constitution, which was adopted in 1869; by sections 11-12 and 333 of the Code; and chapter 203 of the Laws of 1870.

The only conditions precedent to the exercise of the power of the court are the serving of the notice of appeal, and the perfecting of the undertaking. (*Adams v. For*, 27 N. Y. 640; S. C. 40 Barb. 442; 27 How. 404.) These steps having been taken, the court can entertain any application, which the case, in that stage, will admit of; although the return of the subordinate court may not have been filed. (Id.)

The general rule is well settled, that conclusions of law, alone, are to be reviewed in the court of appeals, and not findings of fact. The court has no power to look into the evidence, or the case at large, for the purpose of inquiring into such findings of fact. (*Parker v. Jervis*, 3 Keyes, 271; S. C. 34 How. 254; 1 Trans. Ap. 88; *Bergen v. Wemple*, 30 N. Y. 319; *Cady v. Allen*, 18 id. 573; S. C. 22 Barb. 388; *Stewart v. Smith*, 14 Ab. 75.) But the court may refer to the evidence, in order to ascertain the true meaning of the determination of facts, or to give a construction to it which will support the judgment. (*Spencer v. Ballou*, 18 N. Y. 327.)

Where an appeal is taken from part of a judgment or decree, the court of appeals has the power to review only the determination appealed from. (*Robertson v. Bullions*, 11 N. Y. 243; S. C. 9 Barb. 64; *Kelsey v. Western*, 2 N. Y. 500.) And, on appeal against the plaintiffs, by a part of the defendants, the court will not review the judgment below, so far as it affects adverse defendants against whom no appeal was taken, from the special to the general term. (*Cotes v. Smith*, 31 How. 146.)

The court has not the power to correct an erroneous entry of a judgment for a larger amount than was ordered by the general term. The error should be corrected by the subordinate court, on motion. (*Binsse v. Wood*, 37 N. Y. 526; S. C. 5 Trans. Ap. 42. See *Buck v. Remsen*, 34 N. Y. 383.)

No provision having been made, by the Code, for a finding of facts in a special proceeding, the court of appeals has the power, under ch. 270, § 1, of the Laws of 1854, to examine into the affidavits and evidence upon which the decision below was based. (*Matter of the petition of Livingston*, 34 N. Y. 555; S. C. 32 How. 20; 2 Ab., N. S. 1.) In such a proceeding, the court has the power not only to make such order in the premises as it may deem suitable and proper, but also such final decree or order as justice demands. (Id. *Forrest v. Forrest*, 25 N. Y. 501; S. C. 5 Bosw. 672. See Laws of 1847, ch. 280, § 8; 2 R. S. 167, § 2.)

The court has no authority to reverse a judgment by reason of defects in the pleadings which neither surprised nor misled the appellant, and which affected none of his substantial rights. (*Johnson v. Hathorn*, 3 Keyes, 126.)

Where the defect in a pleading demurred to is formal, and technical, only, requiring amendment by the court below, the court of appeals will not reverse a judgment overruling such a demurrer. (*Lounsbury v. Purdy*, 18 N. Y. 515; S. C. 11 Barb. 490; 16 id. 376; *Lake Ontario, &c., R. R. Co. v. Marvine*, 18 N. Y. 585; *McCormick v. Pickering*, 4 id. 276, 282.)

It is competent for the court to modify a judgment absolute for the plaintiff on demurrer. (*Flornham v. Mallory*, 3 Keyes, 527; S. C. 5 Ab. N. S. 380.) And where the error in the judgment appealed from consists only in assessing excessive damages, the court of appeals is authorized to affirm the judgment, on condition that such excess be deducted. (*Sears v. Conover*, 3 Keyes, 113.) And generally where it appears that the judgment appealed from is substantially correct, it will be affirmed with such modifications as the court may deem proper. (*Casler v. Shipman*, 35 N. Y. 533.)

Where a trial has been had before a jury, the court of appeals has in no case the authority to review questions of fact. (*Parker v. Jervis*, 3 Keyes, 271; S. C. 34 How. 254.) Where a trial was before the court, or before a referee, the court of appeals is authorized to review questions of fact only, if it is certified in the order of reversal that the judgment was reversed on questions of fact. (Id. per HUNT, J.; *Westerlo v. DeWitt*, 36 N. Y. 340; *Rice v. Isham*, 1 Keyes, 44, 46.)

Upon an appeal on exceptions to the finding of fact, in the report of the referee, the court of appeals is to determine whether there was any evidence to sustain the finding. (*McCabe v. Brayton*, 38 N. Y. 196.)

Where the order appealed from does not show that the judgment was reversed on questions of fact, the court of appeals must assume that it was reversed on questions of law arising on exceptions taken at the trial, or to the report of the referee. (*Baldwin v. Van Deusen*, 37 N. Y. 487; S. C. 5 Trans. Ap. 18; *Marco v. Liverpool, &c., Ins. Co.* 35 N. Y. 664.)

The court of appeals has power to enforce an absolute admission, made in a pending action, whether it be by written stipulation, or is proved on the hearing. (*Owen v. Cauley*, 36 N. Y. 600; S. C. 42 Barb. 105; 3 Trans. Ap. 270.) It will enforce a stipulation made between the parties in the court from which the appeal is taken, that the decision in that case shall be final, and that no appeal shall be taken. (*Townsend v. The Musterson, &c., Stone Dressing Co.* 15 N. Y. 587.) The duty of hearing appeals involves the jurisdiction to determine whether a particular case is properly before the case on appeal, and to dismiss it, if brought in violation of the agreement of the parties. (Id.) The court will, in the absence of any other error, affirm a judgment of the supreme court, ordered at a general term, upon exceptions heard there in the first instance, under the stipulation of the parties, although there had been no previous judgment, nor direction to suspend it, by the judge trying the cause. The error being merely formal, and amendable by the court below, and the judgment not being void for want of such amendment, it is unnecessary to reverse, and remit the record in order that an amendment may be made. (*Lake Ontario, &c., R. R. Co. v. Marvine*, 18 N. Y. 585.)

Where the order entered on the decision of a cause in the court of appeals does not correctly embody the judgment of the court, it is not too late to amend, although the remittitur has been filed in the court below. (*Palmer v. Lawrence*, 5 N. Y. 455.)

If no objection is taken, in the court below, to the jurisdiction of that court, the court of appeals will assume jurisdiction to have existed. (*Bidwell v. Astor Mutual Ins. Co.* 16 N. Y. 263.)

An additional allowance beyond the costs allowed by § 307 of the Code, cannot be granted by the court of appeals. (*Wolfe v. Van Nostrand*, 4 How. Pr. 208; S. C. 2 N. Y. 570; 2 Code Rep. 130.)

It is a general rule that, upon an appeal from any order or judgment of an inferior tribunal, the appellate court is to make such a judgment as the court below ought to have made, when the judgment or order appealed from was entered. (*Bank of Orange County v. Fluk*, 7 Paige, 87.)

The Code, (§ 330,) provides that upon appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

All jurisdiction of the appellate court is parted with, after judgment on appeal and the filing of a remittitur in the court below. (*Lawrence v. Bank of the Republic*, 6 Rob. 497, 499.) And a new appeal is the only remedy for an error in the substance of the judgment remitted. (Id.) Irregularities may be cured, on motion, after a return of the remittitur by the court below, on request made by resolution of the appellate court, and not by the order of any member of it. (Id.)

Where a question has once been passed upon, in the court of appeals, and the same question is afterwards presented to that court, the rule of *stare decisis* must be adhered to, and the former decision followed. (*New York and New Haven R. R. Co. v. Kitchum*, 34 How. 302; S. C. 3 Keyes 24, 361; 1 Trans. Ap. 116.)

On appeal to the court of appeals, that court can modify the judgment appealed from by reversing it as to the sum assessed as damages, and may direct that the judgment be so amended as to grant to the relator a writ of mandamus. (*The People ex rel. Aspinwall v. Supervisors of Richmond*, 28 N. Y. 112.)

The admission of incompetent evidence is not sufficient ground for the reversal of a judgment, if it clearly appears that such evidence was wholly immaterial, and could in no way prejudice the appellant. (*Watson v. Campbell*, 38 N. Y. 153; S. C. 6 Trans. Ap. 335.) But unless this appears from the case, the judgment must be reversed, provided proper exception was taken to the incompetent evidence. (*Wilson v. Wilson*, 4 Keyes, 413.)

The supreme court, at general term, has the power to inquire whether the findings of fact in a case accord with the weight of evidence, and if not, to reverse; but the court of appeals has no such power. Where there is any evidence to sustain the findings, it must affirm the judgment. (*Loeschick v. Baldwin*, 38 N. Y. 326; S. C. 1 Rob. 377; 7 Trans. Ap. 322.)

The finding of a fact without any evidence to sustain it is an error of law, and sufficient cause for the reversal of the judgment; unless it appears from the other facts found that the error could not have prejudiced the appellant. (*Mason v. Lord*, 40 N. Y. 476.)

Where there was some conflict of evidence, and some testimony to support the verdict of the jury, the mere fact that the justices of the appellate court, as jurors, would have come to a different conclusion, is not sufficient to warrant a reversal of the judgment. (*Marrin v. Marrin*, 4 Keyes, 9; S. C. 41 N. Y. 619, n.)

A judgment will not be reversed because of the refusal of the referee to allow the answer to be amended, on the ground that he had no power to do so, although he, in fact, had that power; where it does not appear that he would have granted it if he had the power. (*Patchin v. Peck*, 38 N. Y. 39; S. C. 5 Trans. Ap. 33.)

The court of appeals assumes the facts to be, in all respects, as adopted by the general term, and only reviews questions of law arising thereon. (*Van Schaick v. Third Avenue R. R. Co.* 38 N. Y. 346; S. C. 49 Barb. 409; 7 Trans. Ap. 43.)

Upon appeal from an order granting a new trial, if the record does not in some way show that the order was based upon questions of fact, it will be assumed that it was granted for errors of law committed at the trial; and if the appellate court finds no such errors, the order will be reversed. (*East River Bank v. Kennedy*, 4 Keyes, 279; S. C. 9 Bosw. 543.)

Where the order reversing the report of a referee does not state that it was reversed for errors of fact, it will, under § 272 of the Code, be held to have been reversed upon questions of law merely; and in its consideration in the court of appeals all facts not expressly stated are to be assumed, in support of the report, and any fact the reverse of what is not found by the report may be invoked in its aid. (*Mulvaney v. Belloni*, 39 N. Y. 53, 54; S. C. 6 Trans. Ap. 343.)

A plaintiff who appeals to the court of appeals, from a judgment of the supreme court which reverses the judgment of the court below in his favor, and grants a new trial, but provides for an affirmance of such judgment in case he remits a portion of the amount of it, and who, on taking his appeal, stipulates that if the order for a new trial is affirmed judgment absolute shall be rendered against him, cannot avail himself of the condition, in that court; but if the order of the supreme court is affirmed, judgment absolute will be rendered for the defendant. (*Hitchings v. Van Brunt*, 5 Ab.. N. S. 272; S. C. 6 Trans. Ap. 34; 38 N. Y. 335.)

Where the findings or decision made on the trial of a cause are correct, but the decree does not conform thereto, the court of appeals, on reversing the decree, may direct the court below to proceed to a proper judgment upon the original findings and decision, without a new trial. (*Warfield v. Crane*, 4 Keyes, 448.)

A judgment of the court of appeals should be held to be a decision not only upon the judgment, but of the precise proposition decided by the court below. (*Green v. Clark*, 13 Barb. 57.) But when there is a judgment by that court, the judges being equally divided, the decision is not obligatory as a precedent. (*Morse v. Gould*, 11 N. Y. 281; *The People ex rel. Attorney General v. Mayor, &c., of New York*, 25 Wend. 252, 256.)

When the court has a question presented on a second appeal, identical with the one previously before the court, it will not depart from its former decision, although the members of the court were not unanimous in making it. (*Oakley v. Aspinwall*, 13 N. Y. 500.)

Rule 21 of the court of appeals provides that judgments of reversal by default will not be allowed. If the appellant fails to appear, on the argument, and furnish the court with the papers required, and argue or submit his case, judgment of affirmance by default will be ordered, on motion of the respondent.

The rule that, where there has been no finding by a referee on a material question of fact, the court will assume, in support of the judgment, on appeal, that he did find such facts in favor of the party recovering as are essential, is only applicable where from the case it appears that such additional finding of facts would have been warranted by the evidence. (*O'erlander v. Spiers*, 45 N. Y. 175.) Where a fact necessary to sustain the conclusion of law does not appear in the findings of fact of a referee, and the case shows that upon a request to find as to such fact, there was a refusal to find otherwise than as already found, and the conclusion of law is, in terms, based only upon the facts expressly found, the court of appeals will not presume a finding of this fact, in aid of the judgment. This is not like a case of silence in regard to an essential fact; but a refusal to find. (*Meyer v. Amidon*, 45 N. Y. 169.)

It is a legal error for a referee to find a material fact, unsupported by any evidence; but, when such evidence is given, showing the probable truth of the fact, the court of appeals will presume the fact correctly found, irrespective of any rebutting evidence, however strong. (*Burgess v. Simonson*, 45 N. Y. 225.)

Where an inferior court has rendered judgment without having jurisdiction, the appellate court, having power to review its decisions, may so far act upon the judgment as to reverse it for want of jurisdiction. (*McMahon v. Rauhs*, 47 N. Y. 67.)

If the findings of a referee are ambiguous, that construction will be adopted which will sustain the judgment, rather than that which will lead to a reversal. The rule is, that the findings are to receive the most favorable construction of which they are capable, for the purpose of upholding the judgment. (*Hill v. Grant*, 46 N. Y. 496.)

The court of appeals cannot review a decision of an inferior court granting a new trial, unless it appears by the record that the new trial was granted on questions of law, and not of fact. If this be doubtful or uncertain, by the record, the court will not decide the case, but will dismiss the appeal. (*Dickson v. Broadway & Seventh Av. R. R. Co.* 47 N. Y. 507.)

An appellate court cannot reverse a judgment as to the part specified by the notice of appeal, without a reversal of the other part, if the provisions of the judgment are connected and dependent. (*Murphy v. Spaulding*, 46 N. Y. 556.)

power to reverse, affirm, or alter such order or decree, and to make such other order or decree therein as justice shall require.(g)

But the court will not, in all cases, examine into the full merits of the cause. Thus, if the parties in the court below neglect to except to the master's report, the court for the correction of errors will not enter into an investigation of the calculations made by the master, but will consider the exceptions waived by the neglect to except.(h) So, on an appeal from an order granting an injunction to stay proceedings at law, the court for the correction of errors will not hear and decide on the merits of the case if the court below had not heard the cause on the merits previous to the order.(i) And on an appeal from an interlocutory order, the court will not permit evidence to be read which was not read in the court below; nor will they hear and decide on the merits, unless the merits have also been heard in the court below.(k) But if the merits are fully before the court, even on an appeal from an interlocutory decree, the court will take them into consideration and make a final decree.(l)

In the case of *Sands v. Codwise*,(m) it was decided that the court for the correction of errors would decide on those parts only of the decree of the court below which are complained of in the petition of appeal.

Within what time appeals to be brought.] Appeals from final decrees of the court of chancery must be made within the same time after the enrolment thereof as is prescribed for bringing writs of error upon judgments at law; subject to the same exceptions and provisions in favor of persons under disability at the time of rendering such decree, and subject to the same restrictions, except where provision is otherwise specially made by law.(n) (25)

Writs of error are required to be brought in two years after the

(g) 2 R. S. 166, § 28, (orig. § 27.)

(h) *Delabigarre v. Bush*, 2 John. 490.

(i) *Trustees of Huntington v. Nicoll*, 3 John. 566.

(k) *Deas v. Thorn*, 3 John. 543.

(l) *Le Guen v. Gouverneur et al*, 1 John. Cas. 436. *Bush v. Livingston*, 2 Cal. Cas. in Er., 66. *Beebe v. Bank of New York*, 1 John. 529.

(m) 5 John. 531.

(n) 2 R. S. 605, § 78. Id. 594, § 21.

(25) TIME FOR APPEALING.

Section 331 of the Code provides that an appeal to the court of appeals, under subdivision 2 of § 11 must be taken within *sixty days* after written notice of the order shall have been given to the party appealing. Every other appeal allowed by the 2d and 3d chapters of title XI, part II of the Code, must be taken within *two years* after the judgment shall be perfected, by filing the judgment roll.

An appeal from a judgment directing the sale of mortgaged premises and the payment of any deficiency, must be taken within the time limited by law for appealing from final judgments, reckoning from the notice thereof, and not from notice of the subsequent order confirming the sale and stating the deficiency. (*Morris v. Morange*, 38 N. Y. 172; S. C. 4 Ab., N. S. 447, 451; 6 Trans. Ap. 1.)

rendering of the judgment or final determination, except in the following cases:

The exceptions are, where the person against whom the judgment or decree is made shall be, at the time, 1. within the age of twenty-one years; or 2. insane; or 3. imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence, for any term less than for life; or 4. a married woman.(o)

The time during which any such disability continues, is not to be deemed any portion of the time above limited for bringing a writ of error or appeal; but such person may bring the same after the time so limited and within two years after such disability is removed.(p)

If the person entitled to bring such writ or appeal, dies during the continuance of any disability specified in the statute, his heirs, devisees, executors, or administrators entitled by law to bring such writ or appeal, may bring the same, at any time within two years after such death.(q)

But the existence of any disability specified in the statute will not authorize the bringing of a writ of error or appeal upon any judgment or decree after the expiration of five years from the time of rendering the same.(r)

In the case of *Jenkins v. Wild*,(s) Chief Justice Savage expresses an opinion that there is a test of the question, whether a decree is final or interlocutory, arising from the peculiar language of the section of the statute which limits the time for appealing from final decrees.(t) That section requires appeals from such decrees to be brought within the same time *after the enrolment thereof*, as is prescribed for bringing writs of error. The chief justice observes—"The term *enrolment* is not applicable to an interlocutory decree or order, nor to any but a final decree. It seems to follow that none are final decrees but such as are capable of enrolment. All others are but interlocutory, although they do decide the principle in controversy."

The time for appealing from *interlocutory orders or decrees*, including decrees for the general costs of the cause, is fifteen days after notice of such order or decree shall have been given to the party against whom the same was made, or his solicitor.(u)

We have already inquired, in the last section, relative to appeals from vice chancellors—in what cases and in what manner notice of the

(o) Id. 594, § 22.

(p) Id. ib.

(q) Id. 595, § 23.

(r) Id. ib. § 24.

(s) 14 Wend. 539.

(t) 2 R. S. 502, § 78.

(u) 2 R. S. 605, § 79.

entry of an order or decree must be given to the opposite party, in order to limit his time for appealing.(v) The remarks there made, and the decisions referred to, are also applicable to appeals from the chancellor to the court of errors. It may be added, however, that in the case of *Jenkins v. Wild*,(w) it was held by the court of errors, that notice, in the section relative to appeals to that court, does not mean knowledge, but a regular formal notice to be given. This notice must be given, and implies a positive act of the party in whose favor the decree is made, to limit the right to appeal. Possibly, the party entering the order or decree would be estopped, as in 4th Paige, 273, from alleging that he had no notice of his own acts. The statute does not require notice to be given to the prevailing party.

The distinction between final and interlocutory decrees has been already stated.(x)

If the appeal is not made within the proper time, the objection should be taken by motion. It is too late to do so at the hearing.(y) And putting in an answer to the petition is a waiver of all objections of form.(z)

Mode of appealing—notice.] The appellant must, within the time prescribed by law for making an appeal, deliver to the register or assistant register, with whom the decree or order is entered, a written notice, stating that such decree or order, or some particular part thereof, to be specified, is appealed from.(a) (26) And within eight days thereafter, he must serve a like notice on the solicitor of the adverse party, or the appeal will be considered as waived.(b) It has been decided that this last clause of the 117th rule, applies to appeals from the chancellor to the court for the correction of errors, only, and is not applicable to appeals from a vice chancellor.(c)

Bond, or deposit. Within the time allowed for appealing, the appellant must also make the deposit, or file the bond required to be given, as security for costs on such appeal.(d) (27)

(v) Ante, p. 400.

(w) 14 Wend. 544.

(x) Ante, p. 326, 330.

(y) Per Sutherland J., *Disbrow v. Henshaw*, 8 Cowen, 353.

(z) *Rogers v. Cruger*, 3 John. 564.

(a) Rule 117.

(b) *Idem*.

(c) *Eldridge v. Howell*, 4 Paige, 457.

(d) Rule 117.

(26) The notice of appeal required to be given, on an appeal to the court of appeals, is specified in § 327 of the Code. See *ante*, note 20 of this chapter.

(27) SECURITY ON APPEAL.

1. *For payment of costs and damages.*] The Code, (§ 334,) provides that to render an appeal effectual for any purpose, a written undertaking must be executed,

on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him, on the appeal, not exceeding \$500; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

An undertaking given to effectuate an appeal under the above section, and which recites that the appellant *intends* to appeal, is &c., not void as showing by the recital, that the undertaking was executed before the appeal. There is no impropriety in the recital that the party intends to appeal. He forms the purpose to appeal, and the giving of an undertaking being an essential constituent to the completion of his purpose, it is not only truthful, but appropriate, to recite the fact in the instrument which is to effect that purpose. The two things are essential parts of one transaction, and are not not only to be construed, but to be taken together as necessary complements to a thing perfected by their joint agency. (*Forrest v. Havens*, 38 N. Y. 469.)

The undertaking is not sufficient unless it mentions "costs," as well as damages. (*Langley v. Warner*, 1 N. Y. 606; S. C. 3 How. Pr. 363; 1 Code Rep. 111; *Wilson v. Allen*, 3 How. Pr. 369.)

Where two different sums of money were adjudged to different defendants, but only one record was made, and the plaintiff appealed to the court of appeals, it was held that only one undertaking to pay costs and damages on the appeal, was necessary. (*Smith v. Lynes*, 2 N. Y. 569.) Where an appeal was taken from two orders, and an undertaking was given for the amount prescribed by statute, it was held that the undertaking was not large enough, and that the appeal must be dismissed, unless the appellant amended. (*Schermhorn v. Anderson*, 1 N. Y. 430; S. C. 2 Code Rep. 2.)

On an appeal from an order requiring a purchaser at a judicial sale to complete his purchase, no other undertaking than that prescribed by § 334 is required, (*Grisswold v. Fowler*, 15 Ab. 368 n. :) and such security is all that is requisite to stay proceedings, in such a case. (Id.)

Where a statute requires an undertaking to be entered into by sureties, in order to give a right of appeal, an instrument containing the requisite stipulations is valid, although it does not express a *consideration*, and is not *under seal*. (*Doolittle v. Dinwiddie*, 31 N. Y. 350; *Seacord v. Morgan*, 17 How. Pr. 394; S. C. 35, id. 487; 4 Ab., N. S. 249; *Thompson v. Blanchard*, 3 N. Y. 335; S. C. 3 Code Rep. 196.) The statute of frauds applies only to common law agreements, where the consideration was the subject of mutual agreement between the parties. It does not apply to instruments created under, and deriving their obligation from, special statutes, without the acceptance or assent of the party for whose ultimate benefit they were given. (Id.)

An appeal to the court of appeals without an undertaking amounts to nothing. It is in effect a nullity. (*Kelsey v. Campbell*, 14 Ab. 368; S. C. 38 Barb. 238.) So if the sureties fail to justify. (Id.) But an ineffectual appeal, rendered so by an insufficient security, is no bar to another appeal within the time allowed by statute. (Id.)

The appeal will be effectual if the justification states that the sureties are worth double the amount of the judgment; but it will not be sufficient to stay proceedings unless the sureties also justify in double the amount specified in § 334, relative to costs and damages. (*Hoprock v. Cottrell*, 13 How. Pr. 461; *Newton v. Harris*, 1 Code Rep., N. S. 191; S. C. 8 Barb. 306.) All objections to the insufficiency of the undertaking to stay proceedings will be considered waived by the silence of the respondent. (*Halsey v. Flint*, 15 Ab. 368.)

Giving an undertaking under § 334, on appeal to the court of appeals, neither discharges the lien of the judgment, nor the sureties in the appeal to the general term; nor does it release a deposit made, in case the bond is waived. (*Parsons v. Travis*, 2 Duer. 659.) And where a deposit has been made, in lieu of the bond on the appeal to the general term, but is afterwards lost, during the appeal to the court of appeals, the loss must fall on the appellant, where no negligence or blame can be imputed to the respondent. (*Parsons v. Travis*, 5 Duer. 650.)

The "affirmance" mentioned in an undertaking on appeal signifies an affirmance by any legally constituted tribunal having final jurisdiction of the cause. Hence the sureties in an appeal to the general term are liable if the general term reverses the judgment appealed from, but the court of appeals reverses that decision and affirms the special term judgment. (*Robinson v. Plimpton*, 25 N. Y. 484; *Gardner*

v. *Barney*, 34 How. 467.) There must be an affirmance of the judgment which is final, and not merely interlocutory leaving room for further litigation, in order to bind the sureties. (*Poppenhuisen v. Seeley*, 3 Keyes, 150; S. C. 41 Barb. 450.) Where a judgment absolute, on demurrer, was pronounced at a special term, but on appeal to the general term, the judgment of that tribunal was that "the judgment is affirmed, except that the defendants have leave to answer the complaint within twenty days; the costs of appeal to abide the event of the action"; it was held that on an ordinary undertaking, the sureties were not liable, upon such an affirmance. (Id.)

On an appeal from a judgment against two or more defendants, an undertaking reciting that "if the judgment, or any part thereof, be affirmed," the sureties will pay the damages and costs that shall be awarded, binds the sureties, although it may be affirmed as to one of the appellants and reversed as to the others. (*Seacord v. Morgan*, 35 How. 477; S. C. 4 Ab. N. Y. 249; *Gardiner v. Barney*, 24 How. 467.)

Where the appeal is dismissed, the sureties are not liable. (*Drummond v. Husson*, 14 N. Y. 60; S. C. 1 Duer. 142, sub. nom. *Watson v. Husson*.)

If a statute, allowing increased damages, is passed intermediate the time when the obligation is assumed by the sureties and the time of affirmance, so that the damages are more than the law allowed at the time of giving the undertaking, the sureties are not discharged from their liability. (*Horner v. Lyman*, 4 Keyes, 237.) They assume the obligation subject to the power of the legislature to modify or augment their liability, and are bound by the contract, as construed under the law in force at the time of performance. (Id.)

In an action upon an undertaking given in an action for the claim and delivery of personal property, judgment may be rendered for the penalty of the undertaking, and *interest* thereon from the date of the judgment. (*Emerson v. Booth*, 51 Barb. 40.) And it is a general rule that the recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as is necessary to include *interest* from the time of the breach. (*Brainard v. Jones*, 18 N. Y. 35.)

2. *On appeal from a judgment for money.*] Section 335 of the Code directs that if the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed, on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant, upon the appeal.

Whenever it shall be made satisfactorily to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. (Id.)

Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking, with surety or sureties, he may in lieu thereof, deposit with the officer or into court, as the case may require, money to the amount for which such bond or undertaking is to be given. (Id.)

The court in which such action or proceeding is pending may direct what disposition shall be made of such money, pending the action or proceeding. (Id.)

In any case where, by this section, the money is to be deposited with an officer, a judge of the court, at special term or at chambers, upon the application of either party, may, before such deposit is made, order it to be deposited in court, instead of with such officer, and a deposit made pursuant to such order, shall be of the same effect as if made with such officer. (Id.)

The giving of the security provided for in this section stays proceedings on the judgment, by force of the statute, without any intervention of the power of the court. (*Duckman v. Valiente*, 43 Barb. 131; S. C. 28 How. 346; 19 Ab. 130.)

The undertaking required by § 335, should state the amount of the judgment from which the appeal is taken. (*Harris v. Bennett*, 3 Code Rep. 23.) It should be filed and served with the notice of appeal. (*New York Central Ins. Co. v. Safford*, 10 How. Pr. 344.) If filed and served after the appeal has been perfected, by giving the notice of appeal and the undertaking required by § 334, it will not stay proceedings. (Id.)

Where the respondent finds that the undertaking is defective, he must not disregard it and proceed on the judgment, but he should move to have the undertaking set aside. (*Parfitt v. Warner*, 13 Ab. 471.)

This section is applicable to appeals from the special to the general term, except that the neglect to give a new undertaking, when required, is not accompanied by the penalty of dismissal. (*Wenter v. Fields*, 1 Keyes, 483.) The phrase "payment of money," in this section, does not include payment of money out of a fund in court. (*Curtis v. Leavitt*, 10 How. Pr. 481; S. C. 1 Ab. 274.) Consequently, a judgment directing the payment of money out of the hands of a special receiver does not come under this section. (Id.) And an appellant, in such a case, may furnish the undertaking prescribed in § 334, which will be adequate for all the purposes desired. (Id.)

Where a party does not give a sufficient undertaking, he may be relieved under § 327, and allowed to amend. (*Sternhaus v. Schmidt*, 5 Ab. 66.)

A judgment directing a new trial and restitution cannot be enforced after the appellant has given the undertaking required by § 335, to the amount awarded, by way of restitution and costs. (*Britton v. Phillips*, 16 Ab. 33.) The security amounts to a stay of proceedings, in such a case. If the restitution is ordered on a motion, after judgment, the undertaking given on appeal from the judgment in the action will not operate to stay restitution. (Id.)

Where a party who has parted with his interest in the suit appeals from a decree, the giving of the undertaking prescribed in § 335 does not stay proceedings on the judgment, as between parties alone affected by the decree. (*Hackley v. Hope*, 4 Keyes, 123.)

The question as to whether a party has complied with the provisions of the Code, in giving security on appeal can only arise upon motion to set aside the proceedings of the opposite party, taken in disregard of the undertaking given. (*Dyckman v. Valiente*, 43 Barb. 131; S. C. 19 Ab. 130; 23 How. 346.)

Where the judgment is affirmed as to one of several defendants, but reversed as to others, sureties in an undertaking given in pursuance of § 335 are liable, to the amount of the affirmation. (*Seacord v. Morgan*, 3 Keyes, 636; S. C. 35 How. 437; 4 Ab., N. S. 249; 17 How. Pr. 394; *Gardner v. Barney*, 24 How. Pr. 467.)

The privilege of exacting a new undertaking from the appellant, in the event of the insolvency of the sureties, is dependent entirely on this statute. (*Willett v. Stringer*, 15 How. Pr. 310; S. C. 6 Duer, 686.) A new undertaking will not be directed where only one of the sureties has become insolvent. (Id.; *Eiseman v. Swan*, 11 Ab. 112; *Hartford Quarry Co. v. Pendleton*, 4 id. 460.)

An allegation in the complaint, of the execution of the undertaking, if not denied in the answer, is sufficient allegation of its existence, and sufficient proof of its regular execution and complete delivery. (*Robert v. Good*, 36 N. Y. 403; S. C. 2 Trans. Ap. 103.)

3. On appeal from a judgment for the assignment or delivery of documents, &c.] If the judgment appealed from directs the assignment or delivery of documents, or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint; or unless an undertaking be entered into, on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof, or county judge, shall direct, to the effect that the appellant will obey the order of the appellate court, upon the appeal. (Code, § 236.)

In *Elliott v. Buckland*, (37 How. 71.) it was held that in a successful action for the claim and delivery of personal property, from which the defendant appealed, the undertakings necessary to stay proceedings were those required by §§ 334, 335 and 336.

4. On appeal from a judgment for the sale or delivery of possession of real property, or for the sale of mortgaged premises.] If the judgment appealed from directs the sale or delivery of possession of real property, the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. (Code, § 338.)

When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency. (Id.)

An undertaking pursuant to § 334 will be sufficient to render an appeal from a judgment directing the sale of mortgaged premises effectual, but not for a stay of proceedings. (*Firemen's Ins. Co. v. Bay*, 3 How. Pr. 424 ; S. C. 2 Code Rep. 3.)

Unless the proper security is given, the proceedings will not be stayed. (*People v. Church*, 2 Lans. 459, 468.)

5. *Dispensing with, or limiting, the security required by §§ 335, 336 and 338.* Section 339 of the Code provides that the court below may, in its discretion, dispense with, or limit, the security required by §§ 335, 336 and 338, when the appellant is an executor, administrator, trustee or other person acting in another's right ; and may also limit such security to an amount not less than fifty thousand dollars. in the cases mentioned in sections 336, 337 and 338, where it would, otherwise, according to those sections, exceed that sum.

Upon an appeal by executors, the amount of the security may be limited to the amount of assets disclosed to be in their hands. (*Mills v. Forbes*, 12 How. Pr. 466.)

The sureties are not compelled to justify to more than double the amount of the judgment proper. (*Rich v. Beekman*, 2 Code Rep. 63.)

The sum to be named in the undertaking is to be fixed by a judge ; and the only discretion that resides in the court is confided to it by § 339. If the sum exceeds \$50,000 it may be reduced. (*Watt v. Watt*, 15 Ab. 367 n.)

6. *Undertakings may be in one instrument, or several ; service of copy.* The undertakings prescribed by sections 334, 335, 336 and 338, of the Code, may be in one instrument or several. at the option of the appellant ; and a copy, including the names and residence of the sureties, must be served on the adverse party, with the notice of appeal, unless a deposit is made, as provided in section 334, and notice thereof given. (Code, § 340.)

To render an appeal to the court of appeals a stay of proceedings upon the judgment, a copy of a proper undertaking must be served with the notice of appeal. Filing and service of a copy of an undertaking on a day subsequent to that on which the notice of appeal was served will not operate as a stay. (*Cushman v. Martine*, 13 How. Pr. 402 ; S. C. 6 Duer, 660 ; *The New York Central Ins. Co. v. The National Protection Ins. Co.* 10 How. Pr. 344.) The court which rendered the judgment appealed from will not, on such a state of facts, order proceedings stayed pending the appeal. (Id.) It will not so order unless the proceedings upon appeal are amended and validated upon a motion made for that purpose, and with the assent of the sureties in the undertaking. (Id.) The rule as to the necessity of filing and serving a copy of the undertaking with the notice of appeal, and not afterwards, is the same on appeal from a judgment of the special term to the general term as on appeal to the court of appeals. (*Smith v. Heermance*, 18 How. Pr. 261.)

For a disregard of this section, costs will be imposed. (*Beach v. Southworth*, 6 Barb. 173 ; S. C. 1 Code Rep. 99.)

7. *Affidavit of sureties ; exceptions to, and justification by, sureties.* An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after the notice of the appeal ; and unless they or other sureties justify, before a judge of the court below, or a county judge, as prescribed by sections 195 and 196, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days. (Code, § 341.)

The sureties are not compelled to justify to more than double the amount of the judgment proper. (*Rich v. Beekman*, 2 Code Rep. 63.)

If the sureties proposed in an undertaking given on an appeal to the court of appeals fail to justify, when excepted to by the respondent, the appeal becomes a nullity. (*Kelsey v. Campbell*, 14 Ab. 368 ; S. C. 38 Barb. 238 ; explained, 40 Barb. 434 ; *Chamberlain v. Demsey*, 13 Ab. 421 ; S. C. 22 How. Pr. 356.) When the sureties fail to justify, and the court, upon motion, refuses them permission to justify, the notice of appeal, with all the proceedings connected therewith, fall to the ground, and the parties are remitted to the same condition they were in before the notice was given. (Id.)

The party should except to the sureties, and not to the undertaking. Thus, where the notice of exception was to the sufficiency of the undertaking, and not

This deposit or bond is the same as is required upon appeals to the chancellor from a vice chancellor.^(e) And the bond is to be approved of by the same officers and in the same manner as upon appeals of the latter description. But this difference is to be noticed. The method of approving bonds upon appeals to the court of errors, being regulated by statute, is a formality which the court cannot dispense with.^(f) But as respects appeals from a vice chancellor, it is a provision by rule of court merely; and if any irregularity occurs it may be corrected, or may be waived by the adverse party.^(g)

The assistant register, or clerk, is not authorized to approve of a bond on an appeal entered with the register. It must be approved by

(e) See ante, p. 401.

(f) Rogers v. Patterson, 4 Paige, 453.

(g) Hawley v. Bennett, 5 Paige, 104.

to the sufficiency of the sureties, it was held an insufficient notice. (*Young v. Collin*, 2 Code Rep. 68.)

The ten days allowed, to give notice of exception, do not begin to run until the undertaking is filed, although the notice of appeal and a copy of the undertaking be served before the filing. (*Webster v. Stephens*, 3 Ab. 227; S. C. 5 Duer, 682.) Where a notice of appeal and a copy of the undertaking was served on the respondent August 1st, but the undertaking was not filed until September 13, a notice of exception, served September 16, was held to be in time. (Id.)

The notice that the sureties intend to justify, when made by mail, should be double time, or ten days. (*Dresser v. Brooks*, 5 How. Pr. 75.)

In order to secure the benefit of an exception to sureties, the respondent must attend on the officer at the appointed time. If he do not so attend, he will be deemed to have waived his exception. And this is so, although the sureties themselves do not attend. (*Ballard v. Ballard*, 18 N. Y. 491.)

Rule 8 of the supreme court provides that in no case shall an attorney be surety on any undertaking. This is a change in the former practice.

On an application for justification of sureties, the merits of the appeal will not be considered. (*Bradley v. Hall*, 1 Cal. 199.)

Where the sureties in an undertaking had been rejected, and an order granted, directing the appellant to file a new undertaking, with new sureties, it was held that the appellant must not only file the undertaking, but procure the justification of the sureties within the time mentioned in the order. (*Chamberlain v. Dempsey*, 13 Ab. 421; S. C. 22 How. Pr. 356.) No exception by the respondent, to the new sureties, is necessary, to call for their justification in such a case. The order provides for that, in effect. (Id.)

In *Hees v. Snell*. (8 How. Pr. 185,) where sureties justified on notice to the respondent's attorney, who refused to attend the justification, because the hour for which the notice was given had gone by, (the delay being excused,) it was, on an affidavit of the respondent that the sureties were irresponsible, held that he was entitled to an order for the dismissal of the appeal, unless the appellant served a new notice of justification, and the sureties should be substituted, who should justify.

8. *Filing undertaking.*] The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered. (Code, § 343.)

9. *Action upon undertaking.*] Where the undertaking, given upon an appeal, has become forfeited by the affirmance and non-payment of the judgment appealed from, an action may be brought upon it without first obtaining leave to prosecute. Although the undertaking be filed with the clerk of the court, pursuant to the statute, yet it is the property of the respondent, and he may enforce it without taking it from the files of the court. (*New York Central Ins. Co. v. National Protection Ins. Co.* 10 How. Pr. 344.)

The above provisions of the Code, relative to security upon appeal to the court of appeals, apply to appeals taken under subdivision 3 of section 11. (Code, § 343.)

a vice chancellor, injunction master, or the officer in whose office the appeal is to be entered.(*h*)

We have already seen, that in certain cases, if a party appealing from the decision of a vice chancellor, wishes to make the appeal operate as a stay of proceedings in the court below, he must give, in addition to the usual security for costs, a bond for the performance of the decree appealed from.(*i*)

The same security is required, in similar cases, upon an appeal from the chancellor to the court for the correction of errors.

It has been decided with respect to bonds of this character, that where the amount of the penalty is very large, the officer who approves the same, is authorized to receive more than two persons as sureties. And it is not necessary that each of the sureties should justify in double the penalty of the bond, provided the amounts in which they can each severally justify, are equal, in the aggregate, to two sureties who are worth double the penalty of the bond.(*k*) But the approving officer is not authorized to split up the justification of the sureties in an ordinary appeal bond of \$250, or in a bond the penalty of which is less than \$1000.(*l*) In the above case, the penalty of the bond was \$38,500.

Petition of appeal. A petition of appeal, addressed to the court for the correction of errors must be filed in the office of the register, or assistant register with whom the decree or order appealed from is entered, within eight days after the entering of the appeal in the court of chancery, or the appeal will be considered as waived, and that court may proceed, notwithstanding the appeal.(*m*)

This petition, whether filed in the recess or during the sitting of the court, must pray that the decree or order appealed from may be sent to the court for the correction of errors and filed with the clerk thereof without delay.(*n*)

In this petition it is sufficient to set forth the decree, decretal or other order appealed from, without reciting the pleadings in the cause; and stating that the said decree, decretal or other order, or some part thereof (specifying what part or parts,) is erroneous, and that the same ought to be reversed or modified as the case may be.(*o*)

The petition of appeal must be signed by one counsel.(*p*)

No person is considered a party respondent in a petition of appeal

(*h*) *Rogers v. Patterson, supra.*

(*i*) See ante, p. 388, 391.

(*k*) *Clark v. Clark, 7 Paige, 607.*

(*l*) *Id. ib.*

(*m*) Rule 9, court of errors.

(*n*) *Idem.*

(*o*) Rule 10.

(*p*) *Fulton Bank v. Beach, 2 Paige, 188.*

who is not named therein and called upon by the prayer thereof to answer the same.(q)

Amendment of petition. The court of errors will permit a petition of appeal to be amended after it has been presented.(r) Thus if any error is discovered in the petition, or if the appellant is advised that some previous orders are so connected with the order appealed from that it will be impossible to do justice to his case without extending his appeal to these former orders,(s) or if there appears to be a defect of proper parties,(t) he should apply for liberty to amend his appeal.

To obtain leave to amend, a petition must be presented, of which four days'(u) notice in writing is to be given to the opposite party; and it should be accompanied by a copy of the petition.(v)

Applications to amend the petition of appeal are not confined to the appellant, but may also be made by the respondent; who is interested in seeing that all the proceedings are correct. But the respondent's petition should pray, "that the appellant may be ordered to amend his appeal in the particulars set forth, and to amend the respondent's copy."(w)

If an appeal be amended after the respondent has put in an answer thereto, and it is considered necessary that a new answer should be put in to the amended appeal, he must obtain an order for leave to withdraw the former answer, and put in a new one, in which case the respondent will be entitled to costs.(x) An order to this effect may be obtained on petition. But if the respondent do not voluntarily apply for such an order, and put in his answer, the appellant may proceed against him by a new peremptory order, and may get the cause set down *ex parte*.(y)

What papers to be annexed to petition. The officer of the court of chancery with whom the petition of appeal is filed, must make and annex to the same the decree, decretal or other order appealed from, and such other order as may be required to be returned to this court, without any of the pleadings, proofs and exhibits in the cause.(z)

In case the cause had been set down for hearing, and heard prior to the decree or order appealed from, then the officer must cause to be annexed also a copy of the minutes taken by the register or assistant

(q) *Gardner v. Gardner*, 5 Paige, 170.

(r) *Palmer's Prac.* 38.

(s) *Bonchier v. Dillon*, 5 Blish, (New Series) 711.

(t) *Sydney on Appeals*, 93, 94.

(u) See Rule 31, court of errors.

(v) 3 Dan. 140.

(w) *Id.* ib.

(x) 3 Dan. 140.

(y) *Palm. Pr.* 42.

(z) Rule 11.

register as to what was read or used in the court below, or offered and overruled on objection, or admitted at the hearing.(a)

Authenticated copies of the pleadings, proofs and exhibits, or such of them as may be relied on by either party, must be produced at the hearing, by the parties.(b)

Filing petition, &c. The appellant must cause the petition of appeal, with the matter annexed, to be brought into the court for the correction of errors, and filed with the clerk thereof, by the day mentioned in such petition, or when duly prepared by the officer as directed. Or in default thereof, he will lose the benefit of such appeal, unless the court shall see cause to allow a further day for that purpose.(c)

The phrase used in the rule last referred to, "by the day mentioned in such petition," has been continued in the last edition of the rules from rule seven of the former edition, without attending to the fact that under the present rule the petition prays that the decree, &c., may be sent to the court for the correction of errors "without delay;" whereas, under the former rule the petition was that the decree be sent to the court on the first day of the next session thereof, or if filed during the sitting of the court, that it be sent without delay.

Orders to file petitions of appeal may be entered in vacation, by the clerk, with the like force and effect as if entered by direction of the court during its session.(d)

Order to answer petition. Upon filing the petition of appeal, the appellant may obtain an order as of course, for the respondent to answer the petition in eight days after service of a copy thereof, or be precluded.(e) If the respondent does not comply with this order, he will be precluded from answering the petition of appeal, and the appellant may be heard ex parte, unless the respondent is an infant.(f)

In the case of *Irving v. Dunscomb*,(g) it was held that an order to answer a petition of appeal was irregular if entered before the petition, with the transcript annexed, was actually returned and filed in the court for the correction of errors.

In that case the chancellor observed: "The petition of appeal is in the first instance to be filed in the court of chancery. If the court of errors is in session, it is returned here immediately, with the transcript

(a) Idem.
(b) Idem.
(c) Rule 12.
(d) Rule 16.
(e) Rule 13.
(f) Idem.
(g) 2 Wend. 205.

of the decree, and of the minutes of the hearing annexed thereto. But if filed in the recess, it is to be returned here on the first day of the next session. In the first case the court is possessed of the cause by relation, from the time when the petition was returnable during the session. And I apprehend it would be regular, under the 26th rule, to enter an order to answer during the recess of the court. In the latter case, however, this court is not possessed of the cause until the first day of the next session. But in neither case can an order to answer be regular until the petition of appeal, with the transcripts annexed, is actually returned and filed in this court."

The present rule on the subject (the 16th) allows orders to answer petitions of appeal to be entered at any time by the clerk, of course, in the minutes of the court, upon the written request of the solicitor, attorney or counsel, at the peril of the party, with the like force and effect as if entered by direction of the court during its session.

A copy of the order to answer the petition must be served upon the solicitor for the respondent; or if none is employed, upon the respondent personally.^(h) It is not sufficient that the petition has been served. Service of the order to answer is necessary.⁽ⁱ⁾

Withdrawing appeal.] If the appellant finds it expedient to withdraw his appeal, he must obtain leave of the court to do it, by petition, of which four days' notice,^(k) to the respondent's solicitor, must be given, together with service of a copy of the petition. But the court will not grant the prayer of it without directing the payment of costs, nor, in some instances, without the consent of the respondent's solicitor. For there may be cases in which it would be unjust to permit the appellant to withdraw his appeal, and thereby leave him at liberty, at a considerable distance of time afterwards, to bring a new appeal; which he might do, notwithstanding the withdrawing of his former appeal.^(l)

Waiver of appeal.] If a party proceeds to carry into effect the order or decree from which he has appealed, it will be considered a waiver or abandonment of the appeal.^(m) (28)

Dismissing appeal.] If the respondent has reason to think the

(h) *Waters v. Travis*, 8 John. 566.

(i) *Id. ib.*

(k) See rule 31.

(l) *Palm. Pr.* 43.

(m) See ante. p. 393.

(28) A positive waiver of the right to appeal, by a stipulation between the parties, before judgment in the subordinate courts, will be enforced in the appellate court, and the appeal dismissed. (*Townsend v. Masterson, &c., Stone Dressing Co.* 15 N. Y. 587.)

appeal is irregularly filed, he should move to have it dismissed.⁽ⁿ⁾ (29) This motion should be made before the petition of appeal is answered; for if the respondent treats it as an effective appeal, by answering it, he will not be entitled to costs.^(o)

If the appeal is made after the time allowed for appealing, the objection should be taken by motion to dismiss the same; and it cannot be taken at the hearing.^(p) Answering is a waiver of objections of a formal nature.^(q)

Answer to petition of appeal.] At any time after the filing of the petition in the court below, and without waiting for the actual return thereof to the clerk of this court, the respondent may put in his answer thereto.^(r)

If an order is entered under the 13th rule, requiring the respondent to answer, and he fails to do so, the appellant, as already stated, may be heard *ex parte*; unless the respondent is an infant.

And it seems the appellant may move for an order that the order or decree appealed from be reversed; and for such further direction as grows out of such reversal.^(s)

The answer to the petition must be signed by counsel.^(t)

Answers are of two kinds, general and special.

The general answer, (which is the kind most commonly used,) admits the making of the decree or order complained of by the appellant; refers thereto when produced; insists that the same is agreeable to equity; and prays that it may be affirmed; and that the petition of appeal may be dismissed, with costs.

If the respondent brings a cross appeal, the answer should be qualified thus, "that the said decree, so far as the same is complained of by the said petition and appeal, is agreeable to equity," &c.

An answer is *special* when particular facts are stated, or some specific matter is alleged, either upon the merits of the cause, or upon any defect in form in the appeal; such as that there are not proper parties; or that the decree or order appealed from did not become final, but remains under review or re-hearing; or that the date or purport of the

(n) Palm. Pr. 44.

(o) Norbury v. Meade, 3 Bligh, 574.

(p) Per Sutherland, J. in Disbrow v. Henshaw, 8 Cowen, 353.

(q) Rogers v. Cruger, 3 John. 564.

(r) Rule 9.

(s) Chamberlain v. Fitch, 2 Cowen, 244. Waters v. Travis, 8 John. 566.

(t) Fulton Bank v. Beach, 2 Paige, 188.

(29) Where it appears that no printed case has been served on the respondent's attorney, and the only papers before the court, besides the affidavit showing that fact, are the case and exceptions in the court below, the court of appeals cannot proceed to judgment, but must dismiss the appeal. (*Rigney v. Savory*, 6 Ab., N. S. 284, n.)

decree or order is erroneously stated in the petition.^(u) But special answers have not, for a long time, been deemed necessary, or used in practice. In fact, the matters here noticed are more properly grounds for an application to the court to dismiss the appeal for irregularity.^(v)

Cross appeals.] Cross appeals are brought in a similar manner, and for the same reasons, as cross appeals in the court of chancery.^(w)

A cross petition of appeal, is, in form, the same as an original appeal; except that it must be entitled "The petition and cross appeal," &c., and should specify the particular parts of the decree or order of which the petitioner complains. It is presented and moved, and an order made upon it in the same manner as upon an original appeal.^(x)

By the practice of the house of lords, security for costs in cross appeals, is not necessary.^(y)

The order to answer a cross appeal may be entered of course, it would seem, under the 16th rule; and it may be served in the same manner as the order in an original appeal. But the respondent, in the cross appeal, being appellant in the original appeal, *et e contra*, by which both parties are in court, service of the order upon the solicitor of the respondent in the cross appeal is sufficient.^(z)

The answer to a cross appeal is in the same form with that to an original appeal; except that the title is "The answer of A. B. to the petition and cross appeal to C. D." And that, towards the end, instead of saying "that the decree, &c. is just," &c. it should be "that the decree, in so far as is complained of by the said C. D., is just, and agreeably to equity," &c.^(a)

Case on appeal.] The 14th rule directs a case to be made and printed for the use of the court, and specifies what it shall contain.⁽³⁰⁾

(u) 3 Dan. 137.

(v) *Id.* ib.

(w) See ante, p. 397.

(x) 3 Dan. 138.

(y) *Id.* ib.

(z) Palm. Pr. 34.

(a) *Id.* ib.

(30) Rule 5 of the court of appeals provides that in all calendar causes, a case shall be made by the appellant, which shall consist of a copy of the return of the clerk, and the reasons of the court below for its judgment, or an affidavit that the same cannot be procured. If the case is voluminous, an index of the pleadings, exhibits, depositions and other principal matters, shall be added. Every opinion in the cause, at special term, as well as at general term, relating to the questions involved in the appeal, is included by the foregoing provisions.

In *Warren v. Warren*, (22 How. Pr. 142,) where it appeared, on appeal from a judgment entered upon the report of a referee, that the referee wrote an opinion, in the cause, in which he assigned his reasons for the conclusions of law and fact contained in his decision, it was held that the opinion of the referee should have been printed with the case and presented to the court, by the appellant's counsel.

Rule 8 of the court requires the appellant, at the commencement of the argument, to furnish a printed copy of the case to each of the judges, and to deliver nine other copies to the clerk.

The respondent must make up this case and furnish the necessary copies thereof, if he has, at or before the service of his answer to the petition of appeal, given a written notice to the adverse party, of his election to do so; otherwise, the appellant is to make it up and furnish copies thereof.(b)

Although the above rule directs the depositions to be printed, yet it seems, from analogy to the practice of the house of lords in England, that the court may, if it thinks proper, hear evidence used in the court below, though not printed.(c)

By the practice of the house of lords, the case must be signed by one or more of the counsel who attended at the hearing in the court below, or who are counsel upon the appeal. And in the case of *The Fulton Bank v. Beach*,(d) the chancellor allowed a fee for two counsel to be taxed.

Points.] Each party, at the commencement of the hearing, must deliver to the members of the court printed copies of the points he intends to rely upon in argument, with a reference to the authorities on which he relies in support of the same.(e) (31)

The points should be signed by counsel.

Manner of printing case and points.] All cases and points prepared and served on the members of the court must be printed in royal octavo form, on sized paper, with a wide margin.(f) (32)

Service of case.] The party who makes the case must, within thirty days after the cause is at issue in this court, (i. e., after the answer to the petition is filed,) serve upon the attorney or solicitor of the adverse party, or on one of his counsel, or transmit to such attorney, &c., by

(b) Rule 14.

(c) *Stackpool v. Stackpool*, 4 Dow, 222. *Palmer's Pr.* 50.

(d) 2 Paige, 188.

(e) Rule 14.

(f) Rule 15.

(31) Rule 8 of the court of appeals requires each party, at the commencement of the argument, to furnish to each of the judges a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and to deliver nine other copies to the clerk, and three copies to the counsel of the adverse party.

Under the term "points" are embraced the heads of an argument, together with the authorities cited, but not the argument at length. (*Gray v. Schenck*, 3 How. Pr. 231.)

Exceptions not noticed in the points, nor argued, are to be deemed waived. (*Sutherland v. Rose*, 47 Barb. 144, 150; *Cummings v. Morris*, 3 Bosw. 560.)

Rule 9 directs that in all cases, each party shall briefly state, upon his printed points, in a separate form, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found.

(32) Rule 6 of the court of appeals prescribes the style and manner in which the cases and points and other papers furnished the court in calendar causes, shall be printed, the quality of the paper, size of the page, kind of type, &c.

mail, directed to him at his place of residence, three printed copies of the case. Otherwise, the party who ought to have served such case shall not have the right to bring his cause on to be heard, without the consent of the adverse party, until after the expiration of thirty days after such copies of the case shall have been served.(g) (33)

Solicitors, counsel, and guardians ad litem on appeal.] The solicitors and guardians ad litem of the respective parties in the court below, are to be deemed the solicitors and guardians ad litem of the same parties respectively, in the court of errors, until others are retained or appointed, and notice thereof served on the other party.(h) (34)

No member of the court of errors shall, as solicitor or counsel, be concerned in, or argue, any cause in that court, unless he was, without reference to such court, actually retained and employed in the cause in the court below, before the decree below was rendered.(i) But this rule does not extend to causes in which any member of the court was actually retained as solicitor or counsel previous to his becoming a member thereof.(k)

Notice of argument.] All causes which have been put at issue in the court of errors (by the filing of an answer to the petition of appeal,) may be brought on to argument upon the notice of either party.(l)

This notice must be served at least fourteen days before the day on

- (g) Idem.
- (h) Rule 17.
- (i) Rule 29.
- (k) Idem.
- (l) Rule 18.

(33) Rule 7 of the court of appeals requires the appellant, within forty days after the appeal is perfected, to serve three printed copies of the case on the attorney of the adverse party. If he fails to do so the respondent may, by notice in writing, require the service of such copies within ten days after service of the notice, and if the copies be not served, in pursuance of such notice, the appellant shall be deemed to have waived the appeal. And on an affidavit proving the default, and the service of such notice, the respondent may enter an order with the clerk, dismissing the complaint for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

The respondent is at liberty to dismiss an appeal by an *ex parte* order, under this rule, only where there is a total failure to serve *any* case, within the required time. If the respondent desires that an imperfect case served should be amended, he must apply to the court by motion, upon notice. (*Bowers v. Tallmadge*, 20 How. Pr. 616; S. C. 23 N. Y. 166.)

(34) Rule 4 of the court of appeals is the same as the above, substantially.

An appeal is in the nature of a new action brought by the party appealing, and may be prosecuted by a new attorney, without substitution. (*Pratt v. Allen*, 19 How. Pr. 450; *McLaren v. Charrier*, 5 Paige, 530. See *Cook v. Dickerson*, 1 Duer, 679; *Thorp v. Fowler*, 5 Cow. 446.)

Under a general retainer, an attorney is employed to prosecute or defend a suit to a final judgment; and when this end is reached, his work under the general retainer is done. (*Adams v. Fort Plain Bank*, 23 How. Pr. 45. See *Mygatt v. Wilcox*, 1 Lans. 55-58.)

which it is intended to bring on the same, and which must be some day on which the court will be in session.(m)

A copy of such notice must also be furnished to the clerk of the court at least four days before the day appointed for the argument.(n)

List of causes, or calendar.] The clerk must make a list of the causes thus noticed, arranging them in the order in which the answer to the petition was filed. And when the court is ready to proceed to the hearing of causes, the same are to be called in the order in which they stand on such list.(o) (35)

A cause cannot be entered on this list or calendar until after the petition of appeal and the respondent's answer thereto have been filed.(p)

Hearing.] (36) Not more than one counsel will be allowed to open the argument, nor more than two to answer; and no more than one

(m) Idem.

(n) Idem.

(o) Idem.

(p) Woodcock v. Bennett, 20 John. 501.

(35) Appeals in non-enumerated motions, as well as others, must, under the rules of the court, be placed on the calendar, otherwise the court will not hear argument upon them, even by consent of counsel. But it may, for good cause, allow them to be submitted upon the points, without argument. (*Gregory v. Cryder*, 9 Ab., N. S. 89.)

Section 18 of the Code allows the court of appeals, by general rules, to provide what causes shall have a preference on the calendar, and provides that on a second and each subsequent appeal to that court, or when an appeal has once been dismissed, for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal, and may be noticed and put on the calendar for any succeeding term; and for a preference of actions or proceedings in which the people of the state, or any state officer, or any board of state officers is or are sole plaintiff or defendant, &c.

Rule 20 of the court of appeals relates to preferred causes, and classifies them, and prescribes their place on the calendar.

Rule 17 directs as to the call of the calendar, exchanging one cause for another, striking causes from the calendar, &c.

(36) An appeal to the court of appeals from any order affecting a substantial right, arising upon any interlocutory proceeding, or upon any question of practice in the action, may be heard as a motion, and noticed for hearing for any regular motion day of the court. (Code § 11, sub. 4.)

Rule 23 of the court of appeals provides that either party may bring on the argument, on a notice to be served upon the opposite party; a copy of which notice, specifying the judicial district in which the cause originated, shall be filed with the clerk, at least fifteen days before the commencement of the term for which the case is noticed; which notice, (except in criminal cases,) shall be for the first day of the term.

And rule 22 directs that in all cases where the notice of argument is filed with the clerk, there should be filed with the same, due proof or admission of the service of argument upon the adverse party; and the clerk is directed not to enter on the calendar any cause in which proof of the service of said notice is not filed with him.

Rule 21 of the court of appeals provides that judgments of reversal by default will not be allowed. When a cause is called in its order on the calendar, it must be either argued, submitted or passed. If the appellant fails to appear and furnish the court with the papers required, and argue or submit his case, judgment of affir-

counsel shall reply or close, except in special cases where there are distinct parties on the same side, having distinct interests in question.(g)

If the parties prefer, they may submit a printed instead of an oral argument.(r)

If the reasons of the court below are not annexed to the cases delivered, the cause will not be heard unless it appears, by affidavit, that application has been made therefor, and that the same could not be obtained.(s)

When any preliminary question, not made in the court below, and not involving the merits of the cause, is presented for argument, it will

(g) Rule 30.

(r) Rule 20.

(s) Rule 19.

mance by default will be ordered, on motion of the respondent. If the appellant, only, appears, he may either argue or submit the case, and it will be determined upon the papers submitted by him. If both parties appear, either or both may be heard orally, or submit the case on printed briefs.

This rule was not intended to impose upon the judges the duty of acting as counsel for the party who does not appear, to prosecute or defend, but to save to parties acting in good faith a further opportunity to present a printed brief, and save the court the loss of time formerly consumed in hearing motions to open default. (*Maher v. Carman*, 38 N. Y. 25; S. C. 5 Trans. Ap. 25.)

Rule 8 provides for the furnishing to the court and clerk, at the commencement of the argument, printed copies of the case and of the points, with a reference to the authorities, and all papers used in the court below, &c.

Rule 9 directs that in all cases, each party shall briefly state, upon his printed points, in a separate form, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found, and the court will not hear an extended discussion upon any mere question of fact.

Rule 16 provides that in the argument of calendar causes and motions, only one counsel will be heard on each side, unless the court shall otherwise direct. And rule 19 provides that in the argument of a cause, not more than two hours shall be occupied by each counsel, except by the express permission of the court.

Rule 12 allows causes which have not been exchanged to be submitted, at any time in term, on printed arguments. Exchanged causes cannot be submitted until reached upon the calendar.

Rule 13 directs as to the hearing of motions.

Rule 17 directs as to the call of the calendar, exchanging one cause for another, striking causes from the calendar, &c.

It has been held that it is the right of parties who have interests dependent on the decision of the court, to claim that their causes shall be heard when reached in their regular order on the calendar. If the opposite party is unprepared, he is at liberty, under the rule, to submit a printed argument. The rules prescribe the only cases in which an argument can be postponed. (*Bank of Salina v. Alvord*, 32 N. Y. 684.) That the counsel for one of the parties is engaged as counsel, in another court, is not a sufficient ground for putting off the argument of a cause. (*Starr v. Benedict*, 19 John. 455.)

Rule 18 prescribes the duty of the clerk, as to exchanged causes, and the calendar.

Rule 20 relates to preferred causes, and classifies them, and prescribes their place on the calendar.

The burden is upon the appellant to show that the granting of a new trial by the general term was erroneous in matter of law. Where the return shows that questions of fact were legitimately before the general term, and the evidence was such that the court may have reversed the judgment upon the facts, an appeal to the court of appeals will be dismissed. (*Wright v. Hunter*, 46 N. Y. 409.)

be first argued and passed upon by the court; and the argument upon the merits will be postponed until such preliminary question shall have been disposed of, unless the court shall otherwise direct.(t)

Under this rule, it is the practice, when a cause is called, to raise any question as to the regularity of the appeal, the time of its being filed, neglect of any requisition of the statute or rules, or as to the character of the order or decree appealed from.(u) It is very common, however, to make a motion to dismiss the appeal on any regular motion day after the same is entered.(v) And in *Rowley v. Van Benthuyzen*,(w) Bronson, J. considers this the regular course.

It seems, however, that the court of errors will not, under any circumstances, previous to the hearing of an appeal, modify or dissolve an injunction granted by the court below.(x)

Default of parties on the hearing.] The court will not hear an ex parte argument in favor of the affirmance of a decree.(y) But if the cause has been regularly noticed for argument and placed on the calendar by the respondent, and the appellant does not appear to argue on his part, or does not furnish the printed cases required by the 14th rule, the decree will be affirmed with costs, together with such damages as the respondent would have been entitled to if the decree had been affirmed on argument.(z) (37)

Whenever any matter is moved for hearing, whether upon the merits, or upon a preliminary or interlocutory question, pursuant to notice, and the party whose right it is to appear and oppose, shall make default, the court will proceed and hear the matter ex parte. And no decision will be given upon the mere default of appearance, except as provided in the 21st rule. But where the respondent has elected to make the case, if he does not appear and furnish the cases when the cause is reached on the calendar, the adverse party may have the default entered, and may then furnish the cases, and submit or argue the cause ex parte, out of its place on the calendar, at any time thereafter.(a)

Abatement of suit, &c.] Where a party in whose favor a decree or order has been made, dies after the entry thereof and previous to the service of notice of the same, and the opposite party is desirous to appeal

(t) Rule 24.
 (u) 2 Hoff. Pr. 46.
 (v) Id. lb.
 (w) 16 Wend. 369.
 (x) See Ins. Co. v. Ward, 20 Wend. 588.
 (y) Rule 21.
 (z) Idem.
 (a) Rule 22.

(37) Rule 21 of the court of appeals is substantially the same as the above.

to the court of errors, his course is to defer the prosecution of the appeal until the suit has been revived in the court of chancery in favor of the representatives of the deceased, and due notice given him of the decree or order by the solicitor of the substituted parties. Notice given by the solicitor of the party deceased may be regarded as a nullity.(b) So where there is an abatement after notice of appeal and before the petition of appeal is presented, it seems the practice is to revive the cause in the court below, by bringing in the representatives of the deceased party.(c)

But where either party dies *after* the appeal is presented in the court of errors, the practice is to bring in the proper parties there.(d) It is not necessary in such case to revive the cause in the court of chancery, as was done in *Wilson v. Hamilton*, 9 John. 442.(e)

It seems that if a party in whose favor the decree was made should die after notice of the decree given to the opposite party, and within the fifteen days allowed for appealing, an appeal would be held valid if the petition of appeal and the bond were dated as of a day anterior to the death of the deceased party.(f) But where an appeal was made after a suit abated, and before a revival in the court below, and a bond was executed to the representatives of the deceased party, it was held that the bond was void and the appeal irregular; and the appeal was accordingly dismissed.(g)

Where a decree is made in the court of errors against a deceased party, after his death, the suit must be revived in the court of chancery, against his representatives, before any proceedings can be had, to carry the decree into effect.(h)

If the appellant dies pending the appeal, the suit must be revived in the name of his heir or representative. A petition for that purpose should be presented stating the appeal, and the abatement, and the transmission of the right to the petitioner.(i) So much of the nature of the suit should be stated in this petition as to show that the petitioner holds the proper legal relation to sustain it, such as heir or executor.(k)

This petition is *ex parte*, and the order made upon it is an order of course.(l)

Whether a respondent can apply, upon the death of the appellant,

(b) *Anderson v. Anderson*, 20 Wend. 535.

(c) *Id. ib.* *Rogers v. Patterson*, 4 Paige 409.

(d) *Id. ib.* *Sydney on Ap.* 110. *Palm. Pr.* 80. *Urquhart*, 82. *Rogers v. Patterson*, *supra*.

(e) *Anderson v. Anderson*, *supra*.

(f) *Id. ib.*

(g) *Id. ib.*

(h) *Rogers v. Patterson*, 4 Paige, 409.

(i) 2 *Hoff. Pr.* 40.

(k) *Id. ib.*

(l) *Byne v. Potter*, 5 Ves. 305.

for an order that the appeal be revived against his representatives, is a point not settled by any decisions of the court of errors or by any rule of the court. By the practice of the court of chancery, however, if one of several complainants dies, the survivors may elect to proceed, or not; and on the application of a defendant, the court will direct that if the suit is not revived within a limited time, it be dismissed.^(m)

If the respondent dies pending the appeal, his heir at law or personal representative may petition to be substituted in his place; or the appellant may claim a similar order.⁽ⁿ⁾

Where a party to an appeal died after issue was joined thereon, but before the cause was argued, and the cause was afterwards heard and decided and remitted to the court of chancery by the court of errors in ignorance of the death of the party, it was held that the court below must carry the decree into effect though it was not entered as of a day previous to the party's death; and that the suit must be revived below, and carried on as if the party had died subsequent to the decree.^(o)

If the heir of the deceased party who applies for a revivor is an infant, his *prochien amy* or guardian must unite in the petition.^(p)

Evidence upon appeal.] The case required by the 14th rule must contain such of the depositions, affidavits, &c., as were read or used on the hearing of the cause or matter before the chancellor, and upon which the decree or order appealed from was founded.^(q) This excludes, by implication, any other evidence. Indeed, the rule is well settled, that no evidence can be received in the appellate court which was not laid before the court below. Nor can any evidence which was received below, be objected to above, unless the admission of improper evidence be among the points of appeal.^(r)

It may be mentioned, also, that where evidence has been rejected below which the court of errors thinks ought to have been received, the usual course is to remit the cause to the court of chancery. It seems, however, that before doing this, the court of errors will look at the rejected evidence, in order to see whether, if it were admitted, it would affect the opinion of the appellate court, in forming its judgment.^(s)

Prosecuting appeal in forma pauperis.] An appeal may be prosecuted by a party *in forma pauperis*, in a proper case. To obtain leave

(m) *Pell v. Coon*, Hopk. 450. *Leggett v. Dubois*, 2 Paige, 211.

(n) *Palmer's Pr.* 80. *Sidney*, 112. *Urqn.* 84.

(o) *Rogers v. Patterson*, 4 Paige, 409. *Bank of the U. S. v. Weisiger*, 2 Peters, 481.

(p) *Palm. Pr.* 81.

(q) See Rule 14, Court of Errors.

(r) *Eden v. Earl Bate*, 1 Bro. P. C. Toml. ed. 465. *Balsh v. Moore*, 3 id. 546. *Button v. Price*, *Proc. in Ch.* 212. 3 Dan. 194.

(s) *McCabe v. Hussey*, 5 Bligh (New Series), 715, 729.

to do so, a petition must be presented, accompanied by an affidavit of poverty.(t) By the English practice, this affidavit states that the petitioner is not worth the sum of five pounds, wearing apparel and the matters of the cause only excepted.(u)

Decision.] At the conclusion of the argument of the appeal, the presiding officer of the court states the question—"Shall this decree be reversed?" And the court proceeds to decide the question, after hearing the opinions of such of the members of the court as wish to state the reasons for their votes. But if any member wishes further time to examine the questions to be decided, the court will postpone the decision.(v)

If a majority of the court do not vote for a reversal, the decree is of course affirmed.(w)

When the cause presents distinct questions, they are to be decided separately.(x)

The president of the senate is entitled to vote upon a question, and express an opinion, equally with the other members. This rule also applies to a president *pro tempore*.(y)

If the court is equally divided, the decree will be affirmed. Such affirmance cannot, however, be considered as settling the law in the court for the correction of errors, except so far as relates to the particular cause.(z)

Where a decree is affirmed in this manner, it ought to be without prejudice to the legal rights of the parties.(a)

A decree may be affirmed or reversed if ten members concur in the decision; provided there be present at the decision nineteen members; and this, although the nine do not vote, or have not heard the argument.(b)

Decree.] If the decree to be entered is simple, such as a mere reversal or affirmance, the clerk draws it up. In very special cases some member of the court frequently prepares the decree. This was done in *Hawley v. James*, (16 Wend. 61.) (c) If counsel attend, they settle the decree among themselves, if they can agree as to its provisions. If not, the court will settle it after hearing the drafts, on the last day of the session.(d)

(t) 2 Hoff. Pr. 46.

(u) Urquhart, 84.

(v) Rule 25.

(w) *Bridge v. Johnson*, 5 Wend. 371.

(x) Rule 26.

(y) *Case of the Lieut. Gov.* 2 Wend. 215.

(z) *Bridge v. Johnson*, 5 Wend. 371.

(a) *Martin v. Welch*, 4 Munf. 60.

(b) *McFarlen v. Cray*, 6 Wend. 325.

(c) 2 Hoff. Pr. 51.

(d) 2 Hoff. Pr. 51. See *Palm. Pr.* 69.

If a party to the record has died between the hearing and decision, the decree may be entered *nunc pro tunc* as of the day of the hearing.(e)

Costs.] The costs which are awarded by the court for the correction of errors, upon appeal, are to be taxed by a taxing master of the court of chancery; and when thus taxed, the payment thereof is to be enforced by the court of chancery according to the practice of that court.(f)

It has been held, however, that the costs need not be inserted in the remittitur, before it is sent down. It may be done after it is filed in the court below.(g)

Upon an affirmance of a decree, costs are allowed as of course. The costs in the court for the correction of errors, are not regulated by statute but by the rule prevailing in the English courts. Whenever the merits of the case are disposed of by the decree of the court for the correction of errors, it may adjudge as to the costs.(h) (38)

Upon the reversal of a decree costs are not allowed.(i)

Where there were two appeals from two distinct orders of the chancellor, and two cases printed, the court for the correction of errors directed that no allowance should be made for any part of the second case which was contained in the case made on the first appeal. It also consolidated the orders of affirmance, and made but one decree of affirmance as to both appeals.(k)

(e) *Murray v. Blatchford*, cited 2 Hoff. Pr. 51. Ante, p. In the case of *Van Vechten v. Van Vechten*, after the appeal to the court for the correction of errors was noticed for argument, it being expected that J. V., one of the parties, would die before the cause could be argued, and the parties being willing to submit the same on printed arguments, Mr. Rhoades, on the 19th of January, 1841, obtained an order of the appellate court, that the cause be entered in the clerk's minutes as submitted on that day. On the next day J. V. died, and on the 28th of December thereafter, the decree of the chancellor was affirmed with costs. A special order was thereupon obtained, that the decree of affirmance be entered *nunc pro tunc* as of January 19th, 1841. And on taking down the remittitur, an order was obtained, January 24th, 1842, from the chancellor, that the decree to be entered on filing the remittitur be entered and the remittitur filed *nunc pro tunc* as of January 19th, 1841. These orders saved the expense and delay of reviving the cause in both courts.

(f) Rule 28.

(g) *Legg v. Overbagh*, 4 Wend. 190.

(h) *Murray v. Blatchford*, 2 Wend. 224.

(i) Id. ib.

(k) *Fulton Bank v. Beach*, 2 Paige, 186.

(38) COSTS AND DAMAGES, IN COURT OF APPEALS.

On an appeal from an *order*, the costs in the court of appeals are the same as on appeal from a judgment. (*Tauton v. Groh*, 9 Ab., N. S. 453; *White v. Anthony*, 23 N. Y. 164.) Where costs are given, in the court of appeals, on the decision of an appeal, whether from a judgment or an order, general costs must be allowed, and not motion costs merely. (*Hall v. Emmons*, 40 N. Y. 137.)

In *Maher v. Carman*, (38 N. Y. 25; S. C. 5 Trans. Ap. 25,) where the appeal was evidently taken for delay, the judgment was affirmed, with ten per cent. damages. And whenever the court can see no merits in an appeal which comes before it, the judgment will be affirmed, with ten per cent. damages. (*Wright v. Saunders*, 36 How. 136; S. C. 3 Keyes, 323; 1 Trans. Ap. 263.)

In *Shaw v. Smith*, (5 Ab., N. S. 129; S. C. 1 Trans. Ap. 238; 3 Keyes, 306,) upon affirmance of a judgment, in consideration of the hardship resulting to the appellant through an omission to make his exceptions properly, the court awarded no damages to the respondent.

Re-hearing appeals.] In February, 1839, the court for the correction of errors, adopted the following order, which was intended to settle the question as to all future applications for the re-hearing of causes, after there had been a final judgment or decree upon the merits, either upon an appeal or a writ of error:—"Ordered, that this court will not order a re-argument, nor will it re-consider any case, on the ground that it was decided on an equal division of the members of the court, or for any other reason, after the cause has been decided here, upon the merits."(l) (39)

And in the case of *The People v. The Mayor, &c. of New York*,^(m) that court decided that it would not grant a re-hearing after pronouncing final judgment on the merits of a case, and after the judgment had been drawn up, settled, and entered of record, although the members of the court were equally divided on the question of reversal.

It seems, however, that if, in settling the final judgment before it is entered of record, difficulties occur as to the decree or rule to be entered, new points may be argued or old points re-argued, if the court deem it expedient; and that even after the entry of the judgment, before the record is remitted, mere clerical errors and defects in form may be corrected, or even a new clause added, to carry out the judgment of the court.⁽ⁿ⁾

Remittitur.] The statute directs that when an appeal shall have been heard and determined, all the proceedings, together with the

(l) See 25 Wend. 257, per Walworth, chan.

(m) 25 Wend. 252.

(n) Id. ib.

(39) REHEARING IN COURT OF APPEALS.

The Code (§ 14) directs that if five judges do not concur in pronouncing a judgment, the case shall be reheard. But no more than two rehearings shall be had; and if on the second rehearing five judges do not concur, the judgment shall be affirmed. When a rehearing of the case is ordered, the judges shall file the opinions read by them with the reporter of the court, but such opinions shall not be published. No person, other than the judges of the court, the reporter, or the counsel or attorney of either of the parties, shall have access to, or a copy of, the said opinions, but such counsel or attorney may have access to, and a copy thereof.

This section restores the common law as it was understood and acted upon, in this state, previous to the Code. (*Mason v. Jones*, 3 N. Y. 375; S. C. 5 How. Pr. 118; 3 Code R. 164.)

When judgment is pronounced in open court, without dissent by any of the judges, a rehearing will not be allowed because in consultation the judges were equally divided. (*Mason v. Jones. supra.*)

An affidavit of a party that he designs to apply for a re-argument in the court of appeals will not be sufficient to induce the court below to stay the filing of the remittitur for that purpose; but an order from a justice of the appellate court that the adverse party show cause why a re-argument should not be had, &c., will be conformed to by the court below. (*Jarvis v. Shaw*, 16 Ab. 415.)

The act of April 14, 1870, (Laws, ch. 203,) relating to the court of appeals, &c., provides that no existing law which relates to the rehearing of causes in the court of appeals shall be in force. (§ 1.)

decree or order therein, and all things concerning the same, shall be remitted to the court of chancery, where such further proceedings shall be had as may be necessary to carry it into effect.(o) (40)

(o) 2 R. S. 167, § 29 (orig. § 28.)

(40) The Code (§ 12) directs that the judgment of the court of appeals shall be remitted to the court below, to be enforced according to law.

Rule 14 of the court of appeals requires the remittitur to contain a copy of the judgment of that court, and the return made by the court below; and that it be sealed with the seal, and signed by the clerk of the court.

Rule 15 provides that when a decree or order shall be affirmed by the default of the appellant, the remittitur shall not be sent to the court below, unless the court of appeals shall otherwise direct, until ten days after notice of the affirmance shall have been served on the attorney of the appellant. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served.

After a cause has once been remitted, the court of appeals loses all jurisdiction thereof. The only remedy is by a new appeal. (*Dresser v. Brooks*, 4 How. Pr. 207; S. C. 2 N. Y. 559; 2 Code Rep. 130; *Lawrence v. Bank of the Republic*, 6 Rob. 497.) After the remittitur has issued from the court, under its seal, the court below has jurisdiction of the cause, though the remittitur is not actually filed with the clerk of the latter court. (*Judson v. Gray*, 17 How. Pr. 289.)

On the dismissal of an appeal, a remittitur is the regular process to restore the cause to the court below to be enforced. (*Langley v. Warner*, 2 Code R. 97.)

Where the judgment of the court below is reversed by default in not joining in error, the remittitur should not be sent to the court below until ten days have elapsed. (*Lyne v. Ward*, 1 N. Y. 531.)

This rule of the court (15) requiring a delay of ten days after service of notice of the default, before sending out the remittitur, was intended to protect the party against surprise, and to give him ample time to make his application for relief, or to obtain an order staying proceedings to enable him to do so. (*Latson v. Wallace*, 9 How. Pr. 334.)

The judgment of the court of appeals is to be sent back to the court below, there to be enforced. It must therefore be brought formally to the notice of the latter court, and be made one of its judgments. Until the judgment of the court of appeals is incorporated in its records, no proceedings can be instituted to enforce its directions. (*Seaward v. Morgan*, 17 How. Pr. 394; S. C. 4 Ab., N. S. 249; 35 How. 487.) An order of the court below is essential. The filing of the remittitur with the clerk, and his adjustment of the costs thereon, is not sufficient. (Id.) As to the form of judgment on a remittitur, see *Union Rubber Co. v. Babcock*, 1 Ab. 262, 267 n.; S. C. 4 Duer, 620.

The dismissal of an appeal is a *judgment*, within the meaning of the section authorizing a remittitur to the inferior court. (4 How. Pr. 184; *Langley v. Warner*, 2 Code R. 97.) But where no return has been filed, and the appeal is dismissed for that cause, alone, there can be no remittitur. (*Thompson v. Blanchard*, 4 How. Pr. 210, 211 n.; S. C. 2 N. Y. 561; 2 Code R. 138.) After an appeal is dismissed because of a defective return, an objection that a remittitur could not be granted will be of no avail. (*Doty v. Brown*, 4 How. Pr. 429.)

Filing the remittitur is not absolutely essential to give the court below jurisdiction, so as to go on and re-try the cause, where a new trial is ordered by the appellate court. It seems that if the remittitur is in the hands of the prevailing party, it will be sufficient, in such a case. (*Judson v. Gray*, 17 How. Pr. 289.)

If an order dismissing an appeal be irregularly entered, or obtained on false or garbled affidavits, the court of appeals has the power to vacate its order, although the remittitur has been filed in the court below. (*Newton v. Harris*, 8 Barb. 306; S. C. 1 Code Rep., N. S. 191.) But until such order of the appellate court is revoked, the court below is bound by it. (Id.)

After the remittitur is actually filed, the remedy, in case of errors in the judgment, or in cases requiring amendment, must be sought in the court below, or by a new appeal. (*Lawrence v. Bank of the Republic*, 6 Rob. 497; *Newton v. Harris*, 1 Code Rep., N. S. 181; S. C. 8 Barb. 306; *Burkle v. Luce*, 1 N. Y. 239; S. C. 3 How.

The remittitur (by means of which the proceedings are transmitted to the court below, after the decree is made in the court for the correction of errors,) contains a copy of the decree or order of the court for the correction of errors, annexed to the petition of appeal and the matters thereto attached, as brought into the appellate court, under the seal of that court, and signed by the clerk thereof.(p) When the decree is affirmed or reversed by the default of either party, the remittitur must not be sent to the court below, until the expiration of ten days thereafter, unless the court for the correction of errors shall specially direct otherwise.(q)

The remittitur is made out by the clerk of the court for the correction of errors.

General rule as to practice on appeals to the court for the correction of errors.] (41) In all cases not expressly provided for by rule, the practice of the court for the correction of errors on appeals, shall be conformable to that of the house of lords in England, when sitting as a court of appeals.(r)

Proceedings in court below.] In some cases the appellate court, instead of affirming or reversing the decree appealed from, will give directions to the court below to rectify the same. In such cases the order of the appellate court must be made a rule or order of the court

(p) Rule 27.

(q) Rule 23.

(r) Rule 34 of Court for the Correction of Errors.

Pr. 236; *Martin v. Wilson*, 1 N. Y. 240.) But if the order entered and contained in the remittitur does not correctly embody and state the judgment pronounced by the appellate court, it will be amended on motion to that court, notwithstanding the remittitur has been filed below. (*Palmer v. Lawrence*, 5 N. Y. 455.)

Upon filing the remittitur in the court below, all that can be done by that court is to formally adopt the judgment of the court of appeals as its own, (*Macgregor v. Buell*, 17 Ab. 31; S. C. 1 Keyes, 153,) and take such measures as may be necessary to carry the determination of the appellate court into effect. (Id.)

After the court below has obtained full possession of the remittitur (by filing,) and has made the judgment of the appellate court its own, it has not the power to grant an order sending the judgment back to the appellate court for correction of errors. (*Vermilye v. Seldon*, 6 How. Pr. 41; S. C. 3 Sandf. 683.)

Restitution will not be ordered by the court below, unless the remittitur contains a direction to that effect, (*Young v. Brush*, 18 Ab. 171; S. C. 28 N. Y. 667;) or unless upon notice to the party to be affected by such order. (Id.)

An affidavit of a party that he designs to apply for a re-argument, in the court of appeals, will not be sufficient to induce the court below to stay the filing of the remittitur for that purpose. But an order from a justice of the appellate court that the adverse party show cause why a re-argument should not be had, etc., will be conformed to by the court below. (*Jarvis v. Shaw*, 16 Ab. 415.)

(41) The various details of practice on appeals to the court of appeals, so far as the practice depends upon the power of the court itself to regulate the same, are prescribed by the general rules of the court, established in July, 1870, with the amendments since made. To these rules it is only necessary to refer, in this place. They will of course be consulted by the practitioner.

of chancery.(s) So also must it be if the appellate court reverses the decree; because it may otherwise be carried into execution. In England where a decree is affirmed by consent, an application to make the decree a rule or order of the court below will not be granted.(t) Nor indeed can it be necessary there, under any circumstances, where a decree is simply affirmed; unless the proceedings under it have been suspended pending the appeal.(u)

An order to make a decree of the appellate court a rule or order of the court of chancery, may, by the English practice, be obtained of course, on motion, upon production of the decree signed by the clerk of the appellate court.(v)

But in *Rogers v. Hosack*, (w) it was declared to be the settled practice, here, to require the remittitur from the court for the correction of errors to be presented to the chancellor previous to its being filed; to enable him to see whether any thing special is required which entitles the adverse party to be heard before the order of the court for the correction of errors can be fully complied with; so that the proper order may be entered on such remittitur, under the special direction of the court.

To prevent any unnecessary delay, where the chancellor is required by the decree of the appellate court to give special directions, as to which both parties have a right to be heard, the party to whom the remittitur is delivered, instead of making an ex parte application in the first instance, may give notice to the adverse party for some regular motion day, either in term or vacation, that he will file the remittitur and ask for such other order or decree thereon as he may think himself entitled to, or as the court may deem proper, to carry into effect the decree or order of the court for the correction of errors.(x)

The order granted by this court, upon filing the remittitur is, "that the decree of the court for the correction of errors be, and the same is hereby made a decree of this court," &c. &c.

SECTION VIII.

APPEAL TO THE CHANCELLOR FROM A SURROGATE.

When an appeal lies.] The revised statutes authorize appeals to be made from the orders, decrees, and sentences of surrogates in all cases,

(s) Attorney Gen. v. Scott, 1 Ves. 419.

(t) Id. ib.

(u) 3 Dan. 147.

(v) Id. 148. 2 Har. Ch. Pr. 351. See on Decrees, 392, n. 2. Hand's Pr. 124.

(w) 7 Paige, 108.

(x) Id. ib.

to the court of chancery, except where provision has been made for appeals to circuit judges, and except appeals from orders concerning any admeasurement of dower.(y) (42)

The chancellor has decided that an appeal does not lie directly to him from the sentence or decree of a surrogate confirming the probate of a will of personal property, upon allegations against the validity of the will filed in the surrogate's office pursuant to the directions of the 31st section of the article of the revised statutes relatives to wills of personal property, &c. (2 R. S. 61,) but that, under the 35th and 55th sections of the title relative to wills and testaments, (*id.* 62, 66,) the party complaining of the sentence or decree of the surrogate must appeal, in the first place, to the circuit judge.(yy)

Within what time to be brought.] Appeals from a decree for the final settlement of the account of any executor, administrator, or guardian, must be made within three months after such decree shall have been recorded.(z) (43) Appeals from an order for the appoint-

(y) 2 R. S. 609, § 104.

(yy) *Alston v. Jones*, In Chan. Jan'y 23d, 1843.

(z) 2 R. S. 616, § 105.

(42) Appeals from decisions, orders and decrees of surrogates are not regulated by the provisions of the Code. The Code has no application to surrogates' courts. (Van Sant. Eq. Pr. 683; *Wilcox v. Smith*, 26 Barb. 316.) The Code (§ 471) expressly provides that the second part of that act, until the legislature shall otherwise provide, shall not affect appeals from surrogates' courts, except that the costs on such an appeal shall be regulated and allowed in the manner provided in section 318 of that act.

Section 318 directs that when the decision of a court of inferior jurisdiction, including appeals from surrogates' courts, shall be brought before the supreme court for review, such proceedings shall, for all the purposes of costs, be deemed an action at issue on a question of law, from the time the same shall be brought into the supreme court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case.

Appeals to the supreme court from decrees or orders of surrogates are left to be governed by the law in force previous to the Code, as well in respect to costs and fees, as in other particulars, (*Brockway v. Jewett*, 16 Barb. 590;) except as the practice is modified by rule 51 of the supreme court.

Appeals from orders and decrees of surrogates are now, in all cases, made to the supreme court, (Van Sant. Eq. Pr. 683;) and they should be first heard at a general term, *it seems*, (*Wever v. Marvin*, 14 Barb. 376; S. C. 7 How. Pr. 182;) including an appeal from a decision admitting or refusing to admit a will to probate, (Van Sant. Eq. Pr. 683,) which, under the former practice, was made to a circuit judge, and from his decision, to the chancellor.

An appeal from an order of a surrogate, admitting or refusing to admit, a will to probate, can be heard only at a general term. (*McLees v. Avery*, 4 How. Pr. 441; S. C. 3 Code R. 104.)

The decision of a surrogate, awarding costs on the final settlement of the accounts of administrators, may be reviewed on appeal. (*Wilcox v. Smith*, 26 Barb. 316.)

The remedy against an *ex parte* order of a surrogate is not by appeal, but by motion to the surrogate. (*Saltus v. Saltus*, 3 Lans. 9)

(43) Appeals from orders, decrees and sentences of surrogates must be made within thirty days from the making of the order or decree. (*Williams v. Fitch*, 15 Barb. 654.) An appeal from a surrogate's decree of distribution cannot be taken after three months from its entry; even though such decree does not make a final distribution of the whole estate. (*Anthony v. Brouwer*, 31 How. 128; S. C. *aff'd*, 37 N. Y. 549; 5 Trans. Ap. 86; 34 How. 631.)

ment of a guardian, or for his removal, or upon a refusal to make such removal, must be made within six months after such order shall have been entered.(a) In all other cases not specified, and not otherwise limited by law, appeals from the orders, decrees, and sentences of surrogates must be made within thirty days after the order, decree, or sentence shall have been made.(b)

The thirty days mentioned in this last section are to be computed from the time when the order, decree or sentence is pronounced, and not from the service of a copy thereof.(c)

The chancellor has decided that a decree of a surrogate, upon an account taken against an administrator, made on the application of one or more creditors of the estate, but without citing the next of kin of the intestate, is not a decree for the final settlement of the account of the administrator; and that an appeal from such decree must be made within thirty days after the entry thereof.(d)

Where an appeal is not entered within the time limited by the statute, the court of chancery, acting as an appellate court, can afford no relief to the appellant.(e)

Bond.] No appeal from a surrogate will be effectual until a bond be filed with the surrogate, with two sufficient sureties to be approved by him, in the penalty of at least \$100, to the adverse party, conditioned, substantially, that the appellant will prosecute his appeal and will pay all costs that shall be adjudged against him by the court of chancery.(f) (44)

(a) Id. ib. § 106.

(b) Id. ib. § 107.

(c) Bay v. Van Rensselaer, 1 Paige, 423.

(d) Bronson v. Ward, 3 Paige, 189.

(e) Id. ib.

(f) 2 R. S. 610, § 108.

(44) In cases of admitting or refusing to admit a will to record or probate the bond is similar, except that the statute directs it to be executed to the people, (2 R. S. 66, § 56;) and the appeal in such cases, being so perfected, stays the recording and probate of the will until the appeal is determined. (2 R. S. 66, § 55.)

The surrogate will not, upon an appeal being taken from an order made by him, appointing a collector of an estate, approve of a paper offered to him as an appeal bond, which runs "To the people of the state of New York;" or which runs to only one of the parties interested in maintaining such order; or which is tendered more than thirty days after the entry of the order appealed from. (*Matter of Patullo's estate*, 1 Tucker, 106.) The supreme court will not, upon the *ex parte* application of administrators, compel the surrogate, by *mandamus*, to approve a bond offered by them for an appeal from his decree made on their final accounting; nor to make a more specific statement of his objections to the bond offered; when it appears, by his return to the order to show cause why the writ should not issue, that no notice of appeal had been filed with such surrogate, and that the bond did not run to the proper party. (*Matter of Black's estate*, 1 Tucker, 339.) On appeal from all such portions of a surrogate's decree on the final accounting of administrators as contain a summary statement of their accounts, and directs payment to be made by them, a bond conditioned to all the persons to whom sums were awarded by the surrogate, in such decree, and who are therefore parties to the appeal, is proper and sufficient. (Id.)

Petition of appeal.] The appellant must file a petition of appeal addressed to this court, with the register or assistant register, within fifteen days after the appeal is entered in the court below, or the appeal will be considered as waived; and any party interested in the proceedings in the court below may thereupon apply to the chancellor *ex parte*, to dismiss the appeal, with costs.(g) (45)

The petition of appeal must briefly state the general nature of the proceedings in the court below, and of the sentence, order, or decree appealed from; and must specify the part or parts thereof complained of as erroneous; except where the whole sentence, order, or decree is alleged to be erroneous; in which case it will be sufficient to state that the same and every part thereof is erroneous.(h)

Where the appeal is from the sentence or decree of a surrogate on the settlement of the account of an executor, administrator, or guardian, if the appellant wishes to review the decision of the surrogate as to the allowance or rejection of any particular items of the account, such items must be specified in the petition of appeal; or the allowance or disallowance of any such items will not be considered a sufficient ground for reversing or modifying the sentence or decree appealed from.(i)

The petition should name the persons intended to be made defendants in the appeal, and should pray that they may answer the same.(k) If a party who is interested in the sentence or decree appealed from is not made a party to the petition, he may apply to the chancellor to dismiss the appeal, or for leave to proceed in the court below notwithstanding the appeal.(l)

The omission to file the petition of appeal within the fifteen days required by the 118th rule, is not such a waiver as to deprive the court of chancery of all jurisdiction over the case, or to authorize the surrogate to proceed as if no appeal had been entered. But it is such a waiver as entitles the court of chancery to declare the appeal deserted and to authorize the surrogate to proceed, notwithstanding the appeal.(m)

(g) Rule 118.

(h) *Idem.*

(i) *Idem.*

(k) *Kellet v. Rathbun*, 4 Paige, 107.

(l) *Halsey v. Van Amringe*, 4 Paige, 279.

(m) *Halsey v. Van Amringe*, 4 Paige, 279.

(45) The present practice in respect to petitions of appeal, is regulated by rule 51 of the supreme court; which prescribes the time within which it shall be filed, what it shall contain; service thereof; the order to answer the same; the answer; hearing thereon, &c.

The appellant may be permitted to amend his petition of appeal by the addition of new parties. (*Gilman v. Gilman*, 35 Barb. 591.)

Transcript.] The appellant must cause the transcript of all the proceedings before the surrogate, to be made, authenticated and returned to the court of chancery within twenty days from the time of entering the appeal in the court below, or the chancellor may dismiss the appeal; unless further time is allowed for the return of the transcript.⁽ⁿ⁾ (46)

The appellant need not wait for the return of the transcript before filing his petition of appeal. But the respondent cannot be compelled to answer the petition until the transcript is returned.^(o)

An application to dismiss the appeal for not procuring the transcript to be returned and filed within the time prescribed by the 118th rule, will not be granted *ex parte*. Notice of the application must be given to the appellant's solicitor.^(p) And the court will not dismiss an appeal for such neglect of the appellant, where he shows a sufficient excuse. It is too late to give notice of an application to dismiss the appeal, after the respondent, or his solicitor, has notice of the fact that the transcript is actually returned and filed, though not within the time prescribed by the rule.^(q)

The mode of compelling a return of the transcript by the surrogate, or of correcting any omissions or imperfections therein, is by order and by attachment for disobedience to the same, in conformity with the practice of the court of chancery in similar cases.^(r)

And if the surrogate's return does not contain all the proceedings before him which either of the parties deem requisite for a correct understanding of the questions arising upon the appeal, the proper course is to apply to the chancellor, before the hearing of the cause, for an order for a further return.^(s)

When appeal stays proceedings.] An appeal from a surrogate suspends all proceedings on the order appealed from until such appeal is determined, or until the appellate court shall authorize proceedings thereon.^(t) But this section does not apply to appeals from an order appointing a collector or special administrator on the estate of any

(n) Rule 118.

(o) *Halsey v. Van Amringe*, *supra*.

(p) *Vreeddenburgh v. Calhoun*, 7 Paige, 419.

(q) *Id. ib.*

(r) *Halsey v. Van Amringe*, 4 Paige, 279.

(s) *Halsey v. Amringe*, 6 Paige, 12.

(t) 2 R. S. 610, § 109.

(46) It is the duty of the surrogate to make his return as soon as practicable; and if he neglects, unreasonably, to do so, the court has power to order him to make the return, on pain of attachment. (*Gardner v. Brown*, 5 How. Pr. 351.)

It is the duty of the appellant to procure the return from the surrogate. But where the circumstances are such as to show that the appellant could not obtain the return, or could not take any steps to procure or compel the return, the court will grant further time before dismissing the appeal. (*Gilman v. Gilman*, 35 Barb. 591.)

deceased person; to appeals from orders directing the sale of perishable property; from orders appointing appraisers of personal property; nor from orders for the service and publication of notices. Appeals from such orders will not stay or affect any proceedings under them.(u)

Appeals from orders for the commitment, or awarding process for the commitment of any executor, administrator, or guardian, for not returning an inventory, rendering an account, or obeying any other order of a surrogate; and from orders for the commitment of any person refusing to obey any subpoena, or to testify when required, according to law, will not stay the execution of such orders or process, unless the party committed shall give bond as required by statute.(v) Such bond must be executed at the time of filing the appeal, by the appellant and two sufficient sureties, to be approved by the surrogate, to the people of this state, in a sufficient penalty, not exceeding \$1,000, conditioned that if the order appealed*from shall be affirmed, such person will, within twenty days after such affirmance, surrender himself to the custody of the sheriff, to whom he shall have been committed, in obedience to such order or process.(w)

Appeals from the order of a surrogate suspending or removing any executor, administrator, or guardian, will not affect any such order until the same is reversed.(x)

Notice of appeal.] The filing of the appeal in the office of the surrogate, and perfecting the same by giving a bond in the cases required by law, is declared by statute to be sufficient notice of such appeal, to the adverse party, without any other notice.(y)

Order to serve copy petition.] If the petition of appeal has not been served on the respondent, he may have an order of course that the appellant deliver a copy of the petition of appeal to the solicitor or guardian *ad litem* of the respondent, within ten days after service of the notice of such order, or that the appeal be dismissed. And if the same is not delivered within the time limited, the respondent, upon due notice to the adverse party, may apply to the chancellor to dismiss the appeal, with costs.(z)

Order to answer.] After the petition of appeal and the transcript of the proceedings in the court below have been filed with the register, or assistant register, the appellant may have an order of course that the respondent answer the same within twenty days after service of a copy

(u) Id. ib. § 110.

(v) Id. ib. § 111.

(w) Id. ib. § 112.

(x) Id. 611, § 116.

(y) Id. ib. § 117.

(z) Rule 118.

of the petition of appeal and notice of the order, or that the appellant be heard *ex parte*.(a)

If the respondent is an adult, the petition and notice must be served upon his solicitor, if he has appeared, either in the appellate court or in the court below, by a solicitor in chancery, or upon the surrogate, if he has not appeared by such solicitor.(b)

The respondent cannot be compelled to answer the petition of appeal until the transcript is returned by the surrogate.(c)

Guardian ad litem for infants.] Where the respondent is a minor, if he does not procure a guardian *ad litem*, to be appointed, upon the appeal, within twenty days after the filing of the petition of appeal, the appellant may apply to the chancellor, *ex parte*, for the appointment of one for him.(d) If the minor has appeared by his guardian *ad litem* in the appellate court, the appellant may have an order of course that the guardian *ad litem* answer the petition of appeal within twenty days after service of a copy thereof, and notice of the order, or that an attachment issue against him.(e) (47)

Parties.] Upon an appeal from an order or decree of a surrogate, all the parties to the proceedings before him who are interested in sustaining the decree or order appealed from, should be made parties to the petition of appeal.(f) (48) No person is considered a party respondent

(a) Idem.

(b) Idem.

(c) *Halsey v. Van Amringe*, 4 Paige, 279.

(d) Rule 118.

(e) Idem.

(f) *Gilchrist v. Rea*, 9 Paige, 66.

(47) These provisions of the statute are continued, substantially, in rule 51 of the supreme court, under the Code.

(48) (*Suffern v. Lawrence*, 4 How. Pr. 129; S. C. 2 Code R. 69; *Wilcox v. Smith*, 26 Barb. 316.) And this although they were not parties to the proceedings before the surrogate. (Id.)

A legatee and devisee named in a will, though not a party to the proceedings before a surrogate for the probate of a will, may appeal from the decree of the surrogate refusing to admit the will to probate, without first obtaining leave from the court to do so. (*Lewis v. Jones*, 50 Barb. 645.)

Parties to a proceeding before a surrogate, for the probate of a will and codicils, and who will, if the will be established, take nothing by the codicils, and whose interests are unaffected, whether the decision of the surrogate is affirmed or reversed, have nevertheless a right to appeal from that part of the decision of the surrogate which admits the codicils to probate. (*Parish v. Parish*, 42 Barb. 274; S. C. 16 Ab. 397 n.; 1 Redf. 130; aff'd 25 N. Y. 9.)

The gift of a sum of money, to an executor, as a compensation for his services, in addition to his commissions as executor, or his appointment as a legatee in trust, or trustee of real estate, for the purposes of the will, is not such a beneficial provision as to be forfeited under the Revised Statutes, (2 R. S. 66, § 50.) by his appearing and testifying as a witness, to prove the will. And the right of appeal, given to a legatee or devisee by the 55th section, will remain, notwithstanding the provisions of § 50. (*Pruyn v. Brinkerhoff*, 7 Ab., N. S. 400.)

Heirs, next of kin and legatees of the deceased, in addition to the executors, are

in a petition of appeal who is not named therein and called upon by the prayer of the petition, to answer the same.(g)

It seems that a person interested in the subject matter of the suit may make himself a party to an appeal from the surrogate, although he was not a party to the proceedings in the court below.(h) But a party in interest who claims to come in as an intervener, either in the court below or in the appellate court, must apply by petition to be made a party to the proceedings, before he can be permitted to take a part therein.(i)

It is not absolutely necessary that an appeal from an order of a surrogate appointing a guardian for an infant should be in the name of the infant as the nominal appellant; nor that the appellant should have any pecuniary interest in the appointment or removal of the guardian, to entitle him to bring an appeal in his own name.(k) But it is proper the infant himself should be a party to the appeal; especially where the appeal is from an order removing a guardian, or refusing to appoint the person by whom the appeal is brought.(l) Even where the appeal is from an order appointing a guardian, if the infant does not himself appeal, by his next friend, the appellant may make him a party to the petition of appeal, jointly with the person appointed as guardian by the surrogate. But in that case, as the guardian himself must be made a party, there is no absolute necessity for making the infant a party also.(m)

Upon an appeal from the sentence of a surrogate disallowing a will, the chancellor will not change the appellant—he being the executor who propounded the will before the surrogate—by substituting the legatee, in order to give the legatee the benefit of the executor's testimony in favor of the will.(n)

Dismissing appeal.] (49) A party to the proceedings before the sur-

(g) *Gardner v. Gardner*, 5 Paige, 170. *Brown v. Evans*, 34 Barb. 594.

(h) *Foster v. Tyler*, 7 Paige, 48.

(i) *Foster v. Tyler*, 7 Paige, 48.

(k) *Underhill v. Dennis*, 9 Paige, 203.

(l) *Id. ib.*

(m) *Id. ib.*

(n) *Gardner v. Gardner*, 4 Paige, 279.

interested in sustaining an order admitting a will to probate, and should be made parties. (*Gilman v. Gilman*, 35 Barb. 591.) Parties, as next of kin, whose interests and rights are the same, should not bring separate appeals from an order of a surrogate, appointing an administrator. (*Brockway v. Jewett*, 16 Barb. 590.)

(49) Rule 51 of the supreme court provides that when a petition of appeal is filed, if it has not been served on the adverse party, the respondent may have an order of course that the appellant deliver a copy of the petition of appeal to the attorney, or to the guardian *ad litem* of the respondent, within ten days after service of notice of the order, or that the appeal be dismissed; and if the same is not delivered within the time limited by such order, the respondent may, upon due notice to the adverse party, apply, at a special term, to dismiss the appeal with costs.

rogate, whose interests are affected by the appeal, and who is not made a party to the petition, may apply to dismiss the appeal, so far as it affects his rights or stays the proceedings before the surrogate to his injury.(o) Or the party may, in such a case, apply to the chancellor for leave to proceed in the court below, notwithstanding the appeal.(p)

It has been already mentioned that an application to dismiss an appeal on account of the neglect of the appellant to procure a return of the transcript of the proceedings within the time prescribed by the 118th rule must be upon notice to the appellant or his solicitor. It cannot be made *ex parte* as in case of a neglect to file the petition of appeal.(q)

And the court will not dismiss an appeal for such neglect of the appellant, if he shows a sufficient excuse for not procuring the return of the transcript within the time limited. And after the respondent, or his solicitor, has notice that the transcript is actually returned and filed, though not within the time prescribed in the rule, it is too late to move to dismiss the appeal.(r)

Papers how entitled.] An affidavit upon which an application is founded to dismiss an appeal, for the neglect of the appellant to file his petition of appeal, may be entitled as in the proceedings before the surrogate.(s) But after a petition of appeal has been regularly filed, showing who are the parties to the appeal, affidavits and other papers in the appeal cause should be entitled in the names of the appellants, as appellants, against the respondents, as such.(t)

Answer to petition of appeal.] Where the appeal is from the sentence or decree of a surrogate on the settlement of the accounts of an executor, administrator, or guardian, the respondent must, in his answer, specify any items in the account as to which he supposes the sentence or decree erroneous against him.(u) And upon the hearing of the appeal, the sentence or decree may be modified as to such items, in the same manner as if a cross appeal had been brought by the respondent.(v)

Cross appeal.] The provision of the 18th rule just referred to, seems to take away the necessity, in a great measure, of cross appeals, yet it does not expressly prohibit them. Nor is there any statutory provision of that nature, that we are aware of.

(o) *Scribner v. Williams*, 1 Paige, 550.

(p) *Halsey v. Van Amringe*, 4 Paige, 279.

(q) *Ante* p. 426. *Vreedenburgh v. Calf*, 7 Paige, 419.

(r) *Ante* p. 426.

(s) *Foster v. Tyler*, 7 Paige, 48.

(t) *Id. ib.* *Gardner v. Gardner*, 5 Paige, 170. *Hawley v. Donnelly*, 8 *id. id.* 415.

(u) *Rule* 118.

(v) *Id. ib.*

In a recent case(*w*) the chancellor decided, that where an appeal from the decree of a surrogate upon the settlement of the account of an executor, &c., is not in relation to the allowance or rejection of particular items of the account, or if the respondent wishes the decree modified in any other respect than as to particular items of the account, he must bring a cross appeal.

Should a cross appeal be brought, doubtless the practice already pointed out with respect to cross appeals in the court for the correction of errors, would be applicable, substantially.(*x*)

Hearing.] Appeals from the decisions of surrogates as to the appointment or removal of guardians, &c., need not be placed on the calendar, but may be heard on any regular motion day, or in term.(*y*) Appeals from the decisions of surrogates upon summary applications also are to be heard as special motions.(*z*) (50)

But all other appeals are considered calendar causes, and are to be heard at the terms only; unless otherwise specially directed by the chancellor.(*a*)

Such appeals as are necessary to be placed on the calendar have priority from the time when the matter arose before the surrogate.(*b*)

Papers upon the hearing.] The papers which are to be furnished for the chancellor upon the hearing of an appeal from the sentence or decree of a surrogate are, a copy of the surrogate's return, including the transcript of the appeal as entered in the court below, and copies of the petition of appeal and answer to the same filed in the appellate court (if any,) together with the points of the respective parties upon the appeal.(*c*) (51)

Decree.] Upon the affirmance of a decree of a surrogate directing the payment of a balance found due from the appellant, the respondent may have the decree of affirmance enrolled, and may take out execution thereon in this court.(*d*)

(*w*) *Collins v. Hoxie*, 9 Paige, 81.

(*x*) See ante, p. 414.

(*y*) Rule 120.

(*z*) *Wood v. Wood*, In Chan. Nov. 20th, 1833.

(*a*) Rule 120.

(*b*) Rule 91.

(*c*) *Halsey v. Van Amringe*, 6 Paige, 12. Rule 118.

(*d*) *Kellef v. Rathbun*, 4 Paige, 102. *Shultz v. Pulver*, 3 id. 182.

(50) The practice upon the hearing of appeals from a surrogate, is regulated by rule 51 of the supreme court.

(51) Rule 51 of the supreme court directs that upon the hearing it shall be the duty of the appellant to furnish the court with a copy of the petition of appeal, and of the answer thereto, if one has been received, and a copy of the proceedings below, including a copy of the appeal as entered.

The mode of printing, style of paper, &c., of the papers furnished the court at a general term in calendar causes, are prescribed in rule 52 of the supreme court.

Upon a reversal or modification of the decree appealed from, the proceedings may be remitted, with instructions to the surrogate to enter a final decree upon the principles settled by the court; (e) or to take such further proceeding as may be necessary. (f) Or if a just cause of action nevertheless appears, this court may retain the cause. (g)

Where the personal representatives of a decedent appeals from a sentence or decree of a surrogate directing the payment of money by the appellant, upon the final settlement of his accounts, and such sentence or decree is affirmed, the decree of this court will direct the payment to the respondent, of interest on the sum awarded to him by the judge *a quo*; as damages for the delay occasioned by such appeal. (h)

It has been held that the respondents, in an appeal from the sentence or decree of a surrogate, upon the settlement of the account of an executor or administrator, directing the distribution of the estate, are not entitled to a modification of the decree as between themselves; nor to a modification as against the appellant, except as to erroneous items in the account, as provided for by the 119th rule. (i)

Practice generally.] The 118th rule directs proceedings on appeals from surrogates, to be conducted by solicitors and counsel and by guardians *ad litem* of minors according to the ordinary course of practice of this court in other cases; except when regulated in a different manner. Though it may observe the laws and principles of decision governing the surrogate's court. (k) (52)

(e) Halsey v. Van Amringe, 6 Paige, 19.

(f) Gardner v. Gardner, 7 Paige, 112.

(g) Van Wick v. Alley, Hopk. 552.

(h) Jumel v. Jumel, 7 Paige, 591.

(i) Collins v. Hoxie, 9 Paige, 81.

(k) Vanderheyden v. Reid, Hopk. 408.

(52) In most, if not all, cases of appeals from the decisions of surrogates, the whole case is to be examined by the appellate court, as well upon the facts as upon the law, so far as questions are presented by the appeal. This rule applies as well to the court of appeals as to the supreme court. (*Robinson v. Raynor*, 28 N. Y. 494.)

Upon an appeal from a decree of a surrogate on an application for letters of administration, the supreme court is restricted to the proofs before the surrogate, in its review of the decree. It cannot receive further evidence, or award an issue to be tried by a jury at the circuit. (*Devin v. Patchin*, 26 N. Y. 441; S. C. 25 How. 5; *Johnson v. Hicks*, 1 Lans. 157.) But where evidence has been discovered that was unknown at the time of the trial before the surrogate, and for that reason could not be produced, the supreme court may, on appeal, receive such newly discovered evidence, in addition to the evidence which was before the surrogate. (*Caujole's appeal*, 9 Ab. 393.)

An objection to the competency of a witness must be raised on the examination before the surrogate, if at all. (*McDonough v. Loughlin*, 20 Barb. 238.)

The power of the supreme court to award an issue is confined to appeals from decisions admitting, or refusing to admit, wills to probate. (*Devin v. Patchin*, 26 N. Y. 44.)

Where the decision of a surrogate, admitting a will to probate is clearly against evidence, the supreme court need not necessarily award a feigned issue to try the

Where a surrogate makes an order, under the act of May 1837, requiring an administrator to give further security within a specified time, and the administrator immediately appeals from such order, and perfects his appeal before the expiration of the time limited by the order for the giving of such further security, the surrogate has no authority, pending the appeal, to make the further order directed by the statute, revoking the letters of administration, until the appellate court shall have authorized further proceedings before the surrogate, upon the order appealed from.^(l)

It seems that, where an administrator appeals from the order of a surrogate requiring further security, before the further order has been made revoking the letters testamentary, in consequence of the neglect to give such further security, the respondent may, in a proper case, apply to the appellate court for an injunction to prevent the administrator from wasting the assets of the decedent pending the appeal.^(m)

SECTION IX.

APPEAL FROM A SURROGATE TO A CIRCUIT JUDGE.⁽⁵³⁾

In what cases it lies.] The revised statutes authorize an appeal to be made to a circuit judge from the decision of a surrogate by which any

(l) *Vreedeenburgh v. Calh.* 9 Paige, 128.

(m) *Id.* *ib.*

question of fact in regard to the mental capacity of the testator, at the time of making the will, but may direct such judgment and decree as the surrogate should have made when the case was before him. (*Pilling v. Pilling*, 45 Barb. 86.) In *Johnson v. Hicks*, (1 Lans. 150,) however, it was held that the award of such an issue to be tried by a jury, is a matter of right; and that the supreme court cannot, at its discretion, direct the surrogate to enter a final decree in accordance with the terms of the order of reversal.

Upon appeal from an order of a surrogate, requiring an executor to pay over money, an error in requiring him to pay interest with which he is not properly chargeable, will be disregarded, if the petition specifies another error as the sole ground of the appeal. (*Saltus v. Saltus*. 2 Lans. 9.)

The joinder of law and equity jurisdiction in the supreme court has not changed the practice, nor effected a repeal of any of the provisions of the statute regulating the course of proceedings on appeal from the decree of a surrogate, admitting, or refusing to admit, a will to probate. (*Johnson v. Hicks*, 1 Lans. 150.)

Upon the trial of an issue of fact as to the genuineness of a will, on appeal from the decision of a surrogate, refusing to admit it to probate, the declaration of the testator, made before the date of such will, that he intended to give his property to the legatees therein mentioned, and his declaration, made after its date, that he had made such a will, are alike inadmissible to sustain it; being mere hearsay. (*Id.*) Neither, on such trial, can an expert be permitted to testify as to his opinion of the genuineness of the testator's signature, founded upon a comparison of it with his signature on other papers not in evidence, nor admitted to be genuine. (*Id.*)

(53) Since the new Constitution, and the Code, were adopted, the practice described in this section has become obsolete. There is no longer any appeal from a

will of real estate shall have been admitted to record; or any will of personal estate shall have been admitted to probate; or by which any such will shall be refused to be admitted to record or probate.(n)

Within what time to be made.] Such appeal must be made within three months after the decision of the surrogate is made and entered.(o)

Bond.] The appellant must, at the time of filing the appeal, execute and file with the surrogate a bond in the penalty of one hundred dollars, to the people, with sureties to be approved by the surrogate, conditioned for the diligent prosecution of the appeal, and for the payment of such costs as shall be taxed against him, in the event of his failure to obtain a reversal of the decision appealed from. And no appeal will be valid until such bond is filed.(p)

Staying proceedings.] Upon the appeal being filed with the surrogate, it will have the effect to stay the recording or the probate of the will, until the appeal be determined.(q)

Petition of appeal.] The appellant must present a petition of appeal to the circuit judge, naming, among other things, the persons who are interested in sustaining the decree of the surrogate, and making, at least, all of those who appeared before the surrogate, in opposition to the appellant, parties to the appeal. It should also pray that a day may be fixed for the persons thus made respondents, and the appellants, to be heard on such appeal; so that due notice of the hearing may be given to such of the parties as are entitled to appear and sustain the decision of the surrogate.(r) This petition must be in the same form as that required upon an appeal from a surrogate to this court.(rr)

Answer to petition. There must also be an answer to the petition of appeal by the parties interested in sustaining the decision of the circuit judge,(s) in the form prescribed by the 118th rule.

Surrogate's return.] Upon the appeal being perfected, and upon the surrogate being paid the legal fees, he must immediately transmit to the circuit judge a copy of such appeal, and copies of the will, and of all papers, documents, and testimony produced before him in relation

(n) 2 R. S. 66, § 55. Id. 698, § 90.

(o) Id. ib.

(p) 2 R. S. 66, § 56.

(q) Id. ib. § 55.

(r) *Chaffee v. The Baptist Miss'y Convention*, 10 Paige, 85. *Stewart v. Nicholson*, in Chan'y, April 6th, 1841.

(rr) See ante, p. 425.

(s) *Stewart v. Nicholson*, *supra*.

surrogate to a circuit judge. All appeals from the orders or decrees of surrogates, are now made to the supreme court; and heard at a general term. (*Van Sant. Eq. Pr.* 683; *Weyer v. Marvin*, 14 Barb. 376; *S. C.* 7 How. Pr. 182; *McLees v. Avery*, 4 How. Pr. 441; *S. C.* 3 Code R. 104.)

to the subject of the appeal, duly certified by him, under his official seal, with a statement of the decision made by him, and the reasons of such decision, if required.(t)

The circuit judge, upon due proof that an appeal has been made, and of the unreasonable neglect of the surrogate to transmit the same with the copies directed by the statute, after having been paid or tendered his fees, may enforce such return by attachment, as in the case of a witness refusing to obey a subpoena to attend a circuit court.(u)

The surrogate's return should state who propounded the will before him, when the proceedings to prove it were instituted; who were ascertained by him to be the next of kin of the decedent, and which of them, if any, were infants; who were cited to attend upon the proving of the will; and who did in fact attend and litigate the will before him.(v)

Guardian ad litem for infants.] If either of the respondents is an infant who has no general guardian, or whose general guardian has an adverse interest, the circuit judge should appoint a guardian *ad litem* to protect the rights of the infants, on the appeal.(w)

Parties.] Where, by the will of the testator, his whole property is devised and bequeathed to a stranger, all the heirs and next of kin of the testator have a technical interest in opposition to the will, and should therefore be made parties to an appeal, either to the circuit judge or to the chancellor, from a decision relative to the probate of such will; even though they did not in fact appear, to litigate the suit before the surrogate.(x) And a decree made upon an appeal to which only a part of the heirs and next of kin of the testator are made parties, will not affect the rights of those who are not made parties and have had no opportunity to be heard upon the appeal.(y)

Time and place of hearing.] The statute directs that upon the appeal and copies of the papers being received by the circuit judge, he shall appoint a day and place for the hearing of the parties; which time must be, at least, twenty days, and not more than three months from the time of appointing the same.(z)

Notice of hearing.] The appellant must give fourteen days' notice of hearing, to the parties who appeared before the surrogate in opposition to such appellant. This notice must be served on them personally

(t) 2 R. S. 608, § 91.

(u) Id. ib. § 92.

(v) *Chaffee v. The Baptist Missionary Conv.*, 10 Paige, 85.

(w) Id. ib. *Stewart v. Lispenard*, *supra* Rule 118.

(x) *Stewart v. Nicholson*, in Chan'y, *supra*.

(y) Id. ib.

(z) 2 R. S. 608, § 93.

if they can be found; and if not, by leaving the same at their respective places of residence, with some proper person.(a)

Hearing, &c.] At the time and place appointed, and at such other times as the matter shall be adjourned to, the circuit judge is to proceed to hear the allegations of the parties, upon the proofs submitted by them to the surrogate, and shall affirm or reverse the decision of the surrogate as shall be just.(b) Another section of the statute directs that if it appears to the circuit judge that the decision of the surrogate was erroneous, he may, by order, reverse such decision. And if such reversal is founded upon a question of fact, he must direct a feigned issue to be made up, to try the questions arising, and must direct the same to be tried at the next circuit court to be held in the county where the surrogate's decision was made.(c)

Issue, how made up and tried.] Such issue is to be made up and tried in the same manner as issues awarded by the court of chancery. But a new trial may be granted by the supreme court in the same manner as if it had been formed in a suit originally commenced in that court.(d)

The final determination of such issue will be conclusive, as to the facts therein controverted, in respect to wills of personal estate only, upon the parties to the proceedings. If the determination is in favor of the validity of the will, whether it be of real or of personal estate, or in favor of the sufficiency of the proof thereof, the surrogate to whom such determination shall be certified must record the will, or admit the same to probate, as the case may be. But if the determination is against the validity of the will, or against the competency of the proof thereof, the surrogate is to annul and revoke the record or probate thereof, if any has been made.(e)

Decree.] In the decree or order of the circuit judge, or in the proceedings returned by him to the surrogate as hereafter mentioned, it must appear which of the respondents named in the petition of appeal appeared before the circuit judge; and that those who did not appear were duly notified of the time and place of hearing, as directed by the statute.(f)

Costs.] If the decision of the surrogate is affirmed, the circuit judge is to award costs, to be paid by the party appealing, either personally, or out of the estate of the deceased, as he shall direct. If the decision

(a) Id. ib. § 94.

(b) Id. ib. § 95.

(c) 2 R. S. 66, § 57.

(d) Id. 67, § 58. Id. 609, § 98.

(e) Id. ib. §§ 59, 60.

(f) Chaffe v. The Baptist Missionary Conv., 10 Paige, 85.

is reversed upon a question of law, costs will in like manner be awarded against the party maintaining the decision of the surrogate, either personally or out of the estate of the deceased.(g) And payment of the costs thus awarded, may be enforced by the surrogate after the proceedings have been remitted to him, in the same manner as if such costs had been awarded by him.(h)

The costs and expenses of *making up an issue*, and of trial thereon, and all subsequent costs thereon, are to be paid by the party appealing, in case of his failure to impeach the validity or execution of the will. Such costs and expenses may be collected in a suit upon the bond required to be given upon the appeal; which may be prosecuted for that purpose, whenever directed by the surrogate.(i) If the appellant succeeds in impeaching the validity or execution of the will, the party maintaining such validity or execution may be required by the surrogate to pay the costs and expenses of the proceedings, either personally, or out of the property of the deceased; and such payment may be enforced by process of attachment.(k)

Fee of circuit judge.] For attending, hearing, and determining any such appeal, the circuit judge is entitled to receive a fee of five dollars from the appellant, to be allowed and recovered as the other costs of the proceedings.(l)

Certifying determination to surrogate.] The circuit judge having made his decision upon the appeal, must, whether it be an affirmance of the sentence or decree of the surrogate, or a reversal upon a question of law, certify such determination to the surrogate, with the award of costs made by such circuit judge; and the copies of papers sent to such circuit judge must be by him returned to the surrogate.(m)

Further proceedings before surrogate.] After such affirmance, or such reversal upon a question of law, of the surrogate's decision, the surrogate must proceed in the manner directed in the first title of the sixth chapter of the second part of the revised statutes, (2 R. S. 56,) unless an appeal to the chancellor is brought.(n) And if the circuit judge reverses the decision of the surrogate upon a question of fact, and an issue is thereupon awarded and tried, upon the final determination thereof being certified to the surrogate, he must also proceed in the manner directed in the said sixth chapter.(o)

(g) 2 R. S. 608, § 96. Id. 67, § 62.

(h) Id. ib. § 97.

(i) 2 R. S. 67, § 61.

(k) Id. ib. § 62.

(l) Id. 609, § 99.

(m) 2 R. S. 609, § 97.

(n) Id. ib.

(o) Id. ib. § 98.

SECTION X.

APPEAL TO THE CHANCELLOR FROM A CIRCUIT JUDGE.

When it may be brought.] In the last preceding section, we have seen in what cases an appeal lies to a circuit judge from the decisions of surrogates relative to the proof or admitting to record of wills.

From the decision of a circuit judge, upon such an appeal from a surrogate, an appeal lies to the court of chancery when no feigned issue has been awarded by the circuit judge for the trial of any question of fact, as is authorized by the statute.(p)

Within what time.] Such appeal must be made within one month from the time such decision of the circuit judge has been certified to the surrogate and entered in his office.(q)

How made.] Such appeal must be filed with the surrogate, and must be accompanied by a bond in the same penalty and with the same conditions as prescribed by law, in case of an appeal from the order of a surrogate admitting a will to probate.(r)

The chancellor has decided that it is not necessary the appeal bond should be conformable, in all respects, to the form prescribed by the statute; but that it will be enough if the bond is sufficient in substance, so as to secure to the party for whose benefit it is given, all his rights.(s) Therefore, where the condition of the appeal bond was, to pay all costs which should be taxed against the appellants *in the event of their failure on the appeal*, instead of being to pay such costs *in the event of their failing to obtain a reversal of the decision appealed from*, it was held the bond was good in substance, and need not be amended.(t)

Return by surrogate.] Upon an appeal being perfected, the surrogate must certify and return to this court, the decision of the circuit judge, and the copies of the will, papers and testimony returned by such judge, upon making his decision, to the surrogate's office.(u)

This court may enforce such return in the same manner as returns to process issued by it; and upon the same being made, shall proceed thereon as in cases of appeals from surrogates.(v)

This return is styled by the rules, a *transcript of the proceedings*,

(p) 2 R. S. 609, § 100.

(q) *Id.* ib.

(r) *Id.* ib. § 101. Ante, p. 432.

(s) Foster & Tyler v. Foster, 7 Paige, 48.

(t) *Id.* ib.

(u) 2 R. S. 609, § 102.

(v) *Id.* ib. § 103.

and it is required to be authenticated and returned to the court within twenty days from the time of entering the appeal in the court below, or the chancellor may dismiss the appeal, unless further time is allowed for the return of the transcript.(w)

Notice of appeal.] The filing of the appeal in the office of the surrogate, and perfecting the same by giving a bond, will be deemed sufficient notice of the appeal to the adverse party, without any other notice.(x)

Petition of appeal.] The notice of appeal which is filed in the office of the surrogate, being general in its terms, it cannot be ascertained with any degree of certainty, who the appellant intends to make parties to the same, until he has filed his petition of appeal here. This petition should be similar to the petition of appeal required on an appeal to a circuit judge, or upon an appeal from a surrogate to the chancellor, before mentioned, and should name the persons who are intended to be made parties respondents to the appeal.(y) It should also pray that a day may be fixed for the parties to be heard on such appeal, so that due notice of the hearing may be given to such of the parties as are entitled to appear, to sustain the decision appealed from.(z)

Answer to petition.] There must also be an answer to the petition of appeal by the respondents therein, in the form specified by the 118th rule.(a)

Order to answer petition.] The appellant, at any time after the petition of appeal and the transcript of the proceedings in the court below have been filed with the register or assistant register, may have an order of course that the respondent answer the petition within twenty days, in the same manner as upon an appeal from the surrogate to the chancellor, or that the appeal be heard *ex parte*.(b) If the respondent is a minor and has appeared in this court by his guardian *ad litem*, the appellant may have an order of course that such guardian *ad litem* answer the petition of appeal within twenty days, or that an attachment issue against him.(c)

Order to deliver copy of petition of appeal.] If the petition of appeal, after having been filed, is not served on the respondent, he may have an order of course that the appellant deliver a copy of such petition to the solicitor or guardian *ad litem* of the respondent, within ten days,

(w) Rule 118.

(x) 2 R. S. 611, § 117.

(y) *Foster v. Foster*, 7 Paige, 51. *Stewart v. Nicholson*, in Chan. April 6, 1841. See rule 118. Ante, p. 425, 433.

(z) See *Chaffee v. The Baptist Missionary Convention*, 10 Paige, 85.

(a) *Stewart v. Nicholson*, *supra*.

(b) Rule 118.

(c) Idem.

or that the appeal be dismissed. And if the petition is not delivered within that time, the respondent, on notice to the appellant, may apply to the chancellor to dismiss the appeal with costs.(d)

Appointing guardian ad litem.] If the respondent is a minor, he must procure a guardian *ad litem* to be appointed within twenty days after the filing of the petition of appeal, or the appellant may apply to the chancellor *ex parte*, for an order appointing such guardian.(e)

Parties.] An application to the surrogate to prove a will of personal estate may be made either by the executor or by any other person interested in the estate, under the will. And where the executor institutes the proceedings in his own name, any other person who is interested in proving the will, may intervene and make himself a party to the proceedings, if he thinks proper to do so.(f)

It seems that a person interested in proving a will may make himself a party to an appeal from the decision of the surrogate, although he was not a party to the proceedings in the court below. But a party in interest, who claims to come in as an intervener, either in the court below or in the appellate court, must apply by petition to be made a party to the proceedings, before he can be permitted to take a part therein.(g)

Where the wife, as the next of kin, appeals to the circuit judge from the decision of a surrogate admitting a will to probate, which decision is affirmed, the husband cannot appeal from the order of affirmance, in his own name, without joining his wife in the appeal.(h)

Entitling papers.] Previous to filing the petition of appeal, the affidavits and other papers may be entitled in the same manner as the proceedings before the surrogate; but after this court has become fully possessed of the case, by the filing of the petition of appeal, showing who are the respondents, as well as who are appellants, the papers, as between such parties, must be entitled accordingly.(i)

Course of practice.] The statute directs that the court of chancery shall proceed upon such appeals in the same manner as upon appeals from surrogates; and requires the court to prescribe, by rule, the course of practice thereon, as well as upon appeals from surrogates.(k) Accordingly it is provided by the 118th rule that upon such appeals the pro-

(d) *Idem.* See *Halsey v. Van Amringe*, 4 Paige, 279.

(e) Rule 118.

(f) *Foster v. Foster*, 7 Paige, 48.

(g) *Id. ib.*

(h) *Id. ib.*

(i) *Id. ib.*

(k) 2 R. S. 611, § 120.

ceedings shall be conducted by solicitors and counsel, and by guardians *ad litem* of minors according to the ordinary course of practice of this court, in other cases; except where otherwise specified.

SECTION XI.

APPEAL TO THE CHANCELLOR FROM A COURT OF COMMON PLEAS.(54)

By the revised statutes, whenever the overseers of the poor of any city or town, discover any person, resident therein, to be an habitual drunkard having property to the amount of \$250, which may be endangered by means of such drunkenness, it is made their duty to

(54) TO THE SUPREME COURT, FROM AN INFERIOR COURT.

An appeal may be taken to the supreme court from the judgment rendered by a county court, or by the mayors' courts, or the recorders' courts, of cities. (Code, § 344.)

An appeal may also be taken, to the supreme court, from any order affecting a substantial right, made by a county court, or a county judge, in any action or proceeding; and such appeal shall be heard on a copy of the papers on which the order appealed from was made. (Id.)

Upon an appeal from an inferior court, under section 344, the supreme court possesses no other powers than formerly upon a writ of error. (*Thurber v. Townsend*, 22 N. Y. 517.) Accordingly, upon appeal from a mayor's court, the supreme court cannot reverse the judgment because the jury have given excessive damages. Such errors are to be corrected in the court of original jurisdiction. (Id.) On an appeal from a county court, in a cause originating in a justice's court, the supreme court exercises merely an appellate jurisdiction; and can review only decisions actually made by the county court. (*Lynch v. McBeth*, 7 How. Pr. 113; *Dorr v. Birze*, 5 id. 323; *Maltby v. Greene*, 1 Keyes, 548.) It has no power to review a judgment rendered in the county court by default. (*Dorr v. Birze*, *supra*.)

The granting of a new trial, by the county court, under § 366 of the Code, is a matter of mere discretion, and not reviewable on appeal. (*Wavel v. Wiles*, 24 N. Y. 635.) The county court having denied a motion for a new trial, except upon terms, the supreme court cannot review its order. (Id.; *Tanner v. Marsh*, 36 How. 140; S. C. 53 Barb. 438.) In *Taylor v. Scoville*, (54 Barb. 24,) it is said to be doubtful whether an appeal to the supreme court can be taken from an order of a county court denying a new trial, until after judgment, and then only in connection with an appeal from the judgment.

A county court has the same power as the former court of common pleas possessed to incorporate a bill of exceptions, or a case and exceptions, into a judgment roll, in an action brought into that court by appeal from a justice's court. And the supreme court, on appeal from such judgment of the county court, can review any errors brought up by the record, including those, of course, which are contained in the case or exceptions. (*Monroe v. Monroe*, 27 How. 208.) This court can review judgments of the county court, brought up by appeal, on exceptions that are made a part of the record, though the exceptions have not been passed upon in the former court by a motion for a new trial in that court. And it may reverse the judgments of such court, and grant new trials therein. (*Boughton v. Mitchell*, 29 How. 68; *Dixon v. Buck*, 42 Barb. 70.) But the supreme court cannot grant a new trial in the county court on the ground that the verdict was *against evidence*, until after a motion has been made in the latter court, on that ground, and denied (Id.; *Whitney v. Wells*, 28 How. 150.)

A judgment entered by stipulation, to enable one of the parties to appeal, for the purpose of obtaining a decision upon an intermediate order, before the issues in the case have been disposed of, is not reviewable. (*Perkins v. Farnham*, 10 How. Pr. 120.)

The supreme court, on appeal from a county court, has authority to correct the judgment by conforming it to the pleadings, in amount. In such a case, it is the duty of the court to reverse for the erroneous part, and affirm as to the residue. (*Weed v. Lee*, 50 Barb. 354.) The same right and duty appertain to the county court; and if that court fails to exercise the right, it is the duty of the supreme court, and the court of appeals, to modify and correct the judgment of the justice. (*Id.*)

Since the amendment of § 344, in 1860, an appeal lies from an order of a county judge, made in supplementary proceedings. (*Crounse v. Whipple*, 34 How. 333.)

An appellate court will not interfere with the discretion of a justice of the peace, in determining a question of adjournment, except in a clear case of an abuse of such discretion. (*Weed v. Lee*, 50 Barb. 354.)

An appeal lies to the supreme court from any intermediate order of the city court of Brooklyn involving the merits and necessarily affecting the judgment, as well before as after judgment, (*Moore v. Wood*, 19 How. Pr. 405;) as from an order setting aside a verdict and ordering a new trial. (*Id.*) So from an order denying a motion for a new trial. (*Suydam v. Grand Street and Newtown R. R. Co.* 17 Ab. 304; S. C. 41 Barb. 375.) And a new trial may be ordered, on appeal from the city court. (*Von Latham v. Libby*, 38 Barb. 339; S. C. 17 Ab. 238; sub nom. *Von Latham v. Rowan*.) But it is said to be doubtful whether an appeal to the supreme court can be taken from an order of a county court denying a new trial, until after judgment, and then only in connection with the judgment. (Per JAMES, J., in *Taylor v. Seoville*, 54 Barb. 34.)

Time for appealing.] An appeal to the supreme court from an inferior court must be taken within two years after the judgment shall be perfected by filing the judgment roll. (Code, § 331.)

Security upon.] Section 345 of the Code requires security to be given, upon an appeal under § 344, in the same manner, and to the same extent, as upon an appeal to the court of appeals; (i. e., by an undertaking in the sum of \$500 signed by the appellant and at least two sureties, for the payment of costs and damages, or by a deposit of that sum with the clerk; § 334.)

The appeal is ineffectual, for any purpose, unless security is given as required by § 334 of the Code. (*Jones v. Decker*, 14 Ab. 391.)

On an appeal from an inferior court, to the supreme court, the respondent should have information of the residence of the sureties; and it seems the undertaking must state their residence. (*Blood v. Wilder*, 6 How. Pr. 446.)

Appeal, where heard.] Appeals in the supreme court must be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county; except that where the judgment or order was entered in the city and county of New York, the appeal must be heard in the first district. (Code, § 346.)

An appeal from the order of a surrogate, admitting, or refusing to admit, a will to probate, should, in the first instance, be heard at a general term. (*Watts v. Akin*, 4 How. Pr. 439.)

Appeals to the county court which are transferred to the supreme court in pursuance of § 31 of the act to amend the act in relation to the judiciary, passed Dec. 14, 1847, may be heard and decided at special term of the supreme court. (*Sheldon v. Albro*, 8 How. Pr. 305. See Laws of 1870, ch. 408, § 10.)

Judgment on appeal, where entered and docketed.] Judgment upon the appeal must be entered and docketed with the clerk in whose office the judgment roll is filed. When the appeal is heard in a county other than that where the judgment roll is filed, or is not from a judgment of a county court, the judgment upon the appeal must be certified to the clerk with whom the roll is filed, to be there entered and docketed. (Code, § 347.)

In all cases of appeal from the circuit court, the judgment on the appeal should be certified to the clerk with whom the roll is filed, to be there entered and docketed. (*Andrews v. Durant*, 6. How. Pr. 191; S. C. 1 Code Rep., N. S. 410.)

It seems that the old practice of entering a new judgment, upon an appeal, still applies, where the appeal is brought from a judgment of an inferior court to the supreme court. (*Eno v. Crooke*, 6 How. Pr. 462.)

make application to the court of chancery for the exercise of its powers and jurisdiction.(l)

If such drunkard has property to an amount less than \$250, the overseers may make such application to the court of common pleas of the county; which is vested with the same powers in relation to the person and estate of such drunkard as are by statute conferred on the court of chancery, and shall, in all respects, proceed in the like manner, *subject to an appeal to the court of chancery.*(m)

Appeals from any order, judgment or decree of a court of common pleas, made pursuant to these provisions of the statute, must be filed and entered within three months, after the making thereof. And they must be accompanied by a bond, with such sureties as the court shall approve, to the opposite party, in the penalty of \$100, conditioned for the payment of such costs as shall be awarded against the appellant, in case of the order, judgment, or decree being affirmed.(n)

The statutes also directs the court of chancery to proceed upon such appeal in the same manner as upon appeals from surrogates, and to prescribe, by rule, the course of practice thereon.(o) In pursuance of this direction, the court, by the 118th rule, has made the same regulation of the practice as that already mentioned in relation to appeals from a circuit judge.(p)

Appeals of this nature need not be placed on the calendar; but may be heard as special notions.(q)

CHAPTER II.

EXECUTION OF DECREE.

If the party against whom a decree is rendered, does not appeal from the same within the time limited by law, the opposite party proceeds to enforce the same by the process of the court.

By what process.] It is a general principle that this court has the power to issue all process necessary to carry its decrees into effectual execution.(a)

(l) 2 R. S. 52, § 2.

(m) Id. ib. § 3.

(n) Id. 53, § 6. Id. 611, § 119.

(o) Id. 611, § 120.

(p) See ante, p. 439,

(q) Rule 120.

(a) Ludlow v. Lansing, Hopk. 231.

The first step to enforce the execution of a decree, if the party against whom it is pronounced, refuses or neglects to obey it, is a writ of execution;(1) which is a process of this court, under its seal, reciting a

(1) THE DIFFERENT KINDS OF EXECUTION.

The Code (§ 286) provides that there shall be three kinds of execution : one against the *property* of the judgment debtor, another against his *person*, and the third for the *delivery of the possession of real or personal property*, or such delivery with damages for withholding the same. They shall be deemed the process of the court, but they need not be sealed nor subscribed except as prescribed in section 289, which requires an execution to be subscribed by the party issuing it, or his attorney.

Execution against the person.] Executions against the person are governed mainly by the provisions of the Code. Section 178 declares that no person shall be arrested, in a civil action, except as prescribed by that act ; but that that section shall not affect the act to abolish imprisonment for debt. &c., passed April 26, 1831, or any act amending the same ; nor apply to proceedings for contempts.

Section 179 of the Code prescribes the cases in which a defendant may be arrested. Among the cases specified in subdivision 2, are actions for money received, or property embezzled or fraudulently applied, by a public officer or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment. Subdivision 4 embraces cases where the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought ; or when the action is brought to recover damages for fraud or deceit.

The other subdivisions of the section are mostly, if not entirely, applicable to common law actions.

The section also provides that no female shall be arrested, in any action, except for a wilful injury to person, character or property.

Section 285 of the Code provides that if the action be one in which the defendant might have been arrested, as provided in sections 179 and 181, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in the Code provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179.

Section 288 also provides that if any defendant be in actual custody, under an order of arrest, and the plaintiff shall neglect to enter judgment in the action within one month after it is in his power to do so, or shall neglect to issue execution against the person of such defendant, within three months after the entry of judgment, such defendant may, on his motion, be discharged from custody, by the court in which such action shall have been commenced, unless good cause to the contrary be shown ; and after being so discharged, such defendant shall not be arrested upon any execution issued in such action.

The Revised Statutes contain a similar provision, viz.: "where any defendant, at the time judgment shall be rendered against him, shall be in custody of the sheriff, either upon process or when surrendered in discharge of bail, in such suit, he shall be charged in execution thereon within three months after the last day of the term next following that at which such judgment was rendered. And where the defendant is surrendered in exoneration of his bail, after judgment has been obtained against him, he shall be charged in execution thereon within three months after such surrender. Or, if an execution against the property of such defendant shall have been issued within three months after the return day of such execution, if any plaintiff shall neglect to so charge any defendant in execution, such defendant may be discharged from custody by a *supersedeas* to be allowed by any judge of the court in which such judgment shall have been obtained ; and after being so discharged, such defendant shall not be liable to be arrested upon any execution which shall be issued upon such judgment." (2 R. S. 556, §§ 36, 37.)

In *Skinner v. Noyes*, (7 Rob. 228.) it is *held* that the remedy under these pro

visions of the Revised Statutes still remains, upon showing the matters required by sections 36 and 37.

It is not essential that it should appear on the face of an execution issued against the person, that the action is one which warrants the arrest of the defendant, although it is the better practice to state the nature of the action, in the execution. (*Fullerton v. Fitzgerald*, 18 Barb. 441; S. C. 10 How. Pr. 37.)

An execution which directed the sheriff to arrest the debtor and commit him to jail, &c., until he should pay the judgment according to law, the words "or be discharged" being erased, was held a valid execution. in *Hutchinson v. Brand*, (9 N. Y. 208; S. C. 6 How. Pr. 73.)

It has been held that section 288 of the Code, in its true construction, requires that in all those actions where the nature of the cause of action is such that the defendant may be arrested, the ground of arrest must be stated in the complaint, otherwise an execution cannot go against the person, unless an order of arrest has been served. But when the action is one in which the defendant cannot be arrested without some extrinsic fact, forming no part of the cause of action, but merely incidental to it, the fact must be stated in an affidavit, and an order of arrest must be obtained and served. The averment of such fact in the complaint will not alone authorize an execution against the person. (*Atocha v. Garcia*, 15 Ab. 303; S. C. 24 How. 186.) In an action in which the right to arrest grows out of the extrinsic facts, and does not follow from the nature of the action itself, an execution against the person cannot be issued unless an order of arrest has been obtained in the action, before judgment. (*Molenaar v. Kerner*, 22 How. 190; S. C. 13 Ab. 241, n.; *Kendeburg v. Morgan*, 18 How. Pr. 469.)

The execution may issue without an order of the court; and in case an order of arrest has been granted in the action, and not vacated, it is not necessary that the judgment should award the execution, or show that the case is a proper one for an execution against the person. (*Bull v. Mell'ss*, 13 Ab. 241; *How v. Frear*, id. n. S. C. 21 How. Pr. 343; *Crowell v. Brown*, 17 id. 68; *Cooney v. Van Rensselaer*, 1 Code Rep. 38. See *Lockwood v. Van Slyke*, 18 How. 45; *Humphrey v. Brown*, 17 id. 481; *Corvin v. Freeland*, 6 N. Y. 560; *Smith v. Knapp*, 30 id. 581; *Lovee v. Carpenter*, 3 Ab., N. S. 309.) Such an execution may issue of course, on the return of an execution against the property unsatisfied, where the facts constituting the right of arrest are necessarily and properly apparent on the record, and in such cases, no order is necessary. (*Alden v. Larsen*, 4 Ab. 102.) If they do not so appear, a previous order must be obtained. (Id.; *Livesey v. Sanders*, 3 Ab. 176; 12 How. Pr. 25.)

The contracting of a debt by the defendant, in a fiduciary capacity, is not such a cause of action as, in case of judgment thereon, will warrant an execution against the body, unless there has been an order of arrest served, as provided by the Code. (*Wood v. Henry*, 40 N. Y. 124.) Neither does a judgment which sets aside a conveyance as fraudulent, and directs the payment of money to a receiver, &c., warrant the issuing of an execution against the person. (*Fussett v. Tallmadge*, 14 Ab. 188; S. C. 23 How. 244; 37 Barb. 436.) Nor does a judgment at the trial, upon the default of the defendant, where the jury find a special verdict that he is guilty of the fraud alleged in the complaint. (*Stelle v. Palmer*, 11 Ab. 62.) After an order of arrest has been vacated, the defendant is not liable to arrest on execution against the person. (Id.) But the release of the defendant from arrest, by consent of the plaintiff's attorney, upon his giving security, does not vacate the order of arrest, nor exempt the defendant from arrest on final process. (*Meech v. Loomis*, 28 How. 209; S. C. 23 id. 484; 14 Ab. 428.)

Before an execution against the person may issue, an execution against the property of the defendant should be issued and returned, in good faith. If that has been done, it is not material that sixty days have not elapsed between the issuing of the execution against property and its return. (*Fake v. Edgerton*, 3 Ab. 229; S. C. 5 Duer. 681.) Though it is irregular to issue execution against the person before return of an execution against property, yet when the latter has been filed, and it was owing to the sheriff's neglect that a return was not indorsed, the defect is amendable, and an execution against the person may be upheld by allowing the return to be indorsed *nunc pro tunc*. (*Hall v. Ayer*, 9 Ab. 220; S. C. 19 How. Pr. 91.)

In *Smith v. Knapp*, (30 N. Y. 581,) where execution against the property of the judgment debtor was returned in 1854, and no execution against the person was issued until 1856, it was held, that under the provisions of the Revised Statutes,

above referred to, (2 R. S. 556, §§ 36, 37.) the defendant might have moved for a *supersedeas*, on the ground that he was not charged in execution within the time limited. (See *Skinner v. Noyes*, 7 Rob. 228.)

If the application for a *supersedeas* is made when the defendant has been surrendered in exoneration of bail, after judgment obtained, it will not be granted unless it is shown that the bail has been exonerated. (*Hills v. Lewis*, 13 Ab. 101, n. See *Wells v. Jones*, 2 id. 20.) Neither will the application be granted if the plaintiff was ignorant that the defendant had been surrendered by his bail; but it will be allowed conditionally, that is, unless the plaintiff issue execution within a specified time. (*Disables v. Cline*, 4 Rob. 645.)

The time within which a defendant must be charged in execution, before he will be entitled to a *supersedeas*, is to be reckoned from the actual entering of judgment. If the plaintiff neglects to enter it after he is entitled to do so, an order will be made compelling him to do so. (*Lipman v. Petersberger*, 18 How. Pr. 270; S. C. 9 Ab. 209. See *Haviland v. Kane*, 1 Ab., N. S. 409.)

The Revised Statutes (vol. 3. 5th ed. p. 659, § 105.) direct that whenever any person shall be arrested by virtue of an execution issued upon any judgment rendered in a court of record, he shall be safely kept in secure custody, in the manner prescribed by law, at his own expense, until he shall satisfy such execution, or be discharged according to law.

Against married women.] The Code (§ 179, sub. 5,) enacts that no female shall be arrested, in any action, except for a wilful injury to person, character or property.

And where a married woman brings an action for the conversion of personal property, and a judgment is rendered against her, for costs, she is not liable to arrest upon an execution issued against her person, for the costs. (*Hovey v. Starr*, 42 Barb. 435.)

Although a female fraudulently contracted the debt for which the action is brought, she cannot be arrested therein. (*Wheeler v. Hartwell*, 4 Bosw. 684.)

Section 287 of the Code provides that an execution may issue against a married woman (i. e., an execution against property;) and that it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

In a judgment against a married woman, it should be expressly stated that the amount thereof is "to be levied or collected out of her separate estate, and not otherwise;" and the execution, in its terms, should follow the judgment. (*Baldwin v. Kimmel*, 16 Ab. 353; S. C. 1 Rob. 109.) But, in *Thompson v. Sargent*, (15 Ab., 452,) it is held that the provision in section 287 of the Code as to what an execution against a married woman shall direct is directory merely; and that it is not necessary to its vitality that it should contain the words "to be levied or collected out of her separate estate, and not otherwise." In *Moncrief v. Ward*, (25 How. 94; S. C. 16 Ab. 354 n.,) it is held that an execution against a married woman, to compel the payment of costs, may be enforced against her separate estate, whether it contains a direction to that effect or not; and that the court has power to enforce collection of a judgment against a married woman, whether that power be given by § 287 of the Code, or not.

In *Charles v. Louvenstein*, (26 How. 29,) it is held, that under the acts of the legislature of 1860 and 1862, an execution cannot be resorted to, except to enforce a judgment *at law*, against a married woman; and in that case the execution can only reach property in which she has a separate *legal* estate, and which property is of such a nature that it would be liable to levy and sale under an execution if she were sole. If the judgment against her is of an *equitable* nature; if it is to be enforced against her separate *equitable* estate; or if her choses in action or other rights and interests which are not the subject of levy under an execution at law, are sought to be reached, then the aid of a court of equity must be invoked, and the court will act as it is accustomed to do in such cases, through a receiver.

Discharge from imprisonment.] If a defendant is imprisoned on an execution improperly, he should move for his discharge therefrom. If he fails to do so, his imprisonment will be regular. (*Smith v. Knapp*, 30 N. Y. 581.) By the Revised Statutes certain debtors charged in execution may petition the court for their discharge, and the court may order them to be discharged on their making assignments of their property. (2 R. S. 31, §§ 1 to 11.) And when any person shall have remained charged in execution for the space of three months, after being entitled to make such application, without having made it, any creditor at whose suit he shall have

so remained charged, and his personal representatives, may, by written notice, require such prisoner to make application for his discharge. If such prisoner fails to so apply, for thirty days after such notice, he shall be forever barred from so doing. (Id., §§ 16, 17.) And where any person shall have remained charged in execution thirty days from the date of his imprisonment, any creditor may, by written notice to the sheriff, require him to be discharged, and thereafter such creditor may have the same civil remedies to enforce payment of the judgment as though an execution against the person had not been issued. (Laws of 1857, ch. 427.)

A party arrested on execution may move to be discharged from custody, although he has put in bail in the action, who have justified. (*Bridgewater Paint Manuf. Co. v. Messmore*, 15 How. Pr. 12; *Moore v. Culvert*, 9 id. 474; but see *Crowell v. Brown*, 17 id. 68.)

Upon payment of the amount of the levy, to the sheriff, or the plaintiff's attorney, the defendant will be entitled to his discharge. (*Townsend v. Olin*, 5 Wend. 207; *Armstrong v. Farrow*, 6 Cowen, 465; *Munford v. Armstrong*, 4 id. 553; *Codwise v. Field*, 9 John. 263.) But a discharge by the sheriff without actual payment will make him liable for an escape. (Id.) Neither can the attorney discharge a defendant in execution without an actual payment. (*Simonton v. Barrell*, 21 Wend. 362; *Kellogg v. Gilbert*, 10 John. 220; *Jackson v. Bartlett*, 8 id. 361.)

If the discharge of the defendant is without the consent of the plaintiff he may issue a new execution. (*Giuchio v. Fegari*, 4 E. D. Smith, 227; S. C. 2 Ab 185; *Wesson v. Chamberlain*, 3 N. Y. 331.)

Where a defendant has been improperly arrested on an execution, the regularity of such proceeding may be inquired into on *habeas corpus*; and if it appear that the process on which he is detained has been issued in a case not allowed by law, or where it is not authorized by any order or decree of any court, nor by any provision of law, the prisoner may be discharged. (*People ex rel. Burroughs v. Willett*, 15 How. Pr. 210; S. C. 26 Barb. 78; 6 Ab. 37.) But in *Wiles v. Brown*, (3 Barb. 37,) it was held that for formal defects in process, the remedy is either in the same court out of which it issued, by motion to set it aside, or by *certiorari* to the supreme court; and that such defects cannot be corrected by *habeas corpus*. Yet it was decided, in that case, where a person committed upon a *ca. sa.* was brought before an officer upon *habeas corpus*, and discharged from imprisonment, that such discharge, although erroneously granted, was a protection to the sheriff, in an action brought against him for the escape of the prisoner.

Where a defendant has been discharged from imprisonment under an order of arrest, by due course of law, he should not be re-arrested, and imprisoned a second time for the same cause, though in a different form of action. (*Wright v. Ritterman*, 4 Rob. 704; S. C. 1 Ab. N. S. 428; *People ex rel. Ritterman v. Kelly*, 1 Ab. N. S. 432.) Thus, after a party has been arrested in a civil action under the Code, and discharged therefrom, the plaintiff cannot, by changing the form of action, obtain his arrest under the act of 1831. (*Matter of Johnson*, 7 Rob. 269.)

In an application for a discharge from execution, under the above provisions of the Revised Statutes, the debtor is not to be held to the most perfect recollection, at the time of making up his schedule, of every minute claim, debt, or item of property owned by him. If, on his examination, he remembers those particulars, the court will allow him to amend his petition, on the hearing, if satisfied that the omission was not intentional or fraudulent. (*Matter of Rosenberg*, 10 Ab. N. S. 450.) The court acquires jurisdiction of the application only when the person, imprisoned for over \$500, presents his petition after he has been imprisoned for three months; and these facts must appear in the petition. (Id.)

In proceedings under the statute, the account of the estate of the person imprisoned must contain all the statements required by the statute; otherwise it is ineffectual to discharge the imprisoned person. (*The People ex rel. Galsten v. Brooks*, 40 How. 165.)

Setting execution aside.] A defendant who has been arrested before trial, on the ground of fraud, may raise the question of his liability to arrest, upon a motion to set aside the execution against his body, although no motion has been made to set aside the order of arrest, and the time has passed, therefor; provided fraud in the defendant was not essential to a recovery by the plaintiff, so that such motion would be an impeachment of the judgment. (*Elwood v. Gardner*, 9 Ab. N. S. 99.)

If the execution is regular on its face, it is not sufficient ground for granting an application to set it aside that instructions were given to the sheriff not to arrest another defendant equally liable. (*Fuke v. Elgerton*, 5 Duer, 681; S. C. 3 Ab. 229.)

decree of the court, or the substance, or some part thereof, and requiring obedience to so much of the ordering part as is recited and as it concerns the party to perform. (b) (2)

(b) Wy. Prac. Reg. 205.

(2) FORM OF EXECUTION.

The Code (§ 289) directs that the execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the party issuing it, or his attorney, and must intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially, as follows:

1. If it be against the *property* of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

2. If it be against real or personal property in the hands of *personal representatives, heirs, devisees, legatees, tenants* of real property, or *trustees*, it shall require the officer to satisfy the judgment out of such property.

3. If it be against the *person* of the judgment debtor, it shall require the officer to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment, or be discharged according to law.

4. If it be for the *delivery of the possession of real or personal property*, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages or rents and profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall, in that respect, be deemed an execution against property.

An execution must be directed to the sheriff of the proper county. Where the complaint does not allege that an execution, issued upon a judgment, was directed to the sheriff of the county where the judgment debtor then resided, the complaint is not aided by an averment that such execution was returned *nulla bona*. (*Payne v. Sheldon*; 63 Barb. 169.)

An execution to be valid, need not state the time or place of its return. (*Fake v. Elgerton*, 5 Duer, 681; S. C. 3 Ab. 229.) One against the body need not recite facts showing the right to arrest a defendant; as that an execution against property has been returned unsatisfied. It is enough that he was held to bail by a valid order which continues in force. (*Id.*) Though it is said to be the better practice to state, in an execution against the person, the nature of the action, yet it is not necessary to do so. (*Fullerton v. Fitzgerald*, 10 How. Pr. 37; S. C. 18 Barb. 441.)

An execution may be issued against personal property alone. (*Stephens v. Brown-ing*; 7 N. Y. Leg. Obs. 61; S. C. 1 Code Rep. 123.)

In a judgment against a married woman, it should be expressly stated that the amount thereof is "to be levied or collected out of her separate estate, and not otherwise," and the execution, in its terms, should follow the judgment. (*Baldwin v. Kimmel*, 16 Ab. 353; S. C. 1 Rob. 109.)

Defects in the form of an execution may be amended, on motion. (*Sears v. Burnham*, 17 N. Y. 445; S. C. 2 Bradf. 394; *Park v. Church*, 5 How. Pr. 381; S. C. 1 Code Rep., N. S. 47; *Pierre v. Craine*, 4 How. Pr. 257; S. C. 3 Code Rep. 21.) It is not a substantial defect in an execution that it states that the judgment was obtained in an action, when, in fact, it was entered on confession. (*Healy v. Preston*, 14 How. Pr. 20.)

Irregularities which would be amendable on motion, can be taken advantage of only by the judgment debtor. (*Abels v. Westervelt*, 15 Ab. 230; S. C. 24 How. Pr. 284; *Grosvenor v. Hunt*, 11 id. 355; *Berry v. Riley*, 2 Barb. 307; *Oakley v. Becker*, 2 Cowen, 454.)

A writ of assistance is, in ordinary circumstances, the first and only process for giving possession of land under a decree of this court.(c)

An injunction is not necessary, before a writ of assistance.(d)

Where the decree directs deeds or other instruments to be executed by a party to the suit, the ordinary process of contempt must be employed to enforce their execution.(e) But in some instances a

(c) *Valentine v. Teller*, Hopk. 422.

(d) *Id. ib.*

(e) *Ormsby v. Nicholson*, Vern. & Scriv. 115.

The execution must truly describe the person whose property is sought to be taken; as the sheriff can only execute the process against the party described therein. (*Farnham v. Hildreth*, 32 Barb. 277; *Moulton v. De ma Carty*, 6 Rob. 470.)

An execution issued out of the supreme court upon a judgment recovered in the common pleas. is void. (*Clarke v. Miller*, 18 Barb. 269.)

When judgment has been entered in form against several defendants, only a part of whom have been served with process, the execution issued thereon should contain a direction to the sheriff to levy on the separate property of those only, who were served with process. (2 R. S. 377, §§ 3, 4.) But it has been held that the omission of such a direction is a mere irregularity, which is amendable on motion. (*Abels v. Westervelt*, 15 Ab. 230; S. C. 24 How 284.)

The statute relating to the form of the execution is merely directory; and it is sufficient if it substantially follow the terms of the statute. (*Pierce v. Crane*, 4 How. Pr. 257; *Park v. Church*, 5 id. 381; *Chichester v. Cande*, 3 Cowen, 39; *Stephens v. Browning*, 1 Code Rep. 123; *Sears v. Burnham*, 17 N. Y. 445.)

Where a judgment is obtained against the personal property of a deceased debtor, and the execution is issued against his *executors*, describing them in their *representative capacity*, such description, alone, is insufficient to prevent the sheriff from levying upon the *individual* property of the executors. When it is intended to collect the amount out of the assets in the hands of the executors, the execution should require the officer to satisfy the judgment out of the property which, according to the judgment, is liable for its payment. (*Olmsted v. Vredenburg*, 10 How. Pr. 21.) Where the accounts of executors have been "rendered and settled," before the surrogate, it is provided by the Revised Statutes that "the execution shall issue only for the sum that shall have appeared, on the settlement of such account, to have been a just proportion of the assets applicable to the judgment." (2 R. S. 88, § 2.) Therefore where the amount of assets is less than the amount of the judgment, it is irregular to issue execution for the whole amount of the debt. (*Olmsted v. Vredenburg*, *supra*.)

Where an executor has incurred a liability in the administration of the estate, for which a judgment has been recovered, the provisions of the Revised Statutes respecting the order of the surrogate for the issuing of execution, are as applicable as though the debt had been contracted by the decedent. (*Matter of Thompson*, 41 B. r. 237; S. C. 1 Redf. 490)

In *Hutchinson v. Brand*, (9 N. Y. 208; S. C. 6 How. Pr. 73,) an execution which directed the sheriff to arrest the debtor and commit him to jail, &c., until he should pay the judgment according to law, the words "or be discharged" being erased, was held a valid execution.

Upon judgments entered by *confession*, executions may be issued and enforced in the same manner as upon judgments in other cases. Where the debt for which the judgment is recovered is not all due, or is payable in instalments, and the instalments are not all due, the execution may issue for the collection of such instalments as have become due, and must be in the usual form, but must have indorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment. The judgment will remain as security for the instalments thereafter to become due; and whenever any further instalments become due, execution may in like manner be issued for the collection and enforcement of the same. (Code, § 384.)

master of the court is authorized to execute conveyances, which, previous to the passing of an act authorizing it, were required to be executed by the parties; as in mortgage and partition cases, on sales by a master.

If, after a foreclosure and sale of mortgaged premises, the mortgagor refuses to deliver up the possession, on demand, to the purchaser under the decree, the court, on motion for that purpose, will order the possession to be delivered to the purchaser, though the delivery of possession is not made part of the decree. And in case of disobedience, an injunction issues; and if the party refuses to comply with it, a writ of assistance issues to the sheriff, of course.(f)

But before a party can be proceeded against as for a contempt for not performing a decree, a writ of execution commanding him to obey the decree, must be issued and served upon him. If the party neglects to perform the decree, the court, upon affidavit of service of the writ of execution and of the party's disobedience, will make an order that he be proceeded against by the ordinary process of contempt.(g) (3)

Execution how issued.] An execution must be sealed and issued by the register, assistant register, or clerk, with whom the decree is enrolled; who is prohibited from suffering any process to pass his seal if it does not appear to be warranted.(h) (4)

(f) *Kershaw v. Thompson*, 4 John. Ch. Rep. 609. 1 Newl. 677, 8.

(g) *Blake's Pr.* 168.

(h) *Rule* 111.

(3) Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects as provided in title IX, part 2, of the Code. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt. (Code, § 285)

In *Gray v. Cook*, (24 How. 432,) where the judgment directed the payment of money into court, the court said that if a judgment directs the performance of certain acts, and also requires the payment of money, it may be enforced in the latter respect by execution, and that is the only proceeding that can be resorted to, in the first instance, to compel payment.

The plaintiff should serve on the defendant a copy of the judgment. A service on the defendant's attorney of a transcript of the judgment, with notice that satisfaction is required, is not sufficient. (*Fero v. Van Buren*, 9 How. Pr. 148.) There must be a demand and refusal to comply with the requirements of the judgment, in order to justify proceedings for contempt. (*Gray v. Cook*, 24 How. 432)

In *Morris v. Walsh*, (14 Ab. 387; S. C. 9 Bosw. 636,) where the judgment required the execution of a release, on the written demand of the plaintiff, which was served with a copy of the judgment, and two months thereafter a proper release was presented to the defendant, for execution, and he refused to sign it, it was held that there being no person present to witness its execution, and the fact that it was

(4) Under the Code, an execution need not be sealed, although it is to be deemed the process of the court. (Code, § 286.) It is merely required to be subscribed by the party issuing it, or his attorney. (Id. §§ 286, 289.)

The attorney subscribing it must be an attorney at law, and not a mere agent or

The solicitor has no right to alter an execution after it has been issued by the register or clerk. Neither have the registers or clerks any right to issue executions in blank to be filled up by the solicitor.(i) (5)

(i) *Merritt v. Townsend*, 5 Paige, 80.

not sealed, when presented, were not good reasons for a refusal. *Held*, also, that it was not a valid reason for such refusal, that the written demand was not served at the time the release was presented.

The judgment should provide some mode of settling the form of the instrument to be executed; but in the absence of such a provision, if a proper instrument is presented to the defendant, he is bound to execute it, although it has not been approved by the court; or he may apply, on his own behalf, to have the form settled. (*Hilliker v. Hathorne*, 5 Bosw. 710.)

Where the plaintiff had judgment that the defendant cancel, or acknowledge satisfaction of a certain mortgage, and afterwards moved for "an order to compel the defendant to cancel or satisfy the mortgage," &c., it was *held* that such motion was unnecessary, as the judgment itself contained the proper order. (*Fero v. Van Ewa*, 9 How. Pr. 148.)

Where a defendant is, by the judgment recovered against him, enjoined from doing certain acts, and on appeal has stayed the plaintiff's "proceedings on the judgment," an attachment against the defendant for disobeying the judgment will not be allowed. (*Howe v. Searing*, 11 Ab. 28; S. C. 19 How. Pr. 14; 6 Bosw. 354.)

If the court has obtained jurisdiction of the person of a party, in an action, it retains that jurisdiction for all purposes of enforcing the judgment. (*Pitt v. Davison*, 3 Ab., N. S. 398; S. C. 34 How. 355; 37 N. Y. 235.)

attorney in fact. He need not, however, be the attorney of record; any other attorney of the party may subscribe it. (*Cook v. Dickinson*, 1 Duer, 679.)

If the judgment has been assigned, the assignee is the party issuing it, and it may be subscribed by him or his attorney. (*Van Sant*, Eq. Pr. 621. See *Wilgus v. Bloodgood*, 33 How. 289.)

By rule 13 of the supreme court, an attorney, besides subscribing his name to process issued by him, is required to add thereto his place of business. If he neglects to do so, papers may be served on him at his place of residence, through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence, and paying postage thereon. If neither place of business nor residence can be found, service may be made by filing the papers with the clerk.

This rule applies to a party who prosecutes or defends in person, whether he be an attorney or not.

An execution upon a judgment of a district court of the city of New York, which has been docketed in the New York common pleas, may be issued by the attorney of the judgment creditor. It is not required to be issued by the clerk. (*Irush v. Lee*, 3 Ab., N. S. 204; S. C. 34 How. 283.)

(5) TO WHAT COUNTIES IT MAY BE ISSUED.

When the execution is against the *property* of the judgment debtor, it may be issued to the sheriff of any county where judgment is docketed. When it requires the *delivery of real or personal property*, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interest of the parties, adjudged to sold. (Code, § 287.)

In cases where an execution against the *person* is allowed, it may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied, in whole or in part. (Code, § 288.)

An execution against both real and personal property, issued to a county in which no transcript of the judgment has been filed, is irregular, so far as it relates to the real estate. But it may be amended by striking out the clause as to real estate. (*Stephens v. Browning*, 7 N. Y. Leg. Obs. 61; S. C. 1 Code R. 123.)

When and upon what decrees executions may be issued.](6) The revised statutes empower this court to enforce performance of any decree, or obedience thereto, by execution against the body of the

The fact that the judgment debtor has property in the county where the judgment is entered, does not affect the right of the judgment creditor to issue an execution against his property to another county. (*Brush v. Lee*, 36 N. Y. 49; S. C. 3 Ab., N. S. 204; 34 How. 283; 1 Trans. Ap. 66.)

Where an execution has been issued and a levy made thereon, in a county where a transcript of the judgment has not been filed, the court has the power to order a transcript to be filed, and the judgment docketed, *nunc pro tunc*, in the county where the improper seizure has been made. (*Roth v. Schloss*, 6 Barb. 308.)

(6) ISSUING EXECUTION; IN WHAT CASES, AND AT WHAT TIME; LEAVE TO ISSUE.

By section 283 of the Code, writs of execution for the enforcement of judgments, as formerly used, are modified in conformity to title XI; and the party in whose favor judgment has been given, and in case of his death, his personal representatives, duly appointed, may, at any time within five years after the entry of judgment, proceed to enforce the same as prescribed in that title.

After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part. (Code, § 284.)

When judgment shall have been rendered in a court of a justice of the peace, or in a justices' or other inferior court in a city and docketed in the office of the clerk of the county, the application for leave to issue execution must be to the county court of the county where the judgment was rendered, or, in the city and county of New York, to the court of common pleas of that city and county. (Id.)

An execution against the body may issue short of sixty days, after the return of one against property. (*Fake v. Edgerton*, 5 Duer, 681; S. C. 3 Ab. 229.)

An execution may, in general, be issued *forthwith*, on entering the judgment. (*Swift v. De Witt*, 1 Code R. 25; S. C. 3 How. Pr. 280; 6 N. Y. Leg. Obs. 314.) In some cases, however, the issuing of an execution may depend upon a contingency; as in foreclosure cases, where a party, personally liable, is adjudged to pay the amount of any deficiency which there may be, on the sale of the mortgaged premises, as it shall appear from the report of the sheriff or referee making the sale. In such a case, the judgment should contain a clause that the plaintiff have execution for such deficiency. And an execution for the deficiency reported may issue as soon as an order confirming the report of the referee shall have been entered. (Van Sant, Eq. Pr. 619.)

The provisions of sections 283 and 284 apply as well to judgments rendered in actions prior to the Code as to those in actions under it. (*Catskill Bank v. Sandford*, 2 Code R. 58 n.; S. C. 4 How. Pr. 101; contra, *Clarke v. Hutchinson*, 1 Code R. 127.)

In case of the *death* of a defendant, after judgment, the act of 1850 (ch. 295,) explicitly authorizes the issuing of an execution, after the expiration of one year from the time of his death, provided the surrogate makes an order granting permission to issue such execution. There is no provision in the act, which requires the owner of the judgment to apply to the court that rendered the judgment for leave to issue execution. To ascertain when an application should be made to such court for leave, reference must be had to § 284 of the Code. (*Wilgus v. Bloodgood*, 33 How. 289.) In no case, whether more than five years have elapsed or not, since the rendition of a judgment, should execution be permitted to issue against the property of a deceased judgment debtor, under the act of 1850, without leave of the court, upon due notice. (*Alden v. Clark*, 11 How. Pr. 209.) Such application should be upon affidavit setting forth all the facts, together with the surrogate's permission. An order should be made for all persons interested in the estate to show cause, at a special term, why execution should not issue; and also directing how, and on whom, such order shall be served. (Id.) By the act of 1850, the

creditor is not required to wait until letters are granted upon the deceased debtor's estate, as in section 376 of the Code; but one year after the death of the judgment debtor, upon permission granted by a surrogate having jurisdiction to grant administration, &c., on the estate, execution is permitted to issue in the same manner, and with the same effect, as if the judgment debtor were still living. (Id.) In such a case permission from the surrogate is a condition precedent to the granting of leave by the court, (id. 215;) but does not dispense with an application to the court, for leave.

Although the writ of *scire facias* has been abolished by the Code, yet proceedings in the nature of that writ should be had, after the death of the debtor, wherein the heirs and terre-tenants may have a hearing, before any lands of the deceased, upon which it is claimed that the judgment is a lien, shall be sold on execution. The act of 1850 does not supersede the necessity of such proceeding; nor is it a substitute for them. (*Frink v. Morrison*, 13 Ab. 80.)

The pendency of proceedings supplementary to execution is not a valid objection to the court's granting leave to issue another execution, after five years have elapsed since entry of judgment, notice of the application being given to the defendant. (*Smith v. Mahony*, 3 Daly, 285.)

In *Wood v. Morehouse*, (45 N. Y. 368,) it was held that executions to sell real estate cannot be issued after the death of the defendant, without an opportunity for heirs and terre-tenants to be heard; that the judgment must be revived against them. But when an execution has been actually issued, and partly executed, as by the commencement of the publication of a notice of sale thereunder, the subsequent death of the debtor does not affect the process, or prevent its complete execution by a sale of the property. (Id.)

In *Flanagan v. Tinen*, (53 Barb. 587; S. C. 37 How. 180,) it was held that when an execution has been issued within five years from the recovery of a judgment, and returned wholly unsatisfied, no leave from the court is necessary to the issuing of a second execution, after the death of one of the defendants.

Section 288 of the Code provides that if any defendant be in actual custody under an order of arrest, and the plaintiff shall neglect to enter judgment in the action within one month after it is in his power to do so, or shall neglect to issue execution against the person of such defendant, within three months after the entry of judgment, the defendant may, on his motion, be discharged from custody by the court, unless good cause to the contrary is shown; and after being so discharged, such defendant shall not be arrested upon any execution issued in such action.

If a judgment has been satisfied in the mode pointed out by law, (2 R. S. 362, § 22,) no execution can be issued upon it. (*Ackerman v. Ackerman*, 14 Ab. 229.) But when good cause therefor is shown, the satisfaction may be vacated, and the judgment restored. (Id.; *Ward v. Wordsworth*, 1 E. D. Smith, 598; S. C. 9 How. 16.)

Where, after real estate was sold, and a judgment satisfied, it was discovered that the execution was void, whereupon the plaintiff moved for leave to issue a new execution, and the motion was granted, it was held that he had power to issue such execution without an order for that purpose, and that such order would not extend such power beyond five years from the date of the judgment. (*Field v. Paulding*, 3 Ab. 139; S. C. 1 Hilt. 187.)

If a party dies after judgment is rendered against him, but before execution issued thereon, the remedy on such judgment is not suspended by reason of the non-age of any heir of such party; but no execution can issue, on any such judgment, until the expiration of one year after the death of the judgment debtor. (2 R. S. 268, § 27.) This provision of the statute, it has been held, does not prohibit an execution for the period mentioned, where the judgment is against the deceased defendant together with others, and satisfaction is sought out of the property of the other defendants. (*Day v. Rice*, 19 Wend. 644.)

If an execution is issued on a judgment after the lapse of five years from the time of its entry, without leave, it is not void, but voidable merely, and it is discretionary with the court whether it will be set aside. In order that a motion to set aside such an execution should prevail, it must be made promptly, and it must appear that the defendant has not consented to the issuing of such execution. (*Bank of Genesee v. Spencer*, 18 N. Y. 150; *Winebrenner v. Johnson*, 7 Ab., N. S. 202. See, also, *Bellinger v. Ford*, 21 Barb. 311.) No application need be made until after the lapse of five years from the rendition of judgment, and if execution has been issued within that time, no application is necessary. (*Wilgus v. Bloodgood*, 33 How. 289.)

In *Feld v. Poulting*, (1 Hilt. 187 ; S. C. 3 Ab. 187.) an execution was issued in May, 1848, on a judgment then recovered in the New York common pleas. By mistake, the execution purported to be issued on a judgment in the supreme court. This error was not discovered until after a sale under the execution, and an acknowledgment thereon of payment. Subsequently, and in 1851, an order was made, on application of the plaintiff, granting leave to issue a new execution, but none was issued until 1856. *Held* that such execution was irregular, and must be set aside. That the application, for leave to issue execution for the purpose of removing the bar of section 284 of the Code, cannot be made until after five years from the date of the judgment. After five years, the law presumes that the judgment has been paid ; and such presumption is not removed by an order made prior to that time.

An execution may issue after five years, by consent of the defendant. (*Hulbut v. Fuller*, 3 Code R. 55. See *Merritt v. Wing*, 4 How. Pr. 14 ; S. C. 2 Code R. 20.) After a lapse of twenty years, a judgment is presumed to be paid, and an application for leave to issue execution will not be granted, unless there is some proof of a payment, or a written acknowledgment, within that time. (*Kennedy v. Mills*, 4 Ab. 132.)

The assignee of a judgment may take steps to enforce it by execution ; unless some good objection thereto be made on the part of the person or persons who recovered it. (*Wilgus v. Bloodgood*, 33 How. 289.) Upon an application by the assignee of a judgment for leave to issue execution, the fact that the judgment debtor is the owner, by assignment, of judgments to a greater amount, against the moving party, is no answer to the motion. The right to an execution, in such a case, is a legal one, and it cannot be countervailed by the allegation of what may be an equitable offset, without giving the applicant an opportunity to controvert the equitable ground on which a right to set off the counter judgments might be founded. (*Betts v. Garr*, 26 N. Y. 383.) The most the court should do, in such a case, is to suspend the decision, for the purpose of giving time to the party resisting, to make his motion to allow a set-off. (Id.)

After a party has brought an action, on a judgment, and recovered, he may obtain leave to issue execution on the old judgment. (*Small v. Wheaton*, 4 E. D. Smith, 427 ; S. C. 2 Ab. 316.)

Upon an application for leave to issue execution, the court will not inquire into the validity of the judgment. So long as the judgment remains on record, the party is entitled to have his application granted. (*Lee v. Watkins*, 13 How. Pr. 178 ; S. C. 3 Ab. 243.)

If a judgment rendered by a justice of the peace be docketed with the county clerk, the execution must be issued by him, to the sheriff of the county, and will have the same effect, and be executed in the same manner, as other executions and judgments of the county court, except as provided in § 63 of the Code. (Code, § 64, sub. 13.)

In *Ford v. Whittridge*, (9 Ab. 416,) where parties who were not served with process were allowed to come in and defend an action in which judgment had been entered on default of the only party served, such judgment to stand as security ; it was *held* that execution could not be issued upon it pending the litigation.

On an appeal from a justice's court, the judgment rendered in the supreme court may be enforced in the same manner as though the action had been commenced in the latter court. (*Keeler v. Clark*, 18 Ab. 154.)

The Revised Statutes provide that where a creditor shall have obtained a judgment against any executor or administrator, after a trial at law, upon the merits, he may at any time thereafter apply to the surrogate having jurisdiction, for an order against such executor or administrator, to show cause why an execution on such judgment should not be issued. The surrogate shall issue a citation requiring the executor or administrator to appear before him and account. And if it shall appear that there is property properly applicable to the payment in whole or in part of such judgment, the surrogate shall make an order that execution be issued for the amount so applicable. (2 R. S. 116, §§ 19, 20.)

Under the provisions of the above sections of the statute, it is erroneous to proceed by an order to show cause. A citation should be issued. (*St. John v. Voorhies*, 19 Ab. 53;) and if, on the hearing, there appears to be no assets in the hands of the executor or administrator, the surrogate has no power to order an execution. (Ib.)

Where an executor is cited before a surrogate to show cause why an execution should not issue against the estate of his testator, and after a full hearing the surrogate makes an order granting leave to issue such execution, no appeal lies from the

order. It seems that the making of such order is in the discretion of the surrogate (*Mount v. Mitchell*, 31 N. Y. 356; S. C. 19 Ab. 1.)

The court in which judgment is rendered still has jurisdiction to grant an order to issue execution thereon, against the personal representatives of a deceased defendant. The consent of the surrogate, under chapter 295 of the Laws of 1850, is an additional requisite, and is not substituted for that of the court. (*Marine Bank of Chicago v. Van Brunt*, 61 Barb. 361.) By the Code, a motion is substituted in the place of the former writ of *scire facias*, in such a case. (*Id.*) Some motion must be made to the court in which the judgment was recovered; and a motion for leave to issue execution upon the judgment, against the representatives of the deceased, is one of proper character. (*Id.*)

The statute provides that execution shall issue only for the sum that shall have appeared to be a just proportion of the assets of the deceased, applicable to the judgment. (2 R. S. 88, § 32.)

If the judgment was obtained by default, the order may be obtained at any time after six months from the granting of letters testamentary, but not before. (See 2 R. S. 116, § 18.) And if obtained "after a trial at law upon the merits," at any time after judgment, though within the six months. (*Mills v. Thursby*, 2 Ab. 432. 437; S. C. 12 How. Pr. 385; *Winne v. Van Schaick*, 9 Wend. 448. But see *People ex rel. Bailey v. Judges of Albany Mayor's Court*, 9 Wend. 48, contra. And see *People ex rel. Fogalsonger v. Judges of Erie Com. Pleas*, 4 Cowen, 445.) There are cases in which the surrogate has a discretion whether to grant an order for the issuing of an execution. (*Mills v. Thursby*, 11 How. Pr. 126.) Where the accounts of the executor have been rendered and settled, before the surrogate, an order is not necessary. (*Olmstead v. Vredenburg*, 10 How. Pr. 215.)

Where the executor has incurred a liability in the administration of the estate, for which a judgment has been recovered, after a trial on the merits, the surrogate may make an order that execution be issued, in the same manner as though it had been a judgment on a debt owing by the decedent. (*Matter of Thompson's estate*, 41 Barb. 237; S. C. 1 Redf. 490.)

If a plaintiff dies after final judgment in his favor, but before execution issued, the same remedy may be had by action, pursuant to § 428 of the Code, as was previously had by writ of *scire facias* at the suit of his personal representatives. (*Ireland v. Litchfield*, 22 How. Pr. 178; S. C. 8 Bosw. 634.) Such a proceeding is not an action on the judgment, and may be had without leave of the court. It is the only mode of reviving the judgment in the name of the executors or administrators, and of obtaining execution thereon. (*Wheeler v. Dakin*, 12 How. Pr. 537.) In *Thurston v. King*, (1 Ab. 126.) the court say that execution cannot issue upon a judgment after the death of the judgment creditor, and the only remedy is by original action by the executors of the deceased, in which "they would be entitled to ask for and obtain an execution, to be issued in their names."

An execution upon a judgment cannot be issued upon the application of the executors of a deceased plaintiff, upon motion. (*Jay v. Martine*, 2 Duer, 654. See, also, *Wheeler v. Dakin*, 12 How. Pr. 537; *Thurston v. King*, 1 Ab. 126.) When a judgment creditor dies, and within a year thereafter his executor applies to the court, upon affidavit, without notice to the judgment debtor, and obtains an order reviving the suit in the name of the executor, and authorizing an execution to issue, on which real estate is sold, such execution is voidable, but not void; and one not holding under the judgment debtor cannot raise the question. (*Nims v. Sabine*, 44 How. 252.) In such case the rule is good, though more than ten years have elapsed since the docketing of the judgment; and no lien is necessary to authorize a sale, as against the defendant in the execution, or trespassers. (*Id.*)

Where executors have assigned a judgment, an action to obtain an execution thereon is the proper course. (*Cameron v. Young*, 6 How. Pr. 372.) But an action will not lie in the supreme court, for leave to issue an execution on a judgment recovered in the county court. (*Niles v. Perry*, 29 How. 192.)

In *Bellinger v. Ford*, (21 Barb. 311,) where, after the lapse of five years, a motion was made to allow execution to be issued on a judgment, which motion was granted, but it appearing that the plaintiff had been dead for over two years, and that the affidavit was entitled in the original action, and the notice of motion was subscribed by the attorney for the plaintiff; it was held that the order, and the execution issued under it, were void.

A creditor may impeach the discharge of a debtor, obtained under the insolvent laws, for fraud; but he cannot disregard it, and issue execution on his judgment,

party; or by execution against his goods and chattels, and in default thereof, his lands and tenements.(k)

In some decrees the sum of money adjudged due is to be paid, or the duty is to be performed, within a time specified therein. In others, it is decreed to be paid or done generally, without fixing a time. In either case a clause is inserted that the party have execution to enforce the decree. Whether a time is fixed, or not, an execution may be taken out at once, as soon as the decree is enrolled, in the same manner as it is issued upon a judgment at law when docketed.(l)

But no process can be issued on any final decree until the same has been enrolled.(m) If a decree is final as to any branch of the cause, or as to any of the parties, it must be enrolled before execution can be issued to compel a compliance with such decree.(n) (7)

(k) 2 R. S. 183, § 110, (orig. § 104.)

(l) 2 Hoff. Ch. Pr. 92.

(m) 2 R. S. 183, § 110, (orig. 104.) Rule 111.

(n) *Miuthorne's ex'rs v. Tompkins' ex'rs*, 2 Paige, 102.

and sustain the execution and levy by affidavits of the fraud. (*Dresser v. Shufeldt*, 7 How. Pr. 85.) The court will not try the question of fraud, on motion, but will set aside such an execution, and leave the plaintiff to his action on the judgment; and will not allow the levy to be retained as security. (Id.; *Stuart v. Salhinger*, 14 Ab. 291; *Manhattan Oil Co. v. Thorn*, id. note; *Rich v. Salinger*, 11 id. 344.) But when the discharge has been adjudged to be invalid, the plaintiff will be allowed to issue execution on the judgment. (*Small v. Wheaton*, 4 E. D. Smith, 427; S. C. 2 Ab. 316. See *Brown v. Bradley*, 5 Ab., 141.)

In *Gouverneur v. Warner*, (2 Sandf. 624,) where the plaintiff filed a creditor's bill in equity against the defendant, and after due proceedings a receiver was appointed and took possession of the property, and the plaintiff issued an *alias* execution, and a levy was made on property held by such receiver, the court ordered the levy to be set aside and the execution stayed, unless the plaintiff should dismiss his bill in equity and vacate the receivership.

If a defendant is in actual custody under an order of arrest, the plaintiff must issue execution *against the person* of such defendant within *three months* after the entry of judgment; or the defendant may, on motion, be discharged from custody, by the court, unless good cause to the contrary be shown; and cannot be arrested upon execution issued in the action. (Code, § 288.) The Revised Statutes contain a similar provision, and authorizing the discharge from custody, of a defendant, by a *supersedeas*. (2 R. S. 556, §§ 36, 37.)

It is not essential that an execution should be issued by the attorney of record. It will be equally valid if issued by any other attorney. (*Cook v. Dickerson*, 1 Duer, 679.)

As to the time and manner of issuing executions upon judgments entered by *confession*, without action, see Code, § 384.

(7) The judgment roll must be filed, and the judgment regularly docketed. An execution issued before this has been done is void. (*Townshend v. Wesson*, 4 Duer, 342. 354.) No judgment will authorize proceedings thereon, until the record has been signed and filed. (2 R. S. 360, § 11. See *Marvin v. Herrick*, 5 Wend. 109; *Barrie v. Dana*, 20 John. 307.) Where there has been a stay of proceedings for the purpose of an appeal, an oral announcement of the decision, and an entry of the same in the minutes of the clerk, are not sufficient to authorize the issuing of an execution. A formal judgment which embraces the decision of the court, and which becomes a permanent record, must be entered by the clerk; and it is only such a judgment that removes the stay. (*Bowman v. Tallman*, 19 Ab. 84; S. C. 3 Rob. 633; 2 id. 632; 28 How. 482.)

An execution sent to the sheriff, and received by him, previous to the signing and

A party who is equitably entitled to costs, must apply to the court to obtain a positive order for the payment thereof before he can take out an execution for them.(o) Upon such an order, the statute(p) has authorized the issuing of a precept to commit the party to prison if he refuses to pay the amount which is thus ordered to be paid to the adverse party. But as the revised statutes have authorized this court to enforce the performance of a *decree* only, by an execution against the property of the party, as on a common law judgement, it may be doubtful whether a *fi. fa.* can be issued upon a mere order for the payment of interlocutory costs.(q) (8)

The "act to abolish imprisonment for debt,"(r) prohibits the arrest or imprisonment of any person upon any execution issuing out of any court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree, founded upon contract, expressed or implied, or for the recovery of any damages for the non-performance of any contract.

But by the second section of the act, the above exemption is declared not to extend to proceedings as for contempts to enforce civil remedies.(s) And by another provision of the revised statutes,(t) proceedings as for a contempt may be resorted to in all cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record, to enforce the civil remedies or to protect the rights of any party to a suit.

The chancellor has decided that where, upon an appeal by the defendant from an interlocutory decision of a vice chancellor, such decision is reversed, with costs, and no order is obtained to remit the proceedings to the vice chancellor, it is optional with the appellant to have the

(o) *Van Ness v. Cantine*, 4 Paige 55.

(p) See 2 R. S. 411, § 4. Rule 171.

(q) *Van Ness v. Cantine*, *supra*.

(r) 1 R. S. (2d. ed.) 807, § 1.

(s) 1 R. S. (2d. ed.) 808, § 2.

(t) 2 R. S. 534, § 1, sub. 8.

filing of the record, is not irregularly issued, if the sheriff be directed to indorse it as received on a subsequent day, and on that day the record be actually signed and filed, and a levy is not made until such proceedings have been had. (*Walters v. Sykes*, 22 Wend. 566.)

In *Chichester v. Cande*, (3 Cowen. 39,) where an execution was issued and levied through inadvertence, before the record was filed, it was ordered filed *nunc pro tunc*.

(8) The mode of collecting costs awarded by orders of the court, is pointed out by statute, (Laws of 1840, p. 333, § 15; Laws of 1847, p. 491, §§ 2, 3;) and these provisions of law are not repealed by the Code. (*Lucas v. Johnson*, 1 Code Rep., N. S. 301; *Poillon v. Haughton*, 2 Code R. 14.) Whenever there is an order of the court directing the payment of costs, process in the nature of a *fi. facias* may issue against the personal property of the party ordered to pay them, without application to the court, upon the expiration of the time prescribed for payment. (*Weitzel v. Schultz*, 3 Ab. 468.)

decree of the chancellor enrolled and to take out a *fi. fa.* or *ca. sa.* thereon, or to proceed as for a contempt, and apply for a precept to commit the complainant to prison until the costs are paid.(u) So, upon an appeal to the court of errors from an interlocutory order of the chancellor, the decree is final, so far as respects the costs awarded on the appeal; and these costs may be collected on an execution, in the usual manner.(v)

And in the case of *Patrick v. Warner*,(w) it was held that a party who is committed to jail on a precept in the nature of an attachment for the non-payment of costs, is not exempt from imprisonment, under the act to abolish imprisonment for debt.

But a party thus imprisoned is entitled to the jail liberties.(x) And unless the commitment is for costs only, he may be discharged from imprisonment under the statute, upon presenting a petition and making an assignment of his property.(y)

But where a party is committed for the non-payment of a fine imposed upon him by the court, for the breach of an injunction, or other contempt, he must be confined by the sheriff within the walls of the prison.(z)

In the case of *Patrick v. Warner* the chancellor observes that if an order for the payment of interlocutory costs cannot be enforced by the imprisonment of a party, the adverse party would, in most cases, be without remedy, although the property of the person liable to pay them, was more than sufficient to pay all his debts.

Execution against corporations.] If a decree be against a corporation aggregate, and it is not obeyed, the process against them is a *distringas*, and afterwards a sequestration. The form of the *distringas* is in general terms, to compel the defendants to appear and answer a contempt alleged against them,—the endorsement on the writ expressing the nature of the contempt.(a) If a sequestration issues to enforce the performance of a decree for the payment of money, the goods of the corporation and the rents and profits of its real estate, will be applicable, under that process, to the payment of the demand.(b) (9)

(u) *Brockway v. Copp*, 2 Paige, 578.

(v) *Id. ib.*

(w) 4 Paige, 397.

(x) *Id. ib.* *People v. Bennett*, id. 282.

(y) *People v. Bennett, supra.*

(z) *Id. ib.*

(a) 1 Newl. 688.

(b) *Davis v. Davis*, 2 Atk. 24. Wy. Prac. Reg. 386.

(9) AGAINST MUNICIPAL CORPORATIONS.

In all actions commenced since April 14, 1860, against the city of New York, ten days' notice in writing must be given to the comptroller, either by the party adverse

Against absent defendants.] In case of a decree against an absent or absconding defendant, the statute directs that upon the coming in of the master's report of the proofs and examinations had before him, the court shall make such order thereupon as shall be just. Process shall then issue to compel the performance of such decree, either by sequestration of the real and personal estate of the defendant, or such part thereof as shall be deemed sufficient; or where any specific estate or effects are demanded by the bill, by causing possession of the property so demanded, to be delivered to the complainant.(c)

In the case of *Goodrich v. Day*,(d) which was a suit brought to have a mortgage given to the defendant, and which was a cloud upon the complainant's title, declared void on the ground of usury, and to have it delivered up and cancelled of record, the chancellor made a decree accordingly, upon the bill being taken as confessed by the defendant, (who was a non-resident of the state,) without service of process, upon an order for his appearance duly published. And the decree directed him to pay the complainant's costs of suit to be taxed—the payment to be enforced by the sequestration of the real and personal estate of the defendant, according to the directions of the statute.

Against heirs, devisees, &c.] Every final decree rendered in an suit by a creditor against an heir or devisee, has preference as a lien on the

(c) 2 R. S. 137, §§ 135, 136, (orig. §§ 129, 130.)
(d) In Chan. Jan. 23d, 1843.

in interest, his agent, attorney or the sheriff, before any execution can be levied upon the property of the city. (Laws of 1860, ch. 379, §§ 5, 6.)

The act of 1865 provides that until the moneys to pay judgments recovered against the city shall have been raised, as therein provided, and payment of such judgments shall have been refused for two days after demand in writing of the comptroller, no execution shall issue against the corporation, unless the amount of such judgments shall not have been included in the annual report or budget of the comptroller, in the next tax levy passed by the legislature. (Laws of 1865, ch. 646, § 5.) But this provision does not affect claims arising out of the riots of July, 1863. (Id.) Nor to judgments on contracts made before the act took effect. (*Hadfield v. Mayor, &c., of New York*, 2 Ab., N. S. 95; S. C. 6 Rob. 501.)

Under an execution upon a judgment against a municipal corporation, the property of the corporation, not devoted to public use, may be taken and sold to satisfy the judgment. If there is no such property, the remedy is by *mandamus*, to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to raise it by tax. If it is not, then the creditor of the municipal government is placed in the same condition as are the creditors of the state, or of the United States; he has no compulsory remedy. (*Brinckerhoff v. The Board of Education*, 6 Ab., N. S. 428; S. C. 37 How. 499; 2 Daly. 443.) Under the mechanics' lien law, a lien cannot be acquired for work done, or materials furnished towards the erection of a public school-house, erected in accordance with the provisions of certain laws of the state relating to the city of New York, and which is devoted, by those laws, to a public use. (Id.) And no such security can be obtained, under the mechanics' lien law, upon property which, for reasons of public necessity, cannot be taken and sold to satisfy judgments obtained in ordinary civil actions. (Id.)

real estate descended, to any judgment or decree obtained against such heir personally, for any debt or demand in his own right.^(e) And a sale under an execution upon such decree, will overreach all alienations of the estate made subsequent to the commencement of the suit.^(f) (10)

In the case of *Morriss v. Mowatt*,^(g) the chancellor thought it probable that in order to give the purchaser under a decree of this court, a legal title sufficient to protect him in a court of law from a sale under a previous judgment against an heir, it might be necessary to issue an execution upon the decree, and have the property sold by the sheriff in the usual manner.

In suits brought against several heirs jointly, or several devisees jointly, the amount which the complainant shall be entitled to recover shall be apportioned among the heirs of the ancestor, or among all the devisees of the testator, in proportion to the value of the real estate descended to such heirs, or devised to such devisees, respectively, as the case may be; and such proportion only shall be recovered of each heir or of each legatee.^(h) The costs are also to be apportioned in the same manner; and the decree must express the amount recovered against each defendant, and the execution must conform to the decree.⁽ⁱ⁾

Upon a decree against infant heirs or devisees, no execution can be executed against them within one year after the rendition of the decree. But if there are any adult defendants in the same suit, the execution may be executed against them.^(k)

The solicitor issuing an execution in such a case, must endorse thereon the names of the defendants who are infants, and must direct the sheriff not to execute the same against them until the expiration of one year.^(l)

Against lands held in trust.] Lands, tenements, and real estate holden by any one in trust, or for the use of another, are liable to decrees and executions against the person to whose use they are holden,

(e) 2 R. S. 454, § 48.

(f) Id. ib. § 49.

(g) 2 Paige, 592.

(h) 2 R. S. 455, § 52.

(i) Id. ib. § 53.

(k) Id. ib. § 54.

(l) Id. ib. § 55.

(10) The Revised Statutes direct that if execution be issued upon a judgment rendered against any person as^{ter}-tenant, heir or devisee of any deceased person, it shall command the amount of such judgment to be made of the real estate whereof the ancestor, testator or person deceased was seized at the time the same real estate became liable, or at any time afterwards, or at the time of the death of such ancestor, testator, &c., unless such heir, devisee or ter-tenant shall have made his own estate liable to such judgment. (2 R. S. 367, § 25.)

in the cases, and in the manner prescribed in the first chapter of the second part of the revised statutes.^(m)

Levy necessary.] Until an actual levy, no goods or chattels are bound by an execution as against a purchaser without notice.⁽ⁿ⁾ (11) (12) (13) (14) (15)

(m) 1 l. 363, § 26.

(n) 2 R. S. 183, § 111, (orig. § 105.)

(11) LEVY AND LIEN OF EXECUTION.

1. *Levy.*] A levy upon personal property is the act of taking possession of, or seizing it, by the officer, under an execution, whereby the lien of such execution becomes perfect, and the property is deemed in the custody of the law. (Crocker on Sheriffs, § 431, 2d ed.)

To constitute a valid levy, the officer must enter on the premises where the goods are, and take possession thereof, if that be practicable. If not, he must openly and unequivocally assert his title to them by virtue of his execution. It is not essential to the validity of the levy that he take actual possession of the goods; or that he remove them from the custody of the debtor. (*Roth v. Wells*, 29 N. Y. 471; S. C. 27 How. 599; 41 Barb. 194; *Elias v. Farley*, 5 Ab., N. S. 39; S. C. 3 Keyes, 398; *Bond v. Willet*, 29 How. 47; S. C. 31 N. Y. 102; 1 Keyes, 377.) But the goods should be within view of the officer. (*Barker v. Bivinger*, 14 N. Y. 270; *Ray v. Harcourt*, 19 Wend. 495.)

The test of a valid levy is, whether enough has been done to subject the officer to an action of trespass, but for the protection of the execution. (*Roth v. Wells*, *supra*.) Where a sheriff went to the store of judgment debtors, saw the goods, asserted his right to them by virtue of his levy, in the hearing of one of the debtors, and subsequently, on the same day, caused the fact that a levy had been made, to be indorsed on the execution, by a deputy, it was held this was a valid levy. (*Id.*)

A memorandum of the levy should be made, (*Bond v. Willet*, *supra*), and the levy should not be kept secret from the debtor. (*Price v. Shipp*, 16 Barb. 585.) Yet his consent to the levy is not essential. (*Artisans' Bank v. Treadwell*, 34 Barb. 553; S. C. 25 N. Y. 489, sub. nom. *Van Alstyne v. Cook*.) Notice of the levy, given to the person in charge of the goods, is sufficient. (*Elias v. Farley*, 6 Ab., N. S. 39; S. C. 3 Keyes, 398; 2 Trans. Ap. 116.) A public avowal of the levy, by the sheriff, is not necessary. (*Butler v. Maynard*, 11 Wend. 584. See, also, *Haggerty v. Willer*, 16 John. 287; *Wickham v. Miller*, 12 id. 320.)

No inventory is necessary to make a valid levy. A seizure of part of the goods in a house, in the name of the whole, has been held a good seizure of the whole. (*Mills v. Thursby*, 11 How. Pr. 121; *Watts v. Cleveland*, 3 E. D. Smith, 503; *Haggerty v. Willer*, 16 John. 287.)

The sheriff is not restricted as to the amount of property he shall levy upon; nor is it essential that he levy on the whole at once. (*Denvre v. Fox*, 22 Barb. 522.) A levy upon sufficient personal property to satisfy the execution does not, of itself, amount to a satisfaction of the judgment. (*Id.* See, also, *Radde v. Whitney*, 4 E. D. Smith, 378.)

If, after the return day of the execution, other property be substituted for that upon which the sheriff has made a levy, the sheriff will not have such a title to the substituted property as will defeat the title of a prior *bona fide* purchaser; even though the substitution be made under an agreement between the sheriff and the debtor. (*Shelton v. Westervelt*, 1 Duer, 109.) Where a levy has been made upon goods, and some of them are sold by the debtor, and others of the same general character are substituted, the substituted goods are liable to sale, since the debtors have voluntarily mingled goods not liable to be sold, with those that were. (*Roth v. Wells*, 29 N. Y. 471; S. C. 27 How. 599; 41 Barb. 194.)

The sheriff may require indemnity before levying on goods claimed by a third party. (*Chamberlain v. Beller*, 18 N. Y. 115.) If he is indemnified, he has no excuse for not keeping possession of property levied upon, although a sheriff's jury has found that the title is in a third party. (*People ex rel. Kellogg v. Schuyler*, 5 Barb. 166.)

If the sheriff discovers that property upon which he has levied belongs to a third person, he may relinquish the levy and return the execution *nulla bona*. (*Blivin v. Bleakley*, 28 How. 124.)

Where an execution, issued against two joint debtors, has been levied upon the property of one of them, the plaintiff will not be allowed to countermand it, and issue a new execution for the purpose of making a levy upon the sole property of the other defendant. (*McChain v. McKeon*, 2 Duer, 645.) When the first execution, so issued, is not withdrawn, and another issued with the consent of all the defendants, the court will order the second to be set aside, and the first to be returned satisfied. (Id.) The rule that a levy under an execution, upon sufficient property to satisfy the judgment, does not operate, *per se*, as a satisfaction, is only applicable when the collection of the debt, by force of the levy, is not defeated by the act or fault of the plaintiff. (Id.) An assignee of the judgment stands in the same position as the plaintiff upon the record, and the legal consequences of his acts are the same as those of the plaintiff. (Id.)

An execution against joint property cannot be levied on the sole property of one of the defendants. (*Sherry v. Schuyler*, 2 Hill, 204.)

By virtue of an execution on a judgment against one of several partners, the entire partnership property may be seized, and the interest of such partner sold. (*Berry v. Kelly*, 4 Rob. 106; *Hergman v. Dettlebach*, 11 How. Pr. 46; *Walsh v. Adams*, 3 Denio, 125; *Phillips v. Cook*, 24 Wend. 389.) The sheriff may sell the interest of the judgment debtor, and deliver the goods to the purchaser, who takes them subject to the partnership debts. (Id.; *Moulray v. Lawrence*, 13 Ab. 317; S. C. 22 How. 107.) In case of a judgment against a special partner, in a limited partnership, the right, title and interest of such special partner cannot be sold on execution. (*Harris v. Murren*, 28 N. Y. 574.) For a debt owing by all the partners—general and special—in a limited partnership, a suit is well brought against the general partners, alone. And a judgment, and execution, in such suit, levied upon the property of the partnership, will bind the entire interest of all the partners. (*The Artisans' Bank v. Treadwell*, 34 Barb. 553; S. C. aff'd, 25 N. Y. 489, sub nom. *Van Alstyne v. Cook*.)

Where joint property has been levied upon, under an execution against one partner, if the officer sells the whole property, he is liable in trespass. (*Waddell v. Cook*, 2 Hill, 47; *Walsh v. Adams*, 3 Denio, 125.)

The levy of an execution on Sunday is prohibited by the Revised Statutes. (1 R. S. 675. § 69. See *Rob v. Moffat*, 3 John. 257.)

A party who directs, and the officer who makes, an oppressive levy, is responsible for the unlawful act. As regards the officer, the rule is that where a ministerial officer does anything contrary to the duty of his office, and damage thereby accrues, an action lies. (*Cantine v. Clark*, 41 Barb. 629.) Neither a judgment creditor nor an officer is justified in using the process or authority of the court oppressively, to the injury either of the debtor or of any third person. (Id.)

No formal levy upon, or seizure of real estate is necessary. (*Wood v. Colvin*, 5 Hill, 228.) A mere levy upon lands does not amount to satisfaction. (*Taylor v. Roney*, 4 Hill, 619.)

The sheriff has no authority to levy on the property of any person except the one described in the execution. (*Farnham v. Hildreth*, 32 Barb. 277.)

In *James v. Gurley*, (48 N. Y. 163.) a deputy sheriff, by consent of the attorney and county clerk, took from the clerk's office an execution which had been returned, erased the return, and made a levy and sale; it was held, that as the amendment might have been allowed by the court, the process was not void, but only irregular. That the sheriff was therefore liable for the money received by the deputy, thereon.

2. *Lien*.—As against the defendant in the execution, the lien of the execution attaches upon all the goods of the defendant within the jurisdiction of the sheriff when the writ is delivered to the officer. (*Roth v. Wells*, 29 N. Y. 471; S. C. 41 Barb. 194. See 2 R. S. 365. § 13; *Pine v. Rikert*, 21 Barb. 469; *Camp v. Chamberlain*, 5 Denio, 198.) The lien attaches not only to the property which the judgment debtor had when the execution was issued, but to all acquired by him, within the jurisdiction of the sheriff, during the life of the execution. (*Roth v. Wells*, *supra*.) The lien of a levy by virtue of an execution issued on a *bona fide* judgment in a state court, is preserved by the bankrupt act, and is to be respected by the United States' court sitting in bankruptcy. (*Matter of Bernstein*, 34 How. 289.)

It is provided by statute that the title of any purchaser in good faith, acquired prior to the actual levy of any execution, without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to an officer, to be executed, before such purchase was made. (2 R. S. 366, § 17. See *Millspaugh v. Mitchell*, 8 Barb. 333; *Pine v. Rikert*, 21 id. 469; *Camp v. Chamber-*

lain, 5 Denio, 198.) A subsequent purchaser will have no title, although his purchase be *bona fide* and for a valuable consideration; for, upon a levy, the sheriff acquires the entire interest (subject to the rights of prior *bona fide* purchasers) and his sale relates back to the day of the levy. (*Fuller v. Allen*, 7 Ab. 12; S. C. 16 How. Pr. 247; *Thompson v. Van Vechten*, 5 Ab. 458; *Birdseye v. Ray*, 4 Hill, 153.)

In *Stoutenburgh v. Vandentwigh*, (7 How. Pr. 229, 234, note *a.*) where an execution was delivered to a sheriff one day before the transcript was filed, it was held that the execution became operative so as to effect a lien from the time the transcript was actually filed.

Any agreement by which a sheriff relinquishes his lien upon property seized is void. (*Shelton v. Westerfelt*, 1 Duer, 109.) But if he discovers that property upon which he has levied belongs to a third person, he may relinquish the levy, and return the execution *nulla bona*. (*Blirin v. Bleakley*, 23 How. Pr. 124.)

So far as real estate is concerned, the lien is effected by docketing the judgment in the county where the lands are situated; and, as to goods and chattels, by issuing execution to the sheriff of the county where the property is situated, and levying on the same. The lien being thus placed upon the property, the creditor is in a situation to ask relief in a court of equity, if there be an existing necessity. (*Payne v. Sheldon*, 63 Barb. 169.)

Where the lien of a judgment has ceased, by lapse of time, the court will order a perpetual stay of execution in behalf of *bona fide* purchasers, unless the judgment creditor shall satisfy the court that there is good reason for supposing that the purchases were not made in good faith. (*Wilson v. Smith*, 2 Code R. 18.)

(12) SALE OF PROPERTY UPON; REDEMPTION.

1. *Personal property.*] The sale of any personal property by virtue of an execution, must be made at public vendue, between the hour of nine in the morning and the setting of the sun. (2 R. S. 369, § 36.) A sale of chattels after sundown is void. (*Carrick v. Myers*, 14 Barb. 10.)

No sale of chattels can be made upon execution, unless written or printed notice be posted, for six days successively, in three of the most public places in the town where the sale is to be had, specifying the time and place thereof. (2 R. S. 366, § 21.) The property must be present, and within view, and must be sold in such lots as will be calculated to bring the highest price. (Id. 367, § 23; *Cresson v. Stout*, 17 John. 116.) It must also be specifically designated and separated, if in mass. (*Stevens v. Eno*, 10 Barb. 95; *Warring v. Loomis*, 4 Barb. 484. See *Tift v. Barton*, 4 Denio, 171.)

The plaintiff in the execution may be a purchaser at the sale. (*Weaver v. Toogood*, 1 Barb. 238.) But he must not leave the goods in the possession of the defendant. (*Gardenier v. Tubbs*, 21 Wend. 169. See *Farrington v. Caswell*, 15 John. 430. n.; *Woodworth v. Woodworth*, 21 Barb. 343.) Where property is bought at a sheriff's sale, by the plaintiff in the execution, and left in the possession of the defendant, without any good excuse shown, the sale is void, as against other creditors of the defendant; notwithstanding the plaintiff subsequently, and before the levying of an execution by other creditors, reduces the property to his actual possession. (Id.)

Before the court will restrain the sale of partnership property, under an execution against one partner only, the applicant must show that the defendant in the execution has no interest in the property. (*Mowbray v. Lawrence*, 13 Ab. 317; S. C. 22 How. 107.)

The sheriff may take indemnity to protect himself in selling the property of a third person, but he cannot indemnify buyers. (*Ball v. Pratt*, 36 Barb. 402.) And indemnity given to him is good, though executed after the sale. (*Westerfelt v. Frost*, 1 Ab. 74.)

As to postponements, the sheriff is bound to exercise a proper discretion, and if it appears that there will be too great a sacrifice, he may postpone the sale. (*McDonald v. Neilson*, 2 Cowen, 139, 190.)

Where, after the officer had levied on goods, under an execution, he received another execution, under which he sold some of the goods levied on, it was held not irregular, as the levy under the first execution was sufficient for both. (*Cresson v. Stout*, 17 John. 116.) Objections in respect to the sale can be raised only by parties to the execution. (*Smith v. McGowan*, 1 Code Rep. 27; S. C. 3 Barb. 404.)

Personal property, pledged by way of mortgage, may, after forfeiture, be levied on by virtue of an execution against the mortgagee, although it remains in the hands of the mortgagor. (*Ferguson v. Lee*, 9 Wend. 258.) Where a chattel mortgage is not filed until after the delivery of an execution to the sheriff, it is void as against the

latter, although actually filed before a levy has been made, (*Hale v. Street*, 40 N. Y. 97.) Goods mortgaged may be seized, and the interest of the mortgagor sold, upon execution against him, in case the mortgage is not due, and the mortgagor is in possession at the time of such seizure, and entitled to the possession by stipulation. (*Hull v. Sanson*, 35 N. Y. 274; *Hull v. Carnley*, 17 id. 292. See, also, S. C. 11 N. Y. 501; 1 Ab 158; *Mattison v. Baucus*, 1 N. Y. 295.) The mortgagor's equity of redemption may be sold on execution, by a stranger, notwithstanding the mortgagee has been let into possession of the premises. (*Trinun v. Marsh*, 3 Lans. 509.) Where the title of the mortgagee has become absolute, by reason of the default of the mortgagor, the property cannot be seized on an execution against the latter, although he still retains possession. (*Champlin v. Johnson*, 39 Barb. 606.)

It is provided by statute that where goods shall be pledged for the payment of money, or the performance of an agreement, the interest in such goods of the person making such pledge may be sold on execution against him (2 R. S. 366, § 20. See *Stief v. Hart*, 1 N. Y. 20; S. C. 1 How. Ap. Cas. 181.) But after a sale of such property, the pledgee is entitled to the possession of the goods until they are redeemed by the purchaser. (Id.) In *Brownell v. Carnley*, (3 Duer, 9,) the court say, the question, whether the statute, in authorizing a sale of the interest of a pledgor, upon execution, has authorized the sheriff to remove the property from the possession of the pledgee, is still open; since the decision of the court of appeals in *Stief v. Hart*, *supra*, was rendered on an equal division of the judges.

The interest of a bailee, or a pledgee, may be taken and sold on execution against such bailee. (*Saul v. Kruger*, 9 How. Pr. 569; *Otis v. Wood*, 3 Wend. 500.) But a bailee of sheep, under an agreement to keep them in consideration of receiving their wool, has no leviable interest until shearing time. (*Haslrouck v. Bouton*, 41 How. 208, S. C. 60 Barb. 413.) The bailee must first have performed his entire contract, by keeping the sheep until shearing time. (Id.)

Gold and silver coin may be levied upon, but need not be exposed for sale. Bills or other evidences of debt, issued by a moneyed corporation, may be levied upon. (2 R. S. 366, §§ 18, 19.)

Where the sheriff has collected money upon an execution in favor of B. he has no right, as against the assignee of B., to levy upon such money in his hands, by virtue of, or upon his own motion, to apply them to the payment of an execution against B. received by him; although he has no notice of the assignment. (*Baker v. Kenworth*, 41 N. Y. 215. See, also, *Letts v. Hoyt*, 19 Barb. 412; *Carroll v. Cone*, 40 id. 220.)

If the legal title to property is in a married woman, such property cannot be seized to satisfy the debts of the husband. (*Gage v. Dauchy*, 34 N. Y. 293; *Coring v. Lewis*, 54 Barb. 51; S. C. 36 How. 425; *Allen v. Cowan*, 23 N. Y. 502; *Burger v. White*, 2 Bosw. 92.) Yet, in *Freeman v. Orser*, (5 Duer, 476,) where there was no evidence of any valid assent by the husband to the carrying on of a millinery business by the wife, and it appeared that the earnings and profits, as well as her separate capital, were invested in the stock on hand, and there were no means by which they could be discriminated; it was held that the whole was rightly levied on, under an execution against the property of the husband.

That which grows, spontaneously, from the soil, such as trees and grass, cannot be seized on execution, as a chattel, until it has been severed from the land. (*Bank of Lansingburgh v. Cray*, 1 Barb. 542; *Cresson v. Stout*, 17 John. 116.)

Choses in action cannot be seized and sold on execution. (*Ransom v. Miner*, 1 Code Rep., N. S. 98; S. C. 3 Sand. 692.)

Although an action may be brought only against the general partners of a limited partnership, yet under an execution on a judgment therein, all the partnership effects may be sold. (*Van Alstyne v. Cook*, 25 N. Y. 489; S. C. 34 Barb. 553, sub. nom. *Artisans' Bank v. Treadwell*.) Upon an execution issued on a judgment against a special partner in a limited partnership, the right, title and interest of such special partner cannot be sold. (*Harris v. Murray*, 28 N. Y. 574.) Upon an execution issued on a judgment against one of several partners, the entire partnership property may be seized, and the interest of such partner sold. (*Berry v. Kelly*, 4 Rob. 106; *Hergman v. Dettlach*, 11 How. Pr. 46; *Phillips v. Cook*, 24 Wend. 389; *Walsh v. Adams*, 3 Denio. 125.) The sheriff may sell the interest of the judgment debtor, and deliver the goods to the purchaser, who will take them subject to the partnership debts. (Id.; *Mowbray v. Lawrence*, 13 Ab. 317; S. C. 22 How. Pr. 107.)

In a proper case, a sale upon execution will be set aside, and a resale ordered.

(*Bixby v. Mead*, 18 Wend. 611.) As, where property worth \$1,000 was bid off for \$26, and it was shown that the defendant was insolvent. (*Id.*) So where there was misrepresentation, as to the property sold. (*Dwight's Case*, 15 Ab. 259; *Ames v. Lockwood*, 13 How. Pr. 555. And see *Peet v. Cowenhoven*, 14 Ab. 56.)

In *Carrick v. Myers*, (14 Barb. 9,) where a party, whose property was levied on by execution, objected to the sale, on the ground that the property was exempt from execution, but he afterwards turned out the property to the sheriff, to be sold at a future day; it was held that this was nothing more than a claim of exemption, in order to gain time; that the sheriff, in subsequently selling the property, acted under a claim of authority given by law, and not under an authority given by the party; and that an abuse of his authority, by the sheriff, made him a trespasser *ab initio*.

Property exempt.] Certain personal property, to a limited amount, is, by various statutes, exempted from levy and sale under execution. (See 3 R. S. 5th ed. 645, §§ 22, 23; Laws of 1866, ch. 782; Laws of 1851, ch. 122, § 19; Laws of 1864, ch. 578, §§ 4, 5; Laws of 1858, ch. 107.)

For the decisions, as to what is, and what is not exempt property, and as to exemption, generally, see Wait's Code, 551, 552, 553.

The object of the law is to protect the poor, and their families, and it should receive a liberal construction, in order to promote its humane and remedial purposes. (*Stewart v. Brown*, 37 N. Y. 350; *Wilcox v. Hawley*, 31 id. 648; *Kneettle v. Newcomb*, 22 id. 249; S. C. 31 Barb. 169; *Shaw v. Davis*, 47 id. 497.)

A non-resident debtor is entitled to the same exemption, as to property out of the state, as though it were within the state. (*Bunn v. Fonda*, 2 Code Rep. 70.) Where property of a judgment debtor is exempt, at the time of his death, it remains so afterwards, for the benefit of his widow and children. (*Becker v. Becker*, 47 Barb. 497.)

No property in the possession of a judgment debtor is exempt *per se*. If he would claim exemption, for any property, he must, by proper proof, bring himself and his property within some statutory exception. (*Davis v. Prosser*, 32 Barb. 290; *Griffin v. Sutherland*, 14 id. 456; *Chambers v. Halsted*, Lator's Supp. 384; *Van Sickler v. Jacobs*, 14 John. 434.) Exemption is a personal privilege, and no party can claim it except the defendant in the execution or his family. (*Baker v. Brintnall*, 52 Barb. 188; S. C. 5 Ab., N. S. 253; *Smith v. Brackett*, 36 Barb. 571; *Smith v. Hill*, 22 id. 656; *Earl v. Camp*, 16 Wend. 562; *Mickles v. Tousley*, 1 Cowen, 114; *Twinam v. Swart*, 4 Lans. 263.)

A party cannot, by a prospective agreement, waive the right of exemption. Hence, where a party inserted in a note this clause: "And I hereby waive and relinquish all right of exemption of any property I may have, from execution on this debt," it was held null and void. (*Kneettle v. Newcomb*, 22 N. Y. 249; S. C. 31 Barb. 169; *Harper v. Leal*, 10 How. Pr. 276; *Crawford v. Lockwood*, 9 id. 547; S. C. 12 N. Y. Leg. Obs. 105.)

An officer holding process is not bound to consult with owners of property, before proceeding with a levy. Unless the judgment debtor, after notice that a levy has been made, gives the officer notice of his claim of exemption, he cannot recover against the officer for taking the property. (*Twinam v. Swart*, 4 Lans. 263.) A person who buys a chattel, in good faith, at a sale on execution, is not liable in an action for the recovery of the property, brought on the ground that it was exempt, if the plaintiff did not claim the exemption, at the sale, but merely forbade the sale, without specifying any ground. (*Id.*)

2. *Real estate.*] With respect to what real estate is liable to be sold on execution, the Revised Statutes provide that if there are not chattels sufficient to satisfy the execution, then all the real estate which the debtor may have had when the judgment was docketed, or at any time thereafter, shall be liable, in whose hands soever the same may be. (2 R. S. 367, § 24.)

Lands, tenements, &c., held in trust for the use of another are liable to executions, &c., against the one to whose use they are holden. (*Id.* 368, § 26. See *Carrick v. Hatmaker*, 15 N. Y. 475; *Mallory v. Clark*, 9 Ab. 358; S. C. 20 How. Pr. 418.)

Leasehold property may be seized and sold on execution, if the lessee or his assignee has five years of unexpired term; and so of buildings erected on such property. (Laws of 1837, chap. 462.)

A vested future estate may be sold on execution. (*Sheridan v. House*, 4 Keyes, 569. See, also, *Jackson v. Middleton*, 52 Barb. 9.) But an estate at will, or by sufferance, cannot be so sold, (*Bigelow v. Funch*, 17 Barb. 394; S. C. 11 id. 498;

Colvin v. Baker, 2 id. 206;) nor the interest of one in possession of land under a contract to purchase, (*Sage v. Cartright*, 9 N. Y. 49; *Griffin v. Spencer*, 6 Hill, 525; *Kellogg v. Kellogg*, 6 Barb. 116;) nor, if a debt is secured by a mortgage, can the equity of redemption be sold on a judgment for such debt (*Delaplaine v. Hitchcock*, 6 Hill, 14.) Neither can land lying in another state be sold, by virtue of process from the courts of this state. (*Runk v. St. John*, 29 Barb. 585.)

A reversionary interest in real estate may be the subject of levy and sale upon execution, although the extent of such interest cannot be ascertained at the time of such sale, and the whole reversion is contingent upon the happening of events which may never occur. (*Woodgate v. Fleet*, 44 N. Y. 1.)

In selling property upon execution, the sheriff acts by virtue of a statutory authority, which must be strictly pursued. (*Husted v. Dakin*, 17 Ab. 137.)

The title of land acquired under a sheriff's sale is subject to all prior incumbrances. (*Weaver v. Toogood*, 1 Barb. 238; *McKinstry v. Curtis*, 10 Paige, 503.)

It is a general rule that a purchaser under a power purchases at his peril, and is bound to inquire whether the power has not been extinguished. This rule applies to titles acquired at sheriff's sales upon execution. (*Stafford v. Williams*, 12 Barb. 240.)

Notice of the sale of real estate, upon execution, must be given in the manner prescribed by the Revised Statutes. (2 R. S. 368, 369, §§ 34, 35.) Sales in Hamilton county are governed by chapter 162 of the Laws of 1867, as amended by chapter 662 of the Laws of 1870.

It is sufficient notice of the sale of real estate upon execution to post a notice as required by the statute, forty-two days previous to the sale, and publish a copy thereof in six successive numbers of a weekly newspaper, although the first publication may be less than six weeks prior to the sale. (*Olcott v. Robinson*, 21 N. Y. 150. See *Wood v. Moorhouse*, 1 Lans. 405.) The sale must be at public vendue, between the hour of nine o'clock in the morning and the setting of the sun. (2 R. S. 369, § 36.) The statute directs that if the real estate to be sold consists of several known lots, tracts or parcels, they shall be separately exposed for sale; and if any person claiming to be the owner of any portion of such estate, or of such lots, tracts or parcels, or either of them, or claiming to be entitled by law to redeem any such portion, shall require such portion to be exposed for sale separately, it shall be the duty of the sheriff to expose the same for sale accordingly. (Id. § 38.) It has been decided that this provision of the statute is directory, merely; and that a sale in disregard of it is not void, but only voidable. (*Cunningham v. Cassidy*, 7 Ab. 183; S. C. 17 N. Y. 276; *Groff v. Jones*, 6 Wend. 522.) Such a sale is an irregularity, merely. (*Husted v. Dakin*, 17 Ab. 137.) A party aggrieved by it must apply for relief within a reasonable time. He may waive the irregularity, by express ratification, or by neglect to move within a reasonable time. (*Cunningham v. Cassidy*, *supra*.)

The sheriff may sell, under an execution against several defendants who are tenants in common of the premises bound by the judgment, the right and title of all the defendants together; unless some one claiming to be the owner of some portion of the estate, or claiming to be entitled by law to redeem any portion, shall require such portion to be exposed for sale separately. (*Neilson v. Neilson*, 5 Barb. 565.)

No more of any real estate shall be exposed for sale than shall appear necessary to satisfy the execution. (2 R. S. 396, § 38.) In *Groff v. Jones*, (6 Wend. 522,) where real estate worth \$10,000 was sold *en masse* to satisfy a judgment for \$100, although the premises were so situated that a portion which would probably have brought more than enough to satisfy the judgment could conveniently have been sold separately, the sale was set aside as *fraudulent*.

So a sale will be set aside, in favor of a judgment creditor where it appears that he has been misled by the conduct of the sheriff: especially where the property has been sacrificed. (*Ames v. Lockwood*, 13 How. Pr. 555) The sale of separate parcels together, it is said, is always sufficient cause for setting aside the sale. (Id.) In *Mulks v. Allen*, (12 Wend. 253,) where the plaintiff and a deputy sheriff were deceived as to the locality of the defendant's real estate by the representations of the defendant, and in consequence thereof, the plaintiff bid \$800 for property not worth over \$150, and it was struck off to him, a resale was ordered. And a resale will be ordered when the plaintiff, inadvertently, bids a sum less than the amount of his execution. (*Ontario Bank v. Lansing*, 2 Wend. 260. But see *Vandenburg v. Briggs*, 7 Cowen, 367, *contra*.)

If a sale is advertised under one execution, only, a sale cannot be had under an execution subsequently coming to the sheriff's hands. (*Husted v. Dakin*, 17 Ab. 137, 150.)

If the purchaser refuses payment, the sheriff may bring an action for the amount of his bid. (*Crappell v. Dann*, 21 Barb. 17; *Beardsley v. Root*, 11 John. 464.) If the plaintiff's attorney purchases the property, and takes the certificate in his own name, the presumption is that he has purchased on his own account, and the sheriff may sue him for the price. (Id. See, also, *Hawley v. Cramer*, 4 Cowen, 717.)

One defendant in a judgment may become the purchaser, at a sheriff's sale, of the real estate of his co-defendant. (*Neilson v. Neilson*, 5 Barb. 565.)

The sheriff, or other officer to whom an execution is directed, and his deputy holding such execution and conducting the sale of property in pursuance thereof, are forbidden, directly or indirectly, to purchase any property at such sale; and all purchases made by such sheriff, officer or deputy, or to his use, are declared void. (2 R. S. 370, § 41.) It has been decided that a turnkey, or assistant jailer is not within the operation of this prohibition. (*Jackson v. Anderson*, 4 Wend. 474.)

Where the property of a defendant, sold on execution, is bid in by the plaintiff in the judgment, for a sum sufficient to satisfy the same, the plaintiff ceases to be a judgment creditor of the defendant; and he cannot attack conveyances subsequently made by the judgment debtor; nor ask to have dealings between him and third persons set aside, on the ground of fraud. (*Weaver v. Toogood*, 1 Barb. 238.) Where a judgment creditor purchases, at a sheriff sale under an execution issued upon his judgment, land of the defendant, which is covered by a prior mortgage, he cannot come into a court of equity to compel the judgment debtor to pay such prior mortgage, so as to discharge the land purchased, from the lien thereof. (Id.)

A sale of the property of a defendant by virtue of a judgment and execution which is satisfied, the purchaser having full knowledge of the fact, would, it seems, be considered a nullity, although the defendant assented to the proceeding. (*Jackson v. Anderson*, 4 Wend. 474.) The judgment is the foundation of the sheriff's action, and if that be paid, at the time he undertakes to sell, his acts are without authority, and void. (*Craft v. Merrill*, 14 N. Y. 456; *Stafford v. Williams*, 12 Barb. 240; *Neilson v. Neilson*, 5 id. 565; *Wood v. Colvin*, 2 Hill, 566.)

And even a bona fide purchaser derives no title from the sale. (*Neilson v. Neilson*, *supra*.)

If there is enough land out of which an execution may be satisfied, after the debtor has sold a portion of his estate to a bona fide purchaser, the court will direct the sheriff to satisfy the execution out of what remains. (*Welch v. James*, 22 How. Pr. 474.) In *Cantine v. Clark*, (41 Barb. 629,) where the assignee of a judgment knew, as did the sheriff, also, that certain lands held by the judgment debtor and others as tenants in common had been voluntarily partitioned, by the tenants, among themselves, and quit-claim deeds executed, and that the lots apportioned to and accepted by the judgment debtor were abundantly sufficient to satisfy the judgment, with the expenses of the sale, yet they proceeded to sell, on execution, the lots set off on such partition, to the plaintiff, one of the joint tenants, regardless of his rights and equities, it was held that this was a fraudulent act, none the less reprehensible because committed under the guise of legal sanction; and that an action would lie against the holder of the judgment and the sheriff, to set aside the sale and cancel the sheriff's certificate.

Although a party can obtain an order in such a case, it seems, before the sale, directing the sheriff as to the mode of executing the process, or may obtain relief on motion, after the sale, he has also a remedy by direct action; and will be entitled to relief in such action, although fraud is not charged, in terms, nor proved, or found by the court; provided facts are stated, proved or found, from which fraud is, in law, necessarily deducible. (Id.)

An irregularity in the sale will not affect the title of a bona fide purchaser without notice. (*Neilson v. Neilson*, 5 Barb. 565; *Jackson v. Cadwell*, 1 Cowen. 622; *Chautauqua County Bank v. Risten*, 4 Denio, 580.) Thus the title is not affected by the sheriff's return of the writ, or his failure to return it. (*Neilson v. Neilson*, *supra*.) Nor by his omission to levy until the execution had expired, (*Averill v. Wilson*, 4 Barb. 180;) or to file the certificate of sale. (*Jackson v. Young*, 5 Cowen, 269.)

In the absence of proof to the contrary, it will, ordinarily, be presumed in favor of a sale under execution, that the sheriff has duly posted the proper notices of sale.

(*Wood v. Morehouse*, 45 N. Y. 368.) The publication of a sheriff's notice of sale of real estate under execution is sufficient, if inserted once in each week for the six weeks prior to the sale, although six full weeks have not elapsed between the date of the first publication and the day of sale. (Id.) The statute (2 R. S. 269) providing that the omission of the sheriff to give the required notice of sale shall not affect the validity of a sale made to a purchaser in good faith, without notice of the omission, applies to a sale made to the judgment creditor; although he pays no money, and the amount of his bid is merely credited upon the execution. (Id.)

Sheriff's certificate.] The statute directs that upon a sale of real estate upon execution, the officer making the same shall make out and subscribe duplicate certificates of such sale, containing a particular description of the premises sold; the price paid for each distinct lot or parcel; the whole consideration money paid; the time when such sale will become absolute and the purchaser will be entitled to a conveyance pursuant to law. (2 R. S. 370, § 42.) One of such duplicate certificates must, within ten days after the sale, be filed in the office of the clerk of the county, and the other be delivered to the purchaser. If there be two or more purchasers, a certificate must be delivered to each. (Id. § 43.)

Such certificate, when filed, is to be recorded by the clerk, in a book to be kept by him for that purpose, and the record is presumptive evidence of the facts stated therein. (3 R. S. 5th ed. 651, §§ 58, 59.) The original certificate, on being proved or acknowledged in the manner required by law, or a copy duly certified by the clerk, is also to be received as presumptive evidence of the facts therein contained. (Id. § 60.)

A sheriff's certificate may be assigned, by an instrument to be acknowledged or proved in the same manner as deeds, (3 R. S. 5th ed. 657, § 92,) and the assignment must be filed in the clerk's office. (Id.)

Assignments of sheriffs' certificates made prior to the passage of the act of 1835, (Laws of 1835, ch. 189; 4 Edm. Stat. 623.) and valid when made, were not invalidated by that act, but carried to the assignees all the rights acquired or evidenced by the certificates of sale, notwithstanding an omission to acknowledge or prove and file, such assignments. (*Phillips v. Schiffer*, 64 Barb. 548.) The principal object of the act of 1835, was the protection of sheriffs, by creating a statutory mode of evidencing the claims of assignees, without which, a sheriff could not be compelled to convey to such assignees. (Id.) The sheriff may waive the protection of the statute; and if he does so, and conveys to an actual assignee, the title of his grantee will not be affected by the omission to prove and file the assignment of the certificate. (Id.; *Wood v. Morehouse*, 45 N. Y. 368.)

Where a sheriff's deed recited the sale of the premises by him to persons named, and the assignment of the certificates of sale, by the purchasers, to other persons, by instruments in writing under the hands and seals of the assignees, and the sheriff testified that he always required the production and proof of assignments, before he conveyed lands sold by him on execution, to an assignee, and would not have recited the assignment in a deed, unless the fact of assignment had been satisfactorily proved to him, and the certificate and assignment delivered to him; that it was not his custom to keep or file them, and that he destroyed the assignment, after the deed was executed and delivered: *Held* that the substantial contents of the several assignments were sufficiently proved by the recitals in the sheriff's deed, and that their execution and existence at and before the execution of the deed, and their loss or destruction were satisfactorily shown, by the sheriff. (*Phillips v. Schiffer*, *supra*.)

In a proper case the sheriff's certificate may be amended, as where the sheriff sold a lot of land to which the debtor had no legal title. (*Richards v. Varnum*, 8 How. Pr. 79.) And in *Smith v. Hudson*, (1 Cowen, 430,) where the sheriff had omitted to mention one lot of land sold, he was permitted to make the corrections, according to the fact.

The sheriff's certificate is made *prima facie* evidence of the facts authorized to be inserted therein, but of nothing more. (*Anderson v. James*, 4 Rob. 35.) If the certificate is a cloud upon the title of the equitable owner of lands, an action may be maintained to remove it, before the time to redeem has expired. (*Lounsberry v. Purty*, 18 N. Y. 515; S. C. 11 Barb. 490; 16 id. 376; *Cook v. Newman*, 8 How. Pr. 523.)

Where a judgment creditor applies to redeem to the assignee of the sheriff's certificate, the acceptance of the money and transfer of the certificate, by the assignee, is a waiver of the production by the junior judgment creditor of evidence of his right to

redeem. And as the requirement of such production is for the benefit of the holder of the certificate, his waiver renders such production unnecessary to the validity of the sheriff's deed, given to the creditor so redeeming. (*Wood v. Morehouse*, 45 N. Y. 368.)

Redemption.] Within one year from the time of sale of real estate upon execution, the same, or any distinct lot, tract or portion that may have been sold separately may be redeemed, by the payment to the purchaser, his personal representatives or assignees, or to the officer who made the sale, for the use of such purchaser, of the sum bid on the sale of such lot or tract, with interest at the rate of ten per cent. (Id. 651, § 61.)

The statute also specifies the persons *by whom* redemption may be made, (id. 652, §§ 62, 63, 64, 67,) and declares that upon such payment being made, by any person so entitled to redeem, the sale of the premises so redeemed, and the certificates of such sale shall be null and void. (Id. § 65.) In case the persons so entitled shall omit to redeem, within the year, then the interest vested in the purchaser by such sale may be acquired within three months after the expiration of the year, by the persons, and on the terms prescribed in the statute. (Id. § 66.) That is, by *creditors*. (Id. §§ 67 to 78.)

The right and title of the defendant in the execution to any real estate sold thereby is not divested by such sale, until the expiration of fifteen months from the time of sale; but if the real estate has not been redeemed, and a deed shall be executed, in pursuance of a sale, the grantee in such deed shall be deemed vested with the legal estate from the time of the sale on such execution, for the purpose of maintaining an action for an injury to such real estate. (3 R. S. 5th ed. 655, § 78.)

After the expiration of fifteen months from the time of the sale of any real estate, if any part of the premises sold shall remain unredeemed by the person against whom the execution issued, or by any person entitled to redeem the same within one year from the time of such sale, then the officer making such sale shall complete the same, by executing a conveyance of the premises so remaining unredeemed, either to the original purchaser, or to the creditor who may have acquired the title of such original purchaser, or to the creditor who may have purchased such title from any other creditor, as the case may be; which conveyance shall be valid and effectual to convey all the right, title and interest which was sold by such officer. (3 R. S. 5th ed. 655, § 79.) In case of the death of a person entitled to a deed, previous to its delivery, the conveyance must be made to his executors or administrators, who are to hold the estate so conveyed in trust for the use of his heirs, subject to the dower of his widow, if there be any; but it may be sold for the payment of his debts, by the order of any surrogate, or court of equity, in the same manner as lands whereof such decedent died seized. (Id. §§ 80, 81.)

Where a sale has been made, and a certificate given to the purchaser, but no deed executed pursuant to the statute, it is the duty of the sheriff, or, in case of his death or removal from office, of his under sheriff, to execute a deed of the estate so sold and remaining unredeemed, to any person or persons to whom such certificate shall have been duly assigned, or to the executors or administrators of any deceased assignee. (3 R. S. 5th ed. 657, § 91.)

It has been held that the legal estate of a judgment debtor is not divested by a sale of the land upon execution and the expiration of the time for redemption, unless the sale has been consummated, and the title vested in the purchaser, by a deed from the sheriff. (*Smith v. Colvin*, 17 Barb. 157; *Farmers' Bank of Saratoga County v. Merchant*, 13 How. Pr. 10.) Until a conveyance is executed by the sheriff, the title of a purchaser at a sale on execution is inchoate. By the simple act of purchase he acquires no legal estate in the land, but a right to an estate, which may be perfected by conveyance. The legal estate remains in the debtor, who, prior to the sheriff's deed, is entitled to the possession, and to the rents and profits. (Id.) Before conveyance, the purchaser cannot defend a possession obtained against the consent of the debtor. (Id.)

Upon a judgment recovered in a court of common pleas, an execution was issued out of the supreme court. The sheriff sold the lands of the defendant, thereon, and after the lapse of fifteen months, gave the purchaser a deed, which recited that the execution issued out of the supreme court. Subsequently, the county court granted an order amending the execution, and the sheriff's certificate and deed, so as to represent the execution as issuing out of the county court, instead of the supreme court. In pursuance of the order, the sheriff, after the deed had been delivered, and after his term of office had expired, altered the deed accordingly, without any

new execution or acknowledgment. *Held*, that purchaser at the sheriff's sale acquired no title to the premises. (*Carke v. Miller*, 18 Barb. 269.) *Held*, also, that the deed, after having been executed, and delivered to the purchaser, could not be thus altered, without destroying its validity, if it ever had any. (Id.)

A sheriff's deed of lands sold upon execution, executed after the time to redeem expires, relates back to that period. And where, before any deed is given, in pursuance of the sale, another person acquires all the interest of the purchaser, and procures the sheriff to execute and deliver a deed, the title passes thereby, although the purchaser be the grantee in the deed, and does not consent to the execution and delivery thereof. (*Wright v. Douglass*, 2 N. Y. 373.)

After a sale of lands upon execution, by a sheriff, and the execution of a conveyance to the purchaser, extrinsic evidence cannot be resorted to in order to establish the intent of the sheriff in making the sale. (*Mason v. White*, 11 Barb. 173.) The inquiry into the intent of the sheriff must be restricted to the terms used, and to the intent which the language of the instrument expresses. Extrinsic circumstances may be resorted to to explain the terms used in the deed, and to locate the premises described therein. But they can only be allowed for the purpose of establishing and carrying out the intent expressed in the deed; not an intent which the terms of the deed fail to express. (Id.) Nothing will pass, at a sheriff's sale, except what is then known and promulgated. (Id.)

A sheriff's deed to an assignee of the certificate of sale is valid, though the assignment has neither been proved, acknowledged, nor filed, according to the statute. (*The Bank of Vergennes v. Warren*, 7 Hill, 91.)

If the last day for redemption falls on Sunday, the party must redeem on Saturday. (*People ex rel. Pugsley v. Luther*, 1 Wend. 42.)

After a sale under a judgment, the right to redeem under such judgment is extinguished. (*Shepard v. O'Neil*, 4 Barb. 125; *Wood v. Colvin*, 5 Hill, 228; *Ex parte Stevens*, 4 Cowen, 133.)

Until the expiration of one year from the sale, the judgment debtor is entitled to the possession of real estate sold, and to the rents and profits thereof. (*Evertsen v. Sawyer*, 2 Wend. 507. See, also, *Marsh v. White*, 3 Barb. 518; *Schernerhorn v. Merrill*, 1 id. 511.)

The assignee of a sheriff's certificate of sale stands in the position of the original purchaser, and the redemption may be made from him. (*People v. Ransom*, 4 Denio, 145.)

A party alleging a redemption of premises from a sheriff's sale, by another person, is not bound to produce the sheriff's certificate, or the receipt indorsed thereon, in order to prove the payment of the money, upon the redemption. (*Stafford v. Williams*, 12 Barb. 240.)

All redemptions must be made at the sheriff's office of the county in which the sale took place; and it is the duty of the officer making the sale to attend at such office during the last day for making redemptions, and during the time thereafter in which such redemptions may be made. If the officer who made the sale is absent, then such redemption may be made to the sheriff, and, in his absence, to the under sheriff or deputy. (Laws of 1847, ch. 410, § 3.) If a redemption is made *before* the last day of the fifteen months, the officer to whom it is made must forthwith file in the clerk's office a statement thereof. (Id.)

As regards the real estate that is *exempt* from sale on execution, chapter 260 of the Laws of 1850, (§§ 1, 2,) provides that in addition to the property now exempt by law from execution, there shall be exempt by law from sale on execution, for debts hereafter contracted, the lot and buildings thereon, occupied as a residence and owned by the debtor, being a householder and having a family, to the value of \$1000. Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some one of them continuing to occupy such homestead, until the youngest child becomes twenty one years of age, and until the death of the widow. To entitle a party to this exemption, the conveyance must show that it is designed as a homestead; or a notice of such intent must be executed and recorded in the county clerk's office.

No waiver of such exemption is valid unless the same is in writing, duly subscribed and acknowledged. (Id. See *Robinson v. Wiley*, 15 N. Y. 489.)

Such premises are not exempt from levy and sale under execution issued in an action for a tort. (*Lathron v. Singer*, 39 Barb. 396.)

The exemption under this act is not a lien or incumbrance. (*Robinson v. Wiley*, 15 N. Y. 489;) nor does it run with the land, so that the debtor can transfer it to

another. (*Smith v. Brackett*, 36 Barb. 571; *Allen v. Cook*, 26 id. 374.) Hence the judgment will bind the premises, and be a charge thereon, which may be satisfied as soon as the exemption ceases. (Id.)

Land, not to exceed one-fourth of an acre, set apart, and a portion of which has been actually used, for a family or private burying ground, shall not be subject to levy and sale by execution or other legal process whatever; provided a description of said land shall have been made, certified and acknowledged in the manner required for the acknowledgment of deeds, and recorded in the county clerk's office. (Laws of 1847, chap. 85.)

Setting aside sale. In *Williams v. Williams*, (42 How. 411,) where a judgment creditor, who resided at a distance, was detained, by accident and without fault on his part, and did not arrive at the place of sale until some fifteen minutes after the sheriff had sold the property, upon one bid, for a nominal sum, subject to previous liens, the creditor not being represented by any one, and the sheriff having waited only ten minutes after the advertised time, before selling; it was held that the sale should be set aside, on a motion of the creditor; it appearing that he would otherwise lose his claim.

(13) RETURN OF EXECUTION.

Section 290 of the Code, provides that the execution shall be returnable within sixty days after its receipt by the officer, to the clerk with whom the record of judgment is filed.

It is the duty of the sheriff to return process to the proper office. If he does not do so personally, he must see that it is done. If it be sent by mail, he must pay the postage on the letter containing it. If the postage be not paid, the clerk is not obliged to take the letter from the post office. (*Jenkins v. McGill*, 4 How. Pr. 205.)

An execution may be returned by mail, where the sheriff, or other officer making the return lives in a different place from that in which the clerk's office is situated. (Laws of 1850, ch. 225, § 3.)

A sheriff may, on his own responsibility, return an execution within the sixty days, but he should never do so at the solicitation of the plaintiff; nor can the plaintiff compel a return within that time. (*Spencer v. Cuyler*, 17 How. Pr. 157; S. C. 9 Ab. 382. See, also, *Nagle v. James*, 7 Ab. 234; *Pudney v. Griffith's*, 6 id. 211; S. C. 15 How. Pr. 410; *Fake v. Edgerton*, 5 Duer, 681; S. C. 3 Ab. 229; *Morange v. Edwards*, 1 E. D. Smith, 414.) But the plaintiff, or his attorney, may give the sheriff permission to retain an execution in his hands beyond the return day, for the purpose of endeavoring to collect the amount. (*Humphrey v. Hathorn*, 24 Barb. 278.) What will amount to such permission. (Id.)

The omission of the sheriff to indorse and file the proper return is an irregularity, which will not affect the rights of the judgment creditor. (*Winebrener v. Johnson*, 7 Ab., N. S. 202.)

A sheriff is entitled to pre-payment of his fees before the service of process; but if he makes the service, and thus waives the right of prepayment, he cannot refuse to make a return because his fees have not been paid. (*Wait v. Schoonmaker*, 15 How.)

Executions, to be valid, need not state the time or place of their return. (*Fake v. Edgerton*, 5 Duer, 681; S. C. 3 Ab. 229.)

The mode of compelling a return to an execution is prescribed by rule 10 of the supreme court. At any time after the day when it is the duty of the sheriff to return an execution, by the provisions of the Code, any party entitled to have it returned, may serve upon him a notice to return the same within ten days, or show cause at a special term, to be designated in said notice, why an attachment should not issue against him.

If the sheriff fails to return the execution within ten days after the service of such notice upon him, or to show cause at the time and place mentioned in such notice, why he should not do so, an attachment will be issued.

A sheriff is bound, by law, to return an execution, according to the requisition of the statute, at his peril. If he neglects to do so, he renders himself liable to an attachment, or an action, at the election of the party aggrieved, and in all cases, the onus is on the sheriff to excuse the default. (*Wilson v. Wright*, 9 How. Pr. 459.) But where an order was made staying proceedings upon an execution in the hands of the sheriff, and the plaintiff's attorney served upon the sheriff notice requiring him to return the execution within ten days, or show cause why an attachment should not issue against him, for contempt, it was held that the sheriff was exonerated from the duty of returning the execution, if the stay continued in force up to the expira-

tion of the ten days; and that the plaintiff's attorney should furnish the sheriff with proof that the stay had been vacated, if he desired to bring the sheriff into contempt. (*People v. Canley*, 3 Ab. 215.)

(14) EXECUTION, GENERALLY; ORDER OF PRIORITY; DUTIES AND LIABILITIES OF SHERIFF.

The Code (§ 291) contains a general provision that, until otherwise provided by the legislature, the existing provisions of law not inconsistent with chapter 1 of title X, part 2, relating to executions and their incidents, the property liable to sale on execution, the sale and redemption thereof, the powers and rights of officers, their duties thereon, and the liability of their sureties, shall apply to the executions prescribed by that chapter.

Upon the receipt of any execution, it is the duty of the sheriff to indorse thereon the year, month, day and hour of the day, when he received the same. (2 R. S. 364, § 10.)

If there be several executions issued out of a court of record, against the same defendant, that which shall have been first delivered to an officer to be executed, shall have preference, notwithstanding a levy may be first made under another execution. (2 R. S. 366, § 14.) But in case of a levy and sale under such other execution, the sheriff should be governed in the distribution of the proceeds of such sale, by the order of priority in the delivery of the executions. That delivered first must be first satisfied. (*Peck v. Tiffany*, 2 N. Y. 451; *Rowe v. Richardson*, 5 Barb. 585. See *Kingston Bank v. Eltinge*, 40 N. Y. 391.)

If a judgment creditor, after issuing execution, instructs the sheriff to levy merely for the purpose of securing a preference, and to leave the debtor in possession of the property seized, such execution becomes *dormant*, and a subsequent execution in favor of another creditor, delivered to the sheriff before such instructions are revoked, has a priority of lien. (*Dunderdale v. Saurestre*, 13 Ab. 116; *Knover v. Barnard*, 5 Hill, 377.) It is well settled that if an execution be accompanied by instructions, from which the fair inference is that the debtor is to be left in possession of the property levied upon, and the sale thereof delayed until rendered necessary by the pressure of other process, the execution becomes dormant. It must not be used as a cover. (Id.) There must be an absolute intention to collect the judgment in the ordinary legal mode. Where a levy is made to secure a preference, and the debtor permitted to remain in possession, and to exercise control, no such intention can be said to exist. (Id.)

But a sheriff having several executions against the same debtor, received at different times, cannot be required to treat those first received as dormant, merely because the plaintiffs therein gave to the sheriff a written consent that he might adjourn a sale under them, for forty-seven days after their return day; there being no agreement giving to the debtor a delay, or the use or benefit of the property in the meantime. (*Paton v. Westerfelt*, 2 Duer, 362; S. C. 12 N. Y. Leg. Obs. 7.) Nor will the mere acquiescence of an execution creditor in the delay of a sheriff in selling property, where he does not *direct* such delay, render the execution dormant as to subsequent ones. But delays directed by the creditor will render the execution dormant as to subsequent purchasers and mortgagees, as well as executions. (*Thompson v. Van Vechten*, 5 Ab. 458.)

If a sale be made on a dormant execution, while another and later execution is in the sheriff's hands, such sale is not void. (*Richards v. Allen*, 3 E. D. Smith, 393; *Peck v. Tiffany*, 2 N. Y. 451.) In such a case, the plaintiff in the later execution may apply, on motion, to have the proceeds applied in satisfaction of his claim. (Id.; *Dunderdale v. Saurestre*, 13 Ab. 116.)

If an execution is suffered to lie dormant, the judgment does not cease to be a lien on the *real* estate of the judgment debtor. The doctrine in regard to dormant executions, refers to *personal* estate. (*Muir v. Leitch*, 7 Barb. 341.)

In case a levy is made on an execution issued upon a *bona fide* judgment, before the filing of a petition of a creditor to declare a debtor an involuntary bankrupt, the claim of the judgment creditor to the proceeds of a sale thereunder has precedence over the claim of the assignee in bankruptcy. (*Matter of Bernstein*, 34 How. 289.)

The plaintiff's attorney, in an action in which judgment is obtained, has no authority, as such attorney, to direct the sheriff what property to levy upon, on the execution. (*Averill v. Williams*, 4 Denio, 295.) But in *Root v. Wagner*, (30 N. Y. 9,) the court say: "The party in whose favor process issues, may give such instructions to the sheriff as will not only excuse him from his general duty, but bind him." (See *Godfrey v. Gibbons*, 22 Wend. 569; *McCrain v. McKeon*, 2 Duer, 645.)

A sheriff has no authority to levy on the property of any person except the one described in the execution. (*Farnham v. Huldreth*, 32 Barb. 277.) He is not bound to any greater degree of diligence, respecting goods in his custody, than a bailee for hire. (*Moore v. Westerfelt*, 25 How. 277; S. C. 21 N. Y. 103; 27 id. 234; 1 Bosw. 357; 9 id. 558.) The sheriff has only a special property in the goods levied on. (*Pierce v. King, snill*, 25 Barb. 631.)

A sheriff cannot enforce an execution to collect his fees, after the judgment has been paid. (*Craft v. Merrill*, 14 N. Y. 456.)

A receipt, given to the sheriff, for property levied on under an execution, estops the receiptor from denying that the thing belongs to the execution debtor, only as against the sheriff and the creditor in *that* execution. (*Whedon v. Champlin*, 59 Barb. 61.)

A sheriff should wait a reasonable time, before closing his sale; and if there are no bidders, or if the plaintiff is not represented, and any bid made is inadequate to the value of the property sold, the sheriff should postpone the sale. (*Williams v. Williams*, 42 How. 411.)

In case of the death of the sheriff, or his removal from office, the under sheriff must proceed to collect any executions which may have been in the hands of the sheriff at the time of his death or removal; and may execute a conveyance of any real estate sold thereunder. If there be no under sheriff, the court may appoint some suitable person to proceed on such execution. (2 R. S. 374, §§ 65, 66; *Sickles v. Hogetoom*, 10 Wend. 562.)

The sureties of a sheriff, on his official bond, are only liable for acts done *virtute officii*, and not for those committed *colore officii*. In the latter case, he is in the same position as though he acted without process. (*People ex rel. Kellogg v. Schuyler*, 5 Barb. 166; *Ex parte Reed*, 4 Hill, 572.)

In order to maintain an action upon the official bond of a deputy, the sheriff must show such a breach of duty as to occasion actual damage to the plaintiff. (*Rowe v. Richardson*, 5 Barb. 385.)

The fees of the sheriff, on execution, are fixed by the Revised Statutes, (2 R. S. 645,) and by the Code (§ 243.)

The attorney issuing an execution is liable to the sheriff for his fees, (*Birkbeck v. Stafford*, 23 How. 236; S. C. 14 Ab. 285; *Craft v. Merrill*, 14 N. Y. 456;) and for poundage thereon. (*Campbell v. Cothran*, 65 Barb. 534.) But when a judgment has been reduced in amount, by the court, on appeal, even after levy made upon an execution issued on it, the sheriff is entitled to his fees, or poundage, only on the amount to which the judgment has been reduced, where he has been notified of such reduction, and has collected only the reduced amount. (Id.)

The sheriff has no claim for poundage until he has made a levy. When that duty is performed, the sheriff is entitled to his compensation, although, before he sells, the parties settle the matter; and although the property is insufficient to satisfy the execution. (*People v. Adams*, 1 Code Rep., N. S. 226. See *Rathbun v. Woodworth*, 1 How. Pr. 151.)

A sheriff will not be allowed, on a sale under a second execution, to retain a surplus to pay his fees on a prior execution against the same parties. (*Bank of Whitehall v. Weed*, 8 How. Pr. 104.)

A sheriff has no authority to charge commissions for a sale by an auctioneer; nor can he charge for the services of a watchman to take care of the property. (*Lord v. Richmond*, 38 How. 173.)

For the neglect of a sheriff to execute and return an execution properly, he is liable to an action at the suit of the party aggrieved, for the damages sustained by him. (2 R. S. 440, § 77.) In such an action, the sheriff is *prima facie* liable for the debt, but may mitigate the damages by showing that the defendant had no property out of which the judgment could be collected. (*Swezey v. Lott*, 21 N. Y. 481; *Bowman v. Cornell*, 39 Barb. 69; *Humphrey v. Hathorn*, 24 id. 278; *Ledyard v. Jones*, 7 N. Y. 550. See, also, *Paige v. Willet*, 38 N. Y. 28; S. C. 5 Trans. Ap. 27; *Brookfield v. Rensen*, 4 Trans. Ap. 278.) Upon recovering judgment in such an action, the plaintiff may collect either that or the original judgment on which the execution was issued. A recovery against the sheriff is not a satisfaction of the original judgment. (*Baker v. Martin*, 3 Barb. 634.)

An appeal from the judgment, by the defendant, in the original action, will not affect the plaintiff's right to bring an action against the sheriff. (*Bowman v. Cornell*, 39 Barb. 69.)

As to stay of execution, on appeal to the court of appeals, see Code, §§ 335, *et seq.*

After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt will be a sufficient discharge for the amount so paid. (Code, § 293.)

(15) PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

These proceedings are authorized and regulated by the Code of Procedure; the provisions of which are, in brief, as follows:

By section 292, after an execution has been issued against property and returned unsatisfied, in whole or in part, the judgment creditor is entitled to an order from a judge, requiring the judgment debtor to appear before such judge and *answer concerning his property*.

And upon proof by affidavit of a party, or otherwise, to the satisfaction of the court, or a judge, that the judgment debtor has property which he unjustly *refuses to apply* towards the satisfaction of the judgment, such court or judge may, by an order, require the debtor to appear, at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the *application of the property* of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution.

The section also directs as to the manner of proceeding to examine the judgment debtor; the questions which he may be required to answer; and for the examination of witnesses in behalf of either party. Or, upon proof that there is danger of the debtor's leaving the state, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, the judge may issue a warrant requiring the sheriff to arrest him and bring him before such judge. Upon being brought before the judge, he may be exarquinod on oath, and ordered to enter into an undertaking that he will attend before the judge as he shall direct, and will not dispose of his property.

Section 293 provides that after the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and that the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Section 294 provides for the examination of debtors of the judgment debtor, or of any one of several debtors in the same judgment, or of those having property belonging to the judgment debtor.

The proceedings mentioned in this section, and in section 292, may be taken on the return of an execution unsatisfied, issued upon a judgment recovered in an action against *joint debtors*, in which some of the defendants have not been served with the summons, so far as relates to the joint property of such debtors.

By section 295, witnesses may be required to appear and testify on any supplementary proceedings, in the same manner as upon the trial of an issue.

Section 296 provides that the party or witness may be required to attend before the judge, or before a referee; if before a referee, the examination must be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, must be on oath; except that when a corporation answers, the answer must be on the oath of an officer thereof.

By section 297, the judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment, except the debtor's earnings within the last sixty days, if necessary for the use of a family supported wholly or partly by his labor.

By section 298, the judge may appoint a *receiver* of the property of the judgment debtor. No more than one receiver shall be appointed. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt from execution, and any interference therewith. Before such receiver shall be vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded in the office of the clerk of the county in which any real estate of the judgment debtor is situated.

Section 299 prescribes the proceedings upon a claim of another person to property alleged to belong to the judgment debtor, or a denial of his indebtedness to the judgment debtor.

By section 300, the judge may in his discretion, order a reference to a referee, to report the evidence or the facts, and may appoint such referee, in the first order, or at any time.

By section 301, the judge may allow to the judgment creditor, or to any party so

examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

Section 302 provides for the punishment of any person, party or witness for disobedience of any order of the judge or referee, duly served, as for a contempt. &c.

Nature of.] Supplementary proceedings under the Code are a summary and inexpensive substitute for the former creditor's bill, and the former practice applies, unless inconsistent with, or superseded by, the change made by the legislature. (*Smith v. Mahony*, 3 Daly, 285.) They are, to a certain extent, a more summary mode of exercising the same jurisdiction, formerly exercised by a creditor's bill in equity, combining a discovery of assets applicable to the payment of a judgment, and their application for the purpose, either by a subjection thereof to execution, or a specific appropriation of them. (*DeComeau v. The People*, 7 Rob. 498, 501.) They are not strictly legal, but equitable, proceedings. They are a substitute for the creditors' bills of the courts of equity, which may still be used to reach the equitable property of the judgment debtor. (*Pope v. Cole*, 64 Barb. 406, 409; *Carter v. Clarke*, 7 Rob. 43; *Lynch v. Johnson*, 48 N. Y. 27.) In both modes of proceeding, the judgment creditor being obliged to exhaust his remedy at law, in order to entitle him to equitable relief, the ultimate decision of the court or judge is, in both, *res judicata* upon the facts. (*Carter v. Clarke*, *supra*.)

The order for the examination of a judgment debtor, in supplementary proceedings, is a substitute for a creditor's bill, and is, in all its essential features, equivalent to a new suit. (*Driggs v. Williams*, 15 Ab. 477; *Taylor v. Persse*, 15 How. Pr. 417.)

The settled rules for proceedings under a creditor's bill may be considered as controlling, when not altered by the Code, or the practice under it. (*Orr's Case*, 2 Ab. 457; *Lilliendahl v. Fellerman*, 11 How. Pr. 528; S. C. 2 Ab. 155; *Davis v. Turner*, 4 How. Pr. 190.)

Proceedings supplementary to execution are proceedings *in the action*, not *special proceedings* as designated by § 3 of the Code (*Seelen v. Black*, 35 How. 369; *Bank of Genesee v. Spencer*, 15 id. 412; *Dresser v. Van Pelt*, id. 19; S. C. 6 Duer, 687.)

When proper. The provisions of the Code respecting the examination of judgment debtors, in these proceedings, were intended to give the creditor complete authority for a full and searching examination of the debtor, for the purpose of ascertaining particularly the amount and condition, as well as the disposition the debtor has made, or attempted to make, of his property. And by section 467 it is provided that its enactments are not to be strictly construed. (*Forbes v. Willard*, 54 Barb. 520; S. C. 37 How. 193.)

The right to the discovery, by the examination of the judgment debtor, is given whenever an execution has been returned unsatisfied, in whole or in part. The right is unqualified, and the only condition is the return of the execution unsatisfied. (*Owen v. Dupignac*, 9 Ab. 180; S. C. 17 How. Pr. 512.)

Where an execution has been duly issued and returned unsatisfied, in whole or in part, and the plaintiff has in nowise interfered, he may safely act upon the return of the sheriff in instituting proceedings supplementary to the execution. And the question whether there was property which the sheriff ought to have taken and sold, for the purpose of satisfying the judgment, cannot be raised. (*Fenton v. Flagg*, 24 How. Pr. 499; *Tyler v. Willis*, 33 Barb. 327; S. C. 12 Ab. 465; sub nom. *Tyler v. Whitney*. See, also, *Forbes v. Waller*, 25 N. Y. 430.) The propriety of the return can only be raised on a motion to set it aside. (*Id.*, and see *Sperling v. Levy*, 10 Ab. 426.)

Where the facts disclosed by the affidavit of the creditor are not such as to make a case within the statute, the officer acquires no *jurisdiction* over the subject matter; and the voluntary appearance and examination of the defendant cannot give him jurisdiction. (*Sackett v. Newton*, 10 How. Pr. 560; *DeComeau v. The People*, 7 Rob. 498.) That is only acquired by an affidavit containing the proper allegations. (*Id.*) The jurisdiction having been once acquired, however, it continues until the judge makes a *final* order in the matter. (*Webster v. Holbie*, 13 How. Pr. 382; *DeComeau v. The People*, *supra*.) Jurisdiction will be lost by a failure to continue the proceedings by regular adjournments, (*Carter v. Clarke*, 7 Rob. 490; *Squire v. Young*, 1 Bosw. 690;) unless the debtor appears without objection. (*Haves v. Barr*, 7 Rob. 452; *Amnidon v. Wolcott*, 15 Ab. 314.) A judge does not, by making an order appointing a receiver of the debtor's property, and filing the same, before the examination of the debtor is finally concluded, lose jurisdiction of his person;

nor his power to commit the debtor for contempt in refusing to answer questions on his further examination. (*People ex rel. Fitch v. Mead*, 29 How. 360.) The judge may appoint a receiver at any time while the proceedings are pending before him, in his discretion. (Id.) The powers conferred by § 294 are exercised by the judges not as a court, but as judicial officers. (*DeConeau v. The People*, 7 Rob. 498.)

The Code does not provide how a single judge of a court is to *regain* jurisdiction of these proceedings, after an order made by one, therein, affecting a substantial right, in a case where the proceedings have been dismissed, or discontinued, has been reversed, although a right of appeal from such an order is therein given. Hence, whether the general term can make a new order, requiring the judgment debtor to appear and be examined, or direct a single judge to make such an order, is a question not free from doubt. (*Harris v. Barr*, 7 Rob. 452.)

Supplementary proceedings founded upon a judgment obtained prior to the discharge of the defendant from his debts, under the two-thirds act, will be vacated, upon application; although the plaintiff produces affidavits to show that the discharge is invalid. (*Smith v. Paul*, 20 How. Pr. 97.) But where the plaintiff, during the pendency of the action, petitioned for his discharge as an insolvent debtor, and afterwards suffered a default to be taken, in the action, and a judgment for costs was rendered against him, before his final discharge as an insolvent, it was *held* that the plaintiff was not discharged from the judgment by the insolvent discharge. (*Truener v. Lay*, 2 Daly, 113.) As a general rule, the courts will not try the validity of an insolvent's discharge, by affidavits, on motion, but will put the party to an action upon the judgment, to determine the question. (Id.; *Smith v. Paul*, *supra*; *Stuart v. Salinger*, 14 Ab. 291; *Rich v. Salinger*, 11 id. 344; *Dresser v. Shufeldt*, 7 How. Pr. 85.) But where the only question is, whether a discharge, admitting it to be valid, operates to discharge a particular judgment, and there is no question as to the facts, the question can be disposed of upon motion. (*Gardner v. Lav*, *supra*.)

In the *World Co. v. Brooks*, (7 Ab., N. S. 212,) supplementary proceedings were stayed on the ground that the defendant had been discharged in *bankruptcy*, although the debt was not proved, and the defendant did not apply for a stay previous to judgment.

Supplementary proceedings cannot be taken against *corporations*, who are debtors. (*Sherwood v. Buffalo & N. Y. City R. R. Co.* 12 How. Pr. 136; *Hinds v. Canandaigua & Niagara Falls R. R. Co.* 10 id. 487; *Hammond v. Hudson River Iron, &c., Co.* 11 id. 29; S. C. 20 Barb. 378.)

After an execution has been returned unsatisfied, these proceedings may be had, notwithstanding the fact that another execution has been issued, upon which a levy has been actually made, (*Farquharson v. Kimball*, 18 How. Pr. 33; S. C. 9 Ab. 385, n.; *Fellerman's case*, 2 id. 155; 11 How. Pr. 528; *Sale v. Lawson*, 4 Sandf. 718;) unless it is clear that such levy will satisfy the execution. (Id.) And the proceedings may be continued, although the plaintiff has issued an *attachment* against the defendant, as a non-resident debtor. (*Hanson v. Tripler*, 1 Code Rep., N. S. 154; S. C. 3 Sandf. 733.)

Upon a judgment against *joint debtors*, where process has been served upon one only, supplementary proceedings may be had to enforce the judgment against those not served. (*Emery v. Emery*, 9 How. Pr. 130.) It seems that there is no case where an execution has been regularly issued and returned unsatisfied, in which the creditor may not proceed under § 292 of the Code, to obtain satisfaction of his judgment. (Id. per HARRIS, J.) It is not necessary to make a joint judgment debtor a *party* to supplementary proceedings; because the equities between the debtors themselves are not to be regarded. There can be no decree for contribution, as was formerly the case, under a creditor's bill. (Id.) In *Jones v. Lawlin*, (1 Sandf. 722; S. C. 1 Code Rep. 94.) it was *held* that the provisions of the Code apply to judgments against joint debtors entered before the Code, upon service of process upon one only, where the execution has been issued since the Code took effect. In *Dickerson v. Cook*, (16 Barb. 509,) where judgment was recovered and execution issued before the Code took effect, the proceedings were sustained.

To sustain supplementary proceedings upon a *justice's judgment*, the judgment must be for at least \$25. (*Butts v. Dickinson*, 20 How. Pr. 230; S. C. 12 Ab. 60; *Vulte v. Whitehead*, 2 Hilt. 596.)

Although the face of the judgment has been paid, yet, if there is interest due thereon, these proceedings may be had to collect such interest. (*Johnson v. Tuttle*, 17 Ab. 315.)

The *assignee* of a judgment may institute supplementary proceedings thereon,

although the judgment was assigned to him after the execution was returned unsatisfied. (*Orr's case*, 2 Ab. 457; *Frederick v. Decker*, 18 How. Pr. 96; *Ross v. Clusman*, 3 Sandf. 676; S. C. 1 Code Rep., N. S. 91.) These proceedings are prosecuted in the action in which the judgment was recovered; and the assignee of the judgment may conduct them in the name of the plaintiff of record. (*Ross v. Clusman*, *supra*.)

Supplementary proceedings, and an action to set aside an assignment by the debtor as fraudulent, are so entirely distinct and unlike that both may be proceeded with, at the same time. (*Taylor v. Persse*, 15 How. Pr. 417.)

The Code requires that the execution be issued to the county where the judgment debtor resides, or has a place of business; but in the latter case, it need not necessarily be the county where his principal place of business is located. (*McEwan v. Burgess*, 15 Ab. 473; S. C. 25 How. 92. See *Belknap v. Hasbrouck*, 13 Ab. 418 n.) If issued to the county "where the debtor resides," it must be to the county where he resides at the time the execution is issued. (*Tesup v. Jones*, 32 How. 191; *Bingham v. Distrow*, 5 Trans. Ap. 198; S. C. 14 Ab. 251; 37 Barb. 24.) In *Appleby v. Barr*, (2 Rob. 689,) where a judgment roll was duly filed in the clerk's office, but an entry was not actually made in the judgment book, until after execution issued; it was held that it was a substantial compliance with the statute, as between the parties to the judgment; and the court refused to set aside supplementary proceedings instituted on such judgment.

These proceedings cannot be taken against a foreign consul. The objection to the jurisdiction of the court is fatal at any stage of the proceedings. (*Griffin v. Dominguez*, 2 Duer, 656; S. C. 11 N. Y. Leg. Obs. 285.)

The right of examination on supplementary proceedings, its object and scope, are all given by section 292 of the Code; and such right is not limited by section 299. (*Lathrop v. Clapp*, 40 N. Y. 328; S. C. 23 How. Pr. 423.)

The issuing of an execution by the clerk of the city and county of New York to one of the marshals of the city, and its return wholly unsatisfied, are not sufficient to sustain supplementary proceedings. Section 292 of the Code authorizes such proceedings only after an execution has been issued to, and returned by, the sheriff of the county. (*Silverman v. Henant*, 40 How. 88.)

If supplementary proceedings are voluntarily withdrawn by agreement of parties, after an examination, but prior to any order having been made, they are no bar to subsequent proceedings of that kind, in the same case. (*Carter v. Clarke*, 7 Rob. 43, 490.) The rule that the former proceeding or action must have been terminated by a decree or order, on the merits, before it can become *res judicata*, should prevail as to examinations on supplementary proceedings. If the proceedings first commenced are voluntarily discontinued, they should not be held conclusive that the debtor had no property when they were commenced; and his examination on like proceedings subsequently commenced, should not be confined to property acquired since the former examination. (Id.)

A creditor having commenced supplementary proceedings may, before the appointment of a receiver, abandon them, and commence a creditor's suit. (*Bennett v. McGuire*, 58 Barb. 625.)

At what time to be instituted. As to the time within which supplementary proceedings may be instituted: the words of § 292 are "any time" after the return of an execution unsatisfied. In *Miller v. Rossman*, (15 How. Pr. 10,) it was held that they might be instituted after the expiration of five years, without leave of the court obtained. And in *Owen v. Dupignac*, (9 Ab. 180,) where an execution was issued and returned unsatisfied ten years before supplementary proceedings were commenced, it was held that the lapse of time did not take away the creditor's right.

In all cases, the creditor must first issue his execution. If he fails to reach the debtor's property by that means, he may, under the first subdivision of § 292, upon the return of an execution unsatisfied, have an order requiring the debtor to submit to an examination for the purpose of discovering his property. (*Sackett v. Newton*, 10 How. Pr. 560.) Under the second subdivision, if, after the execution has been issued and before it has been returned, the creditor can prove, to the satisfaction of the judge, that the debtor has property not subject to levy, or which is so kept by the debtor that it cannot be clearly identified, and with ordinary diligence reached by execution, the creditor may have the same order; upon which the same proceedings may be had as are given on the return of the execution. (Id.) But where it appears that a defendant in an execution not returned is in possession and occupation of a farm of land, with stock and farming implements thereon, which he claims belongs to

his wife, the creditor has no authority to institute proceedings under § 292. He must first exhaust his remedy by execution; because the property is tangible and affords unequivocal evidence of title and possession. (*Id.*)

Upon the proper return of the execution, by the sheriff, at any time within the sixty days, supplementary proceedings may be commenced. (*Livingston v. Clearland*, 5 How. Pr. 393.) If the order for examination is obtained before the return of the execution, the proceedings will be dismissed. (*Engle v. Bonneau*, 2 Sandf. 679.) The first clause of section 292 provides for the issuing of the order requiring the debtor to appear and answer concerning his property, *after an execution has been returned unsatisfied*; thus plainly implying that, in ordinary cases, the creditor must exhaust his remedy by execution, before resorting to this proceeding. (*Sackett v. Newton*, 10 How. Pr. 560.) But, in *Jones v. Porter*, (6 How. Pr. 286,) where the affidavit was made by the plaintiff, and the order obtained in good faith, (the execution, returned *nulla bona*, having been delivered to a messenger to be filed,) two hours before the actual filing of the return, it was *held* that fractions of a day would not be considered, in such a case; and the court refused to set aside the proceedings.

The sheriff may return the execution within sixty days; but it *seems*, it must appear that it is without collusion with the plaintiff or his attorney, in order to make such return the foundation of supplementary proceedings. (*Forbes v. Waller*, 25 N. Y. 430; S. C. 25 How. 166; 4 Bosw. 475, sub nom. *Forbes v. Logan*; *Tyler v. Whitney*, 12 Ab. 465; S. C. 33 Barb. 327, sub nom. *Tyler v. Willis*; *Farquharson v. Kimball*, 9 Ab. 385 n; S. C. 18 How. Pr. 33.) If the plaintiff procures the return of the execution within the sixty days, these proceedings cannot be maintained, upon such return. (*Spencer v. Cuyler*, 17 How. Pr. 157; S. C. 9 Ab. 382.)

Affidavit on which to obtain order.] The affidavit on which a plaintiff applies for an order for examination of the defendant, in supplementary proceedings, must state that the judgment has been docketed. (*Havis v. Barr*, 7 Rob. 452.) When the affidavit is made by an *agent*, it must show that the agent is authorized to institute that particular proceeding. Mere agency implies nothing. The *nature* of the agency must be stated. (*Id.*)

It must specify an existing judgment. If it is improperly described—as, if a judgment docketed against “Ira Weed and Mrs. Weed” is described as a judgment against “Ira Weed and Mary Weed,” it is a fatal objection, affecting the jurisdiction of the judge, and cannot be obviated by amendment. The order founded on such an affidavit is void. (*Kennedy v. Weed*, 10 Ab. 62.) The affidavit need not show that a transcript of the judgment was duly filed in the county to which the execution was issued. (*Bingham v. Disbrow*, 5 Trans. Ap. 198. But see *Havis v. Barr*, 7 Rob. 452, *contra.*) Except in proceedings upon judgments of the justices’ or district courts. (*Kennedy v. Thorp*, 3 Ab. N. S. 131; S. C. 2 Daly, 258.) It is sufficient if the affidavit states that the execution was issued to the county where the judgment debtor resides; meaning where he resided at the time of issuing such execution. (*Bingham v. Disbrow*, *supra.*)

The creditor is not required to show that the defendant has property, before he is entitled to the order. (*Hatch v. Weyburn*, 8 How. Pr. 163; *Hough v. Kohlin*, 1 Code Rep., N. S. 232.) But the execution should be described as an execution against property; as all the facts which confer jurisdiction must appear affirmatively. (*People ex rel. Williams v. Hulburt*, 5 How. Pr. 446; S. C. 9 N. Y. Lög. Obs. 245; 1 Code Rep., N. S. 75. See *Arthur v. Lansburgh*, *id.* 211.)

The *ex parte* affidavit of the judgment creditor is sufficient *proof*, within the meaning of the statute, that the execution has been returned unsatisfied. (*Conway v. Hitchins*, 9 Barb. 378.)

In proceedings by the *assignee* of a judgment, he should show, by his affidavit that he has a right to proceed upon the judgment. (*Frederick v. Decker*, 18 How. Pr. 96; *Lindsau v. Sherman*, 1 Code Rep., N. S. 25; S. C. 5 How. Pr. 308; *Hough v. Kohlin*, 1 Code Rep. N. S. 232. See *Orr’s Case*, 2 Ab. 457.)

The objection that the affidavits are untrue should be raised by motion to set aside the proceedings. (*Hilton v. Patterson*, 18 Ab. 245.) An objection to the affidavits cannot be raised on appeal from an order appointing a receiver, where the appeal papers do not show that the objection was taken in the first instance. The proper course is to move to vacate the original order. (*Union Bank of Troy v. Sargeant*, 53 Barb. 422; S. C. 35 How. 87.)

An affidavit is not essential to give jurisdiction to make an order under section 292, subdivision 1, of the Code. (*Scott v. Duffee*, 59 Barb. 390, n.)

Where the affidavit for instituting proceedings under section 294, after reciting

the judgment, and the issuing of execution thereon, stated that a person named, "has property of the judgment debtor, and is indebted to him in an amount exceeding ten dollars," the order was granted. (*Seeley v. Garrison*, 10 Ab. 460.) But in *Lee v. Heirterger*, (1 Code R. 38,) where the language of the affidavit was, "has property of the judgment debtor, or is indebted to him," it was held insufficient. The language must be positive either that the person "has property of the judgment debtor; or "that he is indebted to him;" or that "he has property and is indebted to him." (Per *Edmonds*, J. id.)

In *Brett v. Browne*, (1 Ab. N. S. 155,) where the affidavit stated only that a third person "has property of the judgment debtor," and the objection was raised that it ought to have stated that the value of the property exceeded \$10; it was held that the limitation applied only to the indebtedness, and not to the value of the property, and that such value need not be stated.

Where an order, made by a county judge, requiring a judgment debtor to appear before a referee and answer on oath, concerning his property, recites, expressly, that it has been made to appear, before such judge, "by the affidavit" of one of the attorneys of the plaintiff, that judgment had been recovered in the action, that execution thereon, against the property of the defendant had been duly issued; and that said judgment remained wholly unpaid; such recital is clearly sufficient *prima facie* to show that such proof had been made by a regular affidavit. It is a presumption which the law raises in support of judicial authority and proceedings. (*Rugg v. Spencer*, 59 Barb. 383.)

The affidavits on which an order for examination is granted need not be served with the order. (*Utica City Bank v. Buell*, 9 Ab. 385; S. C. 17 How. Pr. 498; *Farrucharson v. Kimball*, 18 id. 33; S. C. 9 Ab. 385, n.; *Green v. Bulard*, 8 How. Pr. 313.)

Order for examination, by whom granted; vacating.] The jurisdiction of a justice of the supreme court is co-extensive with the state; so that he may make the order, in these proceedings, in any part of the state, without reference to the residence of the debtor. (*Bingham v. Distrow*, 37 Barb. 24; S. C. 14 Ab. 251.)

The order must be made by a judge, and not by the court, as such. (*Bitting v. Vandenberg*, 17 How. Pr. 80; *Miller v. Rossman*, 15 id. 110. And see *Haves v. Barr*, 7 Rob. 452.) It is properly made at chambers. (*Dresser v. Van Pelt*, 15 How. Pr. 19; S. C. 6 Duer, 687; *Hulsaver v. Wiles*, 11 How. Pr. 446.) The fact that the order was made while the judge was holding a special term, does not render it void. (Id.)

The recorder of Troy has jurisdiction of supplementary proceedings instituted in actions in the supreme court. (*Hayner v. James*, 17 N. Y. 316.)

A justice of the supreme court has no jurisdiction to make an order in these proceedings, on a judgment of the county court. (*Blake v. Locy*, 6 How. Pr. 108; S. C. 1 Code Rep., N. S. 406; *Stright v. Vose*, id. 79, n.)

The city judge of Brooklyn has no jurisdiction over supplementary proceedings, in an action pending in the supreme court. (*Cushman v. Johnson*, 13 How. Pr. 495; S. C. 4 Ab. 256.) Nor has a county judge any power to make an order for the examination of a third party, in supplementary proceedings upon a judgment recovered in the supreme court, unless an execution has been issued upon such judgment to his county. (*Terry v. Hultz*, 8 Ab., N. S. 109; S. C. 39 How. 169.)

If a debtor is served with an order apparently valid, he is bound to obey it, or to move, at once, for a correction. He will not be justified in disregarding an order because it is erroneous. (*Hilton v. Patterson*, 18 Ab. 245; *Artic Ins. Co. v. Hicks*, 7 id. 204.)

If for any cause the order has been improvidently granted, the judge, at chambers, on the return of the order, may vacate it on the defendant's motion. (*Courtois v. Harrison*, 1 Hilt. 109; S. C. 3 Ab. 96; 12 How. Pr. 359.) The proper mode of getting rid of the order is by motion to the court, and such motion may be made either to the judge who granted the order, or to another. (*Bank of Genesee v. Spencer*, 15 How. Pr. 14. 412; *Blake v. Locy*, 6 id. 108; S. C. 1 Code Rep., N. S. 406; *Lindsay v. Sherman*, 5 How. Pr. 308; S. C. 1 Code Rep., N. S. 25. See *Conway v. Hitchins*, 9 Barb. 378.)

Form of order; validity and service. The order must direct the debtor to appear in the county to which the execution was issued. (*Bingham v. Distrow*, 5 Trans. Ap. 198; S. C. 37 Barb. 24; 14 Ab. 251.) An order which omits to state the place at which the debtor is to appear, is fatally defective. (*Kelly v. Fernu*, 31 How. 95.) After the original order has been executed, and the proceedings reported to the

judge who made the order, such judge may direct the debtor to appear before him at a place in another county than that in which such debtor resides. (*Crouse v. Wace*, 33 How. 337.)

Prior to the amendment of § 300 of the Code, in 1857, the court held, in *Hatch v. W. Jburn*, (8 How. Pr. 163,) that the order must require the debtor to appear first before the judge granting it. But the present practice is to appoint a referee, before whom the debtor must appear and answer, in the first instance. (*Hulsaver v. Wiles*, 11 How. Pr. 446.)

If the order be made returnable before "one of the justices of the court," instead of before the judge who made the order, it is an irregularity, which the debtor will waive by neglecting to object thereto on the return day, and by failing to appeal from an order denying his motion to quash the proceedings. (*Ammidon v. Wolcott*, 15 Ab. 314; *Dresser v. Van Pelt*, 15 How. Pr. 19; S. C. 6 Duer, 687; *Viburt v. Frost*, 3 Ab. 119; S. C. 5 Duer, 672.)

The original order may combine the relief authorized by sections 292, 294 and 296 of the Code, if the proof is such as to warrant it. (*Hulsaver v. Wiles*, 11 How. Pr. 446.)

An order, in these proceedings, which is returnable on Sunday is void; and the debtor is not bound to obey it. (*Arctic Fire Ins. Co. v. Hicks*, 7 Ab. 204.)

If the debtor is served with an order apparently valid, he is bound to obey it, or to move, at once, for a correction. He will not be justified in disregarding an order because it is erroneous. (*Hilton v. Patterson*, 18 Ab. 245; *Arctic Fire Ins. Co. v. Hicks*, 7 Ab. 204.)

An order was formally entered, in supplementary proceedings, as at special term, declaring that the examination of the defendant should "be confined to the fact as to whether the defendant had acquired any property, real or personal, since the date of his examination on a former order;" and that all questions put to him on the examination in question, prior to the date of such former examination, were overruled. It appearing that the former proceeding was never terminated by a decision, but was voluntarily abandoned, by the consent of both parties; it was held that even if such order was an order in the action, the exclusion, by it, of the questions, was improper. (*Carter v. Clarke*, 7 Rob. 490.)

The Code makes no provision as to the time, mode or manner of the service of these supplementary orders; nor how the proof of such service shall be manifested, or made to appear. (*Utica City Bank v. Buell*, 9 Ab. 385; S. C. 17 How. Pr. 498.) They may be served by any person. (*Id.*) The order is not directed to the sheriff, and contains no injunction to him to do or return anything; nor by its terms or in its nature is any official return required to be made regarding it. Nor is there any statute which requires the sheriff to make the service or return, or that makes a return, when made, evidence of the facts stated therein. (*Id.*) Consequently, the sheriff's certificate is not sufficient. The service should be proved by affidavit.

The original order should be exhibited to the defendant, at the time of the service; but if he does not appear and take the objection, he will be deemed to have waived it. (*Billings v. Carver*, 54 Barb. 40.)

In *Johnson v. Tuttle*, (17 Ab. 315,) an order directing the debtor to appear was regularly served, and the referee being absent, another order was made, directing the debtor to appear on a future day. The justice, on an affidavit of the plaintiff's attorney, made an order directing substituted service, as prescribed by § 409, of the Code. The court, upon appeal, held that the service was sufficient, and that it might have been made without the order authorizing it.

An appearance merely to ask an adjournment is a waiver of all defects in the proof of service. (*Utica City Bank v. Buell*, 17 How. Pr. 498; S. C. 9 Ab. 385.)

Where an order for examination recites, expressly, that it had been made to appear, before the judge granting it, "by the affidavit" of one of the attorneys of the plaintiff, that judgment had been recovered, in the action; that execution thereon, against the property of the defendant, had been duly issued; and that said judgment remained wholly unpaid; such recital is sufficient, *prima facie*, to show that such proof had been made by a regular affidavit. It is a presumption which the law raises, in support of judicial authority and proceedings. (*Rugg v. Spencer*, 59 Barb. 383.) The order speaks for itself; and as all the necessary facts, to constitute it a regular and valid order, appear upon its face, it will be deemed to be such, until the contrary is made to appear. (*Id.*)

[*Lien of order.*] The service of the order for examination, under sections 292 and 294, takes the place of the commencement of a suit, under the old system, and gives

the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of the debtor. (*Lynch v. Johnson*, 48 N. Y. 27.) But such service does not create any lien as against other creditors, who discover and levy upon property of the debtor. (*Becker v. Torrance*, 31 N. Y. 631. See *Conger v. Sands*, 19 How. Pr. 8.) Nor as against a creditor who obtains a judgment applying certain equitable assets of the debtor by way of pledge, to the payment of the claim of such creditor. (*Voorhees v. Seymour*, 26 Barb. 569.)

The order does not create a lien upon future earnings; nor will an order be made applying such moneys. (*Woodman v. Goodenough*, 18 Ab. 265. See *Potter v. Low*, 16 How. Pr. 549.)

A final order of a judge, in proceedings under § 294, requiring the debtor of a defendant to pay his debt to the plaintiff renders this lien of the plaintiff effectual, and payment, or liability to pay, in pursuance of such order, is a defence to the debtor, in an action against him by the creditor, or by an assignee who is not shown to be a *bona fide* purchaser for value of the claim, prior to the accruing of the lien. (*Lynch v. Johnson*, 48 N. Y. 27.)

Examination of debtor; adjournments.] If, upon the return of the order the referee is absent, the judge who made the original order may appoint another referee or another hearing before the same referee. (*Allen v. Starring*, 26 How. 57.) In case of the referee's absence, the debtor should wait a reasonable time for his arrival. (*Reynolds v. McElhone*, 20 How. Pr. 454; S. C. 26 id. 57, n.)

A postponement, for any reason whatever, should be made by the referee, and not by the judge who made the order. (*Mason v. Lee*, 23 How. Pr. 466. See *Allen v. Starring* 26 id. 57; *Squire v. Young*, 1 Bosw. 690.)

By a failure to adjourn the proceedings from day to day, all jurisdiction will be lost. (*Carter v. Clarke*, 7 Rob. 490; *Hawes v. Barr*, id. 452; *Ammidon v. Wolcott*, 15 Ab. 314; *Squire v. Young*, 1 Bosw. 690;) unless the debtor appears without objecting. (*Hawes v. Barr*, *supra*.) Supplementary proceedings before a county judge cannot be adjourned by him, except by consent of parties. (*People ex rel. Williams v. Hulbert*, 9 N. Y. Leg. Obs. 245; S. C. 1 Code Rep., N. S. 75; 5 How. Pr. 446.)

The provisions of the Code, respecting the examination of judgment debtors, in these proceedings, were intended to give the creditor complete authority for a full and searching examination of the debtor, for the purpose of ascertaining particularly the amount and condition, as well as the disposition the debtor has made, or attempted to make, of his property. And by section 467 it is provided that its enactments are not to be strictly construed. (*Forbes v. Willard*, 54 Barb. 520. See *Le Roy v. Halsey*, 1 Code Rep., N. S. 275; S. C. 1 Duer, 589; 11 N. Y. Leg. Obs. 252.) The object intended by the amendment to § 292, made in 1863, providing that the debtor shall not "be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property, for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution," was, to render the judgment debtor liable to answer questions concerning the disposition he might have made of his property, without any restriction whatsoever, on account of the purposes for which he might have disposed of it. (*Id.*) It could not have been the intention to restrict the inquiry to cases where formal instruments of conveyance or assignment had been made and delivered by him; but was to include within it all conveyances, assignments and transfers whatever, which the debtor may in any manner have made of his property. And it seems to have been the intention to extend the right of examination to cases where the transfer should prove to have been made by an actual delivery, following or accompanying an agreement by parol. (*Id.*) Hence, under this amendment, the debtor may properly be required to answer fully concerning the disposition he may have made of his property, whether it has been done by deed, writing or otherwise; notwithstanding the fact that his examination will show that he has been guilty of a crime in doing it; and without any qualification or restriction arising out of the nature or character of such crime. (*Id.*) In discovering the facts in reference to the sources from, and the means by which he may have acquired property, the debtor may be compelled (if he is required to answer) to give evidence tending to show that he has been guilty of a criminal offence different from those falling within the protection of the amendment of 1863. This he cannot properly be required to do, however, unless the case is brought within the 5th subdivision of section 292 of the Code. (*Id.*) The provision of the Code, that no person shall be excused from testifying on the ground that his

answer will tend to convict him of a fraud, is not to be limited simply to a fraud in the disposition of his property, but extends to any fraud whatever. (*Id.*)

Every question tending to throw light on the matter of property bound by the execution, is pertinent. (*LeRoy v. Halsey*, 1 Code Rep., N. S. 275; S. C. 1 Duer, 589; 11 N. Y. Leg. Obs. 252.) The extent of the inquiry is, in a great measure, left to the good sense of the officer who conducts it. (*Id.*) A general statement, by the debtor, that he has no property, is not sufficient. He must answer in detail. (*Id.*; *Brown v. Morgan*, 3 Edw. 2.8.) But questions will not be allowed which do not tend to show that the debtor is possessed of, or entitled to, property which may be applied on the judgment. (*Hunt v. Enoch*, 6 Ab. 212.)

In a proper case, the debtor will be allowed to explain his position, and will not be required to answer *yes*, or *no*. (*LeRoy v. Halsey*, *supra.*) Where a witness, being asked to specify the incumbrances on his property, some six months previous to the examination, replied, in substance, that he could not do so, it was *held* that the answer was not necessarily evasive. (*Wicker v. Dresser*, 14 How. Pr. 465.)

Where a witness declines to answer questions propounded to him, on the ground that his answers will have a tendency to criminate him, it is the province of the court to determine whether that will probably be the effect of the answers, if required to be given; and if not, he should be required to answer the questions. (*Forbes v. Willard*, 54 Barb. 520; S. C. 37 How. 193.)

The creditor need not examine the debtor, unless he chooses to do so. The whole examination may be made by means of witnesses. (*Graves v. Lake*, 12 How. Pr. 33.)

Where it is shown that the debtor has transferred his property to a witness, the latter is bound to answer all questions touching the transfer, and its consideration. The examination is governed by § 292, and is not regulated by § 299. of the Code. (*Lathrop v. Clapp*, 40 N. Y. 328.) In general, the witness is bound to answer all questions pertinent to the subject of the examination; and is not to be excused from answering because he sets up a claim to the property. (*Sanford v. Carr*, 2 Ab. 462.) The rules are the same as for the examination of the debtor. (*Id.* See *Le Roy v. Halsey*, 1 Code Rep. N. S. 275; S. C. 1 Duer, 589; 11 N. Y. Leg. Obs. 252.) If it appears from the examination, that property has been sold for less than its value, the name of the purchaser may be asked; but if it has been sold for its full value, an inquiry as to his name is not pertinent. (*Williams v. Carroll*, 2 Hilt. 438.)

The wife of the debtor may be examined, concerning the property of her husband. (*Lockwood v. Worstell*, 15 Ab. 430 n.; Laws of 1857, ch. 887; *O'Brien's petition*, 24 Wis. 547 But see *Andrews v. Nelson*, 7 Ab. 3. n.; *Copous v. Kauffman*, 8 Paige, 583.)

The debtor is entitled to be examined, in his own behalf, in the same manner as a witness. (*Le Roy v. Halsey*, *supra.*) But in *Corning v. Tooker*, (5 How. Pr. 16,) it is *held* that the party examined is not entitled to a cross-examination, but that he may have the advice of counsel, in framing his answers. It is *held*, in the same case, that a person not a party to the proceeding should not be allowed to appear by counsel. (See, also, *Sanford v. Carr*, 2 Ab. 462.)

When, in these proceedings, an insolvent's discharge is set up, it operates as a bar, and further proceedings should be suspended until the validity of such discharge is determined. (*Coursen v. Dearborne*, 7 Rob. 143.)

It is in the discretion of the referee to allow corrections or explanations to be made by a party to these proceedings after the examination has been concluded and signed. If he allows such correction, it should be made by a supplemental statement, leaving the original unchanged. (*Corning v. Tooker*, 5 How. Pr. 16.)

The right of discovery or examination, in supplementary proceedings, is merely auxiliary to the relief, and the first proceeding or action must be terminated, by a decree or order on the merits, before it can become *res judicata* that the defendant had no property when it was commenced. (*Carter v. Clarke*, 7 Rob. 490.) An appeal does not lie, to the general term, from the decision of a judge, overruling questions put to a judgment debtor, on his examination. That is entirely a proceeding before a judge, and not before a court. (*Id.*)

It is no objection to proceeding in the examination of the judgment debtor, after the return of an execution unsatisfied, that another execution has been issued, and levied on personal property; unless it is clear that such levy will be effectual to satisfy the judgment. (*Sale v. Lawton*, 4 Sandf. 718.) The constitution is not violated by the power given to a county judge to make an order for the examination of the judgment debtor, after the return of an execution. (*Id.*)

Right of any debtor, under § 293, to pay execution issued against property of his creditor. A voluntary payment, by a judgment debtor, of an execution against him, to the sheriff, under § 293, cannot prejudice a prior assignee of the judgment, in good faith. (*Richardson v. Ainsworth*, 20 How. Pr. 521; *Lyman v. Cartwright*, 3 E. D. Smith, 117; *Robinson v. Weeks*, 6 How. Pr. 161; S. C. 1 Code Rep., N. S. 311.) And the fact that an order was issued and served on the judgment debtor, under § 294, but by consent was withdrawn before the payment by the debtor, makes the payment none the less voluntary. (*Id.*)

Where a party volunteers to pay the debt of his creditor, without his request or consent, in the special manner provided in § 293, in order to avail himself of such payment, in an action, he must set it up specially, in his answer. (*Calkins v. Packer*, 21 Barb. 275.) If the payment is made under orders pursuant to § 294, the proceedings resulting in such payment having been instituted and carried through, after a summons is issued in an action for the debt, the defence of such payment can only be pleaded on special application to the court. (*Waldheim v. Bender*, 36 How. 181.)

Where a person indebted to a judgment debtor pays the amount of his debt to a sheriff holding an execution against the judgment debtor, and takes the sheriff's receipt, as authorized by § 293 of the Code, in order to have such payment allowed to him in an action brought against him to recover the amount of his indebtedness, he must prove the judgment upon which the payment was made, by the production of the record thereof, or of a certified copy of such record. It is not sufficient to produce a certified copy of the transcript of a justice's judgment, filed in the clerk's office of a different county from that in which the judgment was docketed. (*Handly v. Greene*, 15 Barb. 601.)

A sheriff having collected money on an execution issued upon a judgment in favor of B., has no right, as against the assignee of B., to levy upon such moneys in his hands by virtue of, or, upon his own motion to apply them to the payment of, an execution against B., received by him, although he has no notice of the assignment. And if he make such application, he will, nevertheless, be compelled to account to such assignee for the full amount of such moneys. (*Baker v. Kemworthy*, 41 N. Y. 215.)

Proof of payment to the sheriff, after the commencement of an action for the recovery of a debt, and issue joined therein, of a part of such debt, by the defendant therein, under § 293, and of the application thereof upon an execution in his hands, issued against the plaintiff, is simply proof of payment, and should be pleaded. (*Hall v. Olney*, 65 Barb. 27.)

Examination of debtors of judgment debtor, &c., under § 294.] Proceedings under section 294 of the Code may be taken without any proceeding against the judgment debtor, under § 292, for his examination. The proceedings authorized by these two sections, respectively, are independent of each other. (*Gibson v. Haggerty*, 37 N. Y. 555; S. C. 15 Ab. 406; 23 How. Pr. 260; 5 Trans. Ap. 143; *Sherwood v. Buffalo & N. Y. City R. R. Co.* 12 How. 138. See, also, *De Comeau v. The People*, 7 Rob. 498, 502; *Holmes v. Jordan*, 15 Ab. 410, n.; *Parker v. Hunt*, id.; *Seeley v. Garrison*, 10 id. 460; *Foster v. Prince*, 8 id. 407; S. C. 18 How. Pr. 258.) But there are some decisions to the effect that the proceedings authorized by these sections, respectively, cannot be had independently of each other. (*Lord v. Ford*, 15 Ab. 409, n.; *Sherwood v. Buffalo & N. Y. City R. R. Co.* 12 How. Pr. 136; *Hinds v. Canandaigua & Niagara Falls R. R. Co.* 10 id. 487.)

Whether notice shall be given to the judgment debtor of the proceedings under § 294, rests in the discretion of the judge. (*Gibson v. Haggerty*, *supra*; *De Comeau v. The People*, 7 Rob. 498; *Lynch v. Johnson*, 46 Barb. 56; *Ward v. Beebe*, 17 Ab. 1; S. C. 15 id. 373; *Seeley v. Garrison*, 10 id. 460; *Foster v. Prince*, 8 id. 407; *Sherwood v. Buffalo & N. Y. City R. R. Co.* 12 How. Pr. 138.) The proceedings may be instituted, conducted and completed without the knowledge of the judgment debtor. (*Id.*) And the judgment debtor, not being summoned, or informed of the proceedings, by notice, is no party to them, and is not even entitled to appear therein by counsel, of his own motion. (*De Comeau v. The People*, *supra*; *Corning v. Tooker*, 5 How. Pr. 16.)

To warrant the examination of a person understood to have property belonging to the judgment debtor, in his possession, it is not necessary that the execution should issue to the county where the debtor resides. It suffices that the execution is to the county where the property is expected to be found, and where the person

resides who is charged with having it in his possession. (*The People v. Norton*, 4 Sandf. 64.) In *Foster v. Prince*, (18 How. Pr. 258; S. C. 8 Ab. 407,) where execution was issued to the county of Queens, where the judgment debtors resided, and was returned unsatisfied, it was held that a justice of the supreme court in the city of New York, had jurisdiction, under § 294, to make an order compelling a debtor to the judgment debtor, residing in said city, on examination, to apply the property of the judgment debtor in his hands, or to make payment of the debt to the judgment creditor, upon his judgment. It seems that the judgment debtor is not entitled to notice of such examination. (Id.; *De Conrau v. The People*, 7 Rob. 502; *Sherwood v. Buffalo & N. Y. City R. R. Co.* 12 How. Pr. 138.)

It is not necessary that the execution should be returned, before making the order for the examination under this section. (*Gilson v. Haggerty*, 37 N. Y. 555, 558; S. C. 5 Trans. Ap. 143; *Seeley v. Garrison*, 10 Ab. 460; *The People v. Norton*, 4 Sandf. 640.)

The acquisition of jurisdiction, in these proceedings, by proper means, is considered so indispensable, that even a voluntary appearance by the party proceeded against, and his submission to an examination, is held not to confer it. (*De Conrau v. The People*, 7 Rob. 498, 501; *Sackett v. Newton*, 10 How. Pr. 561.) Even a judge of the court in which the judgment was obtained exercises such jurisdiction not as a court, but as an officer. (Id.) But jurisdiction having been once acquired, it remains until the proceeding is completely terminated. (Id.; *Webber v. Hobbie*, 13 How. Pr. 383.) A voluntary omission by the prosecuting party to attend, on any day to which it is adjourned, operates as an abandonment of it. (*Squire v. Young*, 1 Bosw. 690.)

In *Seeley v. Garrison*, (10 Ab. 460,) where the affidavit, under this section, after reciting the judgment and the issuing of the execution thereon, stated that a person named "has property of the judgment debtor, and is indebted to him in amount exceeding ten dollars;" it was held sufficient, and an order was granted thereon. But in *Lee v. Heirterger*, (1 Code R. 38,) where the language of the affidavit was, "has property of the judgment debtor, or is indebted to him," it was held insufficient. The court say the language must be positive, either that the person "has property of the judgment debtor;" or that "he is indebted to him;" or that "he has property and is indebted to him."

Where the affidavit stated only that the person "has property of the judgment debtor," and an objection was raised that it ought to have stated that the value of such property exceeded \$10, it was held that the limitation only applied to the indebtedness, and not to the value of the property. (*Brett v. Browne*, 1 Ab., N. S. 155.) And the affidavit need not state the value of the property. (Id.)

The judgment creditor may examine any person, in regard to the transfer and disposition of property, under these proceedings. (*Clapp v. Lathrop*, 23 How. 423; S. C. 40 N. Y. 328.) And this is the rule, whether the judgment be against a corporation or an individual. Any person holding property belonging to the judgment debtor may be examined in reference to it. (*Gibson v. Haggerty*, 37 N. Y. 555, 559; S. C. 5 Trans. Ap. 143; *McBride v. Farmers' Branch Bank*, 7 Ab. 347; S. C. 28 Barb. 476; *Lowber v. Mayor, &c., of New York*, 7 Ab. 248; S. C. 5 id. 268; *Courtois v. Harrison*, 3 id. 96; S. C. 12 How. Pr. 359; 1 Hilt. 110. But see *Sherwood v. Buffalo & N. Y. City R. R. Co.* 12 How. Pr. 136.)

Public moneys, raised by a municipal corporation pursuant to law, as by tax, for purposes of government, and in the hands of its fiscal officer, are not the property of the corporation, or a debt due to it, within the meaning of § 294, so as to entitle a judgment creditor of the corporation to an order requiring the officer to pay over the moneys in satisfaction of the judgment. (*Lowber v. The Mayor, &c., of New York*, 7 Ab. 248; S. C. 5 id. 268; *McBride v. The Farmers' Branch Bank*, 7 Ab. 347; S. C. 28 Barb. 476.) It seems that § 294 is not inapplicable, however, to the case of a judgment against any corporation. (Id.) In an anonymous case in 1 Code Rep., N. S. where, in an action of foreclosure, there were surplus moneys in the hands of the clerk or chamberlain, which were sought to be obtained under a judgment against one of the parties entitled to such surplus, it was held that a clerk or chamberlain is an officer of the court, and not a "person" or "corporation" subject to examination under this section, in respect to funds in his hands.

Where the indebtedness is disputed, the examination must stop, and the property be remanded to an action by a receiver. The judge has no right to go on and examine witnesses, and settle the question of indebtedness. (*Catlin v. Doughty*, 12 How. Pr. 457; *Sherwood v. Buffalo & N. Y. City R. R. Co.* id 139; *People ex rel.*

Williams v. Hullbert, 1 Code Rep., N. S. 75; S. C. 5 How. Pr. 446.) In *Tompkins County Bank v. Trapp*, (21 How. Pr. 17,) it was held that a denial on oath, by the party examined, that he was indebted to the judgment debtor, and held property belonging to him, determined the examination. And when the title is disputed, the party cannot be examined as to how he acquired the property, and the nature of his claim. (*Town v. Safeguard Ins. Co.* 4 Bosw. 683; *Van Wyck v. Bradlee*, 3 Code Rep. 157.) But in *Clapp v. Lathrop*, (23 How. Pr. 424; S. C. 40 N. Y. 328,) it was held that a party examined in supplementary proceedings, in regard to property, and who sets up title thereto, can be examined as to the *bona fides* of the transfer, and the consideration, and all matters pertaining to the acquirement of title. (See, also, *Sandford v. Carr*, 2 Ab. 462.)

A payment by debtors of a judgment debtor, in obedience to an order made by a judge, under and in pursuance of this section, requiring such payment upon the judgment debt, is a valid payment, although no notice of the proceedings is given to the judgment debtor. (*Gibson v. Haggerty*, 37 N. Y. 555; S. C. 5 Trans. Ap. 143.) Such payment is also a valid payment, and a full protection to the debtor against an assignee of the debt, who has not given notice to the debtors that the debt has been assigned to him. (Id.)

If the party examined under this section has notice of the assignment, before the order of the judge requiring him to pay over the debt to the judgment creditor, it seems that he should not comply with the order. If he does, he will be responsible to the assignee. (*Roy v. Baucus*, 43 Barb. 310.)

Proceedings under § 294 are suspended by the death of the judgment debtor, until his representatives may be brought in as parties. (*Hazewell v. Pennman*, 13 How. Pr. 114; S. C. 2 Ab. 230.) It is no longer a debt due the judgment debtor, but a debt due the estate (Id.) But so far as orders made previous to the death of the judgment debtor, have operated to establish liens, they may be saved by an action to bring in the representatives. (Id.)

Where proceedings under this section are instituted, to reach a debt claimed to be due to the judgment debtor, if denied, the judge has no authority to decide summarily the question of the indebtedness, and to compel its payment. The debt is only recoverable as provided in § 299, in an action against the person or corporation claimed to be owing it, brought by a receiver. (*West Side Bank v. Pugsley*, 47 N. Y. 368.)

Witnesses, on examination of debtor, &c. By § 295 of the Code witnesses may be required to appear and testify, in these proceedings, in the same manner as upon the trial of an issue; and by § 296 they may be required to attend before the judge, or before a referee appointed by the court or judge.

The mode of compelling the attendance of witnesses, whether before a judge, or a referee, is by subpœna issued out of the court which pronounced the judgment, (*The People ex rel. Brunett v. Dutcher*, 3 Ab., N. S. 151;) and disobedience to such writ should be tried and punished in that court, and not by the county judge, before whom the proceedings are pending. (Id.)

Where the witness has been once sworn, he should not be sworn again, at an adjourned examination. If he is again called, his examination should proceed without requiring a new oath. (*Hudson v. Plets*, 11 Paige, 180; S. C. 3 N. Y. Leg. Obs. 120.)

A party examined under § 294 of the Code, can only be required to answer concerning his alleged indebtedness to the judgment debtor, and as to the fact whether he has property belonging to him; and a general denial, on oath, of both propositions, is all that can be required. (*Tompkins County Bank v. Trapp*, 21 How. Pr. 17.) It seems that under § 295, such party may be examined fully and rigidly as a witness; and it is no excuse for not answering, that he sets up a claim to the property. (Id. See also, *Lathrop v. Clapp*, 40 N. Y. 328; S. C. 23 How. Pr. 423.)

A person attending an examination in these proceedings is entitled to the fees allowed to a witness by statute. (Laws of 1840, ch. 386, § 8.) And he is not bound to testify until such fees are tendered. (*Davis v. Turner*, 4 How. Pr. 190.)

In supplementary proceedings, the judgment debtor's wife may be required to disclose whether she has property of her husband, under her control; and may be attached as for a contempt, if she refuses to answer. (*O'Brien's petition*, 24 Wis. 544. See, to the same effect, *Lockwood v. Worstell*, 15 Ab. 430, n.; Laws of 1867, ch. 887. *Contra*, *Andrews v. Nelson*, 7 Ab. 3, n.; *Copous v. Kauffman*, 8 Paige, 583.)

Where it appears, upon the examination, that the judgment debtor has transferred

property to a witness, the latter is bound to answer all questions touching the transfer, and seeking for information as to, and bearing upon, the question, whether such transfer was for a good consideration, and was honest or fraudulent; and upon his refusal to answer, he is liable to be punished as for a contempt. (*Lathrop v. Clapp*, 40 N. Y. 328.)

On an examination of a witness before a referee, it is not necessary to issue a special order, reduced to writing, requiring the witness to answer every question which he may refuse, and to go through the formality of serving the order on the witness. It is a sufficient service if the witness is present when the referee orders him to answer. (*Lathrop v. Clapp*, 40 N. Y. 328, 336; S. C. 23 How. 423.)

What property may be ordered to be applied on execution. Section 297 of the Code, which specifies what property may be applied on the execution, is applicable only to moneys actually due at the time of the service of the order of examination, and not to moneys subsequently becoming due, or to become due on a contingency, or upon an executory contract not yet performed. (*Gerregani v. Wheelwright*, 3 Ab., N. S. 264; *Woodman v. Goodenough*, 18 Ab. 265; *Potter v. Low*, 16 How. Pr. 549; *Stewart v. Foster*, 1 Hilt. 505; *McCormick v. Kehoe*, 7 N. Y. Leg. Obs. 184.)

Supplementary proceedings reach only property in the possession of the debtor at the time of the service upon him of the order for examination. They do not affect property subsequently acquired, or debts arising afterwards. (*Sands v. Roberts*, 8 Ab. 343.) To reach such property new proceedings must be commenced. (Id.) Where an order for the defendant's examination was issued August 6, 1858, and on the 24th of that month a receiver was appointed, about the 1st of September, the defendant's household furniture, exempt, by law, from execution, and not available under supplementary proceedings, was destroyed by fire, whereby a fire insurance company became indebted to the defendant, to the extent of its value, under a contract of insurance; held, that the claim against the company arose subsequently to the appointment of the receiver, and could not be reached by the proceedings instituted. (Id.) The judgment debtor, being a householder, having a family for which he provides, cannot be compelled to execute to a receiver appointed in supplementary proceedings an assignment of a policy of insurance for \$200, upon his household furniture, after a loss has occurred. (*Cooney v. Cooney*, 65 Barb. 524.) For a reasonable time, the debtor has a right to the insurance money, to replace the furniture, if he has not used other means for that purpose. (Id.)

The power given by § 297 of the Code, to order a third person, indebted to a judgment debtor, to pay the judgment creditor so much of such indebtedness as will be sufficient to satisfy the judgment creditor's claim is one which should be exercised with great caution. (*Alexander v. Richardson*, 7 Rob. 63.) It should never be exercised where the amount of the indebtedness due from the third person is either disputed or uncertain; or where there is any doubt as to the pecuniary ability of the third person to make present payment. In such a case, the proper course is to have a receiver appointed. (Id.)

Supplementary proceedings are limited to reaching the property of the judgment debtor in his possession or in the possession of another party, which is conceded to belong to the defendant. (*Crowns v. Whipple*, 34 How. 333; *Gasper v. Bennett*, 12 id. 307; *Stewart v. Foster*, 1 Hilt. 505; *Rodman v. Henry*, 17 N. Y. 482; *The People ex rel. Pease v. King*, 9 How. Pr. 97; *Alexander v. Richardson*, 7 Rob. 63.) Where property is in the hands of others, who make claim to it, the judge has no power to proceed and try the question of title. The proper course is for him to appoint a receiver, who may bring an action to try the question of title. (Id.; *Teller v. Randall*, 40 Barb. 242; *Clapp v. Lathrop*, 23 How. 423; *The People ex rel. Pease v. King*, 9 How. Pr. 97; *Stewart v. Foster*, 1 Hilt. 505; *Rodman v. Henry*, 17 N. Y. 482; *Alexander v. Richardson*, 7 Rob. 63; *Sandford v. Mosher*, 13 How. Pr. 137; *Cornina v. Tooker*, 5 id. 16. And see *Peters v. Kerr*, 22 id. 3.)

Where it appears from the examination that it is doubtful whether the person who is alleged to owe the judgment debtor, or another individual not under examination, is really indebted to him, and as a conclusion of law uncertain, a receiver should be appointed, to enable the creditor, or the party entitled to the right, to pursue the claim by action. (*Cornina v. Tooker*, *supra*.) A judge should not, by a summary order, require trustees, who hold a trust fund of the debtor, to apply the future income accruing therefrom to the payment of the judgment, but should appoint a receiver, by whom an action may be brought against the debtor and the trustee to compel the application of the future income to the payment of the judgment. (*Stewart v. Foster*, 1 Hilt. 505.)

To justify an order requiring the application of property alleged to belong to the defendant, but in the possession of, and claimed by another, the testimony should show, beyond reasonable doubt, that the claim is unfounded, and used merely as a cover. (*Hall v. McMahon*, 10 Ab. 103.) And even if this be shown, yet, if the property be such as may be levied on, the plaintiff may properly be left to his execution. (*Id.*) Where the evidence merely excites a suspicion that property which might be levied on was transferred in fraud of the creditor, and without consideration, its application should not be compelled by an order. (*Id.*)

The beneficial interest of the debtor in *trust* property, where the trust has not been created by the debtor, is not liable to the claims of a judgment creditor, and cannot be reached by proceedings supplementary to execution. (*Campbell v. Foster*, 35 N. Y. 361; S. C. 16 How. Pr. 275; *Locke v. Mabbett*, 2 Keyes, 437; *Graff v. Bonnett*, 31 N. Y. 9; S. C. 2 Rob. 54; 25 How. Pr. 470.)

A widow's right of dower, before assignment, is a chose in action, and might, formerly, be reached by a creditor's bill, (*Thompson v. Fonda*, 4 Paige, 448; *Stewart v. McMartin*, 5 Barb. 438;) and it seems it may, by supplementary proceedings, under the Code. But a receiver cannot, by virtue of his appointment in supplementary proceedings, and without any assignment to him as receiver, maintain an action to recover the possession of real estate admeasured and set off to the judgment debtor as and for her dower right. But the court has power to compel such an assignment. (*Moak v. Coats*, 33 Barb. 498.) The estate of a tenant by *curtesy* will pass to a receiver in supplementary proceedings, so that rent due at the time of his appointment may be recovered and applied to the satisfaction of the judgment. (*Beamish v. Hoyt*, 2 Rob. 307.)

The supreme court has power to compel a judgment debtor to convey lands in another state, for the benefit of his creditors, in such a manner as to vest in the grantee the legal title. (*Bailey v. Ryder*, 10 N. Y. 363; *Bunn v. Fonda*, 2 Code Rep. 70; *Fenner v. Sanborn*, 37 Barb. 610.) The same, or a similar power, is possessed and may be exercised by a justice of that court, or a county judge, in a proceeding supplementary to execution. (*Fenner v. Sanborn*, *supra*.)

A creditor cannot, by a proceeding supplementary to his execution, returned unsatisfied, reach moveables which the debtor assigned for the benefit of his creditors, while the execution was in life in the sheriff's hands. He might have levied his execution on such property after the assignment, but his priority over the assignee ceased when his execution was returned without levying it. (*Watrous v. Lathrop*, 4 Sandf. 700.)

The order of a county judge, made in these proceedings, for the payment of money in the hands of a third person, will not affect the rights of an assignee who has advanced money on the faith and security of the fund, in good faith, and who is not a party to the supplementary proceedings. (*Roy v. Bancus*, 43 Barb. 310.) The Code does not contemplate the adjudication of the rights of assignees, by a judge, in so summary a manner. Where the fact of the assignment of a fund in the hands of a depository, by the owner, is made known to the judge, he ought not to order it to be paid over to the judgment creditor. (*Id.*)

Earnings of the judgment debtor may be reached by supplementary proceedings. (*Gerregani v. Wheelwright*, 3 Ab., N. S. 264; *Woodman v. Goodenough*, 18 Ab. 265; *Potter v. Low*, 16 How. Pr. 549; *Tripp v. Childs*, 14 Barb. 85.) But earnings becoming due after the service of the order for examination cannot be reached by such proceedings. (*Id.*; *Woodman v. Goodenough*, *supra*; *Caton v. Southwell*, 13 Barb. 335; *Ireland v. Smith*, 1 *id.* 419; S. C. 3 How. Pr. 244; *Potter v. Low*, *supra*. See, also, *McCoun v. Dorsheimer*, 1 Clarke, 144, 146; *Browning v. Bettis*, 8 Paige, 168.) Nor is the party examined prohibited from disposing of such earnings as fall due while the proceedings are pending. (*Id.*) Only such earnings are exempted as have been earned within the sixty days previous to the date of the order requiring such earnings to be applied to the satisfaction of the judgment, and not those that may have been earned within sixty days previous to the service of the order for the examination. (*Bush v. White*, 12 Ab. 21.)

Section 297 of the Code exempts the personal earnings of the debtor, earned within the last sixty days, from being applied to the payment of his judgment debts, where it is made to appear that such earnings are necessary to the support of a family. (*Martin v. Sheridan*, 2 Hilt. 586.) But where it appeared that the wife of the debtor kept a boarding house, and thus sustained the family, and that no part of such debtor's earnings were used in the support of the family, although he testified that the family was dependent on him for support; it was held that the

facts did not warrant an exemption, within the provisions of the above section. (Id.)

A housekeeper, and her two children, are not a "family dependent upon the debtor for support," within the meaning of section 297. (*Var Vochten v. Hall*, 14 How. Pr. 436.) It seems that the "family" must sustain such a relation to the debtor as that he would be legally bound to support them. (Id.)

To sustain an application for an attachment, to punish a judgment debtor for disposing of moneys received by him *after* the service of an injunction order in these proceedings, the creditor must show, *affirmatively*, that the money was already earned by, or due to the debtor, when the order was served. If earned subsequently, the defendants had no right to receive and dispose of it. (*Gerregani v. Wheelwright*, 3 Ab., N. S. 264; *Potter v. Low*, 16 How. Pr. 549.)

A judgment recovered by a debtor against his creditor, for an unlawful levy upon, and sale of, exempt property, cannot be reached by the creditor through proceedings supplementary to execution. Such judgment represents the property for the value of which it was recovered. The proceeds of the judgment will be protected as exempt property, until sufficient time has elapsed to afford the debtor a reasonable opportunity to again purchase the exempt property. (*Tillotson v. Wolcott*, 48 N. Y. 188)

A watch is property liable to execution. (*The Deposit National Bank v. Wckham*, 44 How. 421.)

Appointing receiver; prohibiting transfer, &c., of debtor's property; powers and duties of receiver; how constituted and directed, &c. There is no incompatibility between the remedy afforded by § 298 of the Code and that authorized by § 297. They are granted on different states of facts, and are cumulative. (*Heroy v. G'erson*, 10 Bosw. 591.)

The power to entertain, continue and conduct supplementary proceeding under § 298, &c., is a mere statutory authority—conferred, not upon the supreme court, but upon the *judges*, as separate judicial officers; and must be strictly pursued. (*Webber v. Holbie*, 13 How. Pr. 382.)

An action is *pending* in a court, though judgment has been recovered therein, as long as such judgment remains unsatisfied; and upon an execution being issued thereon, and returned unsatisfied, supplementary proceedings may be instituted, and a receiver appointed. (*Weyman v. Childs*, 41 N. Y. 159.)

A receiver may be appointed where the examination discloses only an estate of tenancy by the curtesy, (*Beamish v. Hoyt*, 2 Rob. 307;) or an equity of redemption in real property. (*Bailey v. Lane*, 15 Ab. 373, n.) An application for a receiver should always be made, where an injunction has been granted, restraining the debtor from transferring or removing his property; and this irrespective of the question of the existence of any property. (*Lent v. McQueen*, 15 How. Pr. 313; *Webb v. Overman*, 6 Ab. 92.) And where it appears from the examination, under § 294, that it is doubtful whether the person who is alleged to owe the judgment debtor, or another individual, not under examination, is really indebted to the judgment debtor, a receiver should be appointed, to enable the creditor, or the party entitled to the right, to pursue the claim by action. (*Corn-ing v. Tooker*, 5 How. Pr. 16.) When a referee has certified his examination of the judgment debtor and others who are alleged to owe him, under § 294, to the judge, it is in the discretion of the judge either to make an order under § 297, directing the property of the judgment debtor, whether in his own or other's hands, to be applied upon the judgment; or, under the next section (298,) to appoint a receiver of the property of the debtor; or both. The only restriction upon the exercise of this discretion is to be found in § 299, as applicable to certain specified cases. (Id.)

An execution, issued on a judgment and returned unsatisfied, is all that is necessary to warrant an application for a receiver. (*Lent v. McQueen*, 15 How. Pr. 313.) Where the proceedings are instituted under § 294, it is necessary to wait for the return of the execution unsatisfied before an application for the appointment of a receiver can be entertained. (*Darrow v. Lee*, 16 Ab. 215.)

The creditor is entitled to have a receiver appointed, although the only property discovered by the examination of the judgment debtor is such as might be sold on execution. (*Heroy v. Gibson*, 10 Bosw. 591; *Todd v. Crooke*, 4 Sandf. 694; S. C. 1 Code Rep., N. S. 324; *Miers' case*, 2 Ab. 476.)

Where the examination discloses the possession of choses in action, or the existence of a relation—*e. g.* partnership—which renders it probable that the debtor

may have assets, a receiver should be appointed, even though the debtor deny that the property disclosed is of any value. (*Webb v. Overmann*, 6 Ab. 92.)

An application for the appointment of a receiver, in these proceedings, must be to the judge who granted the order of reference and who appointed the referee to examine as to the property of the judgment debtor. No other judge, out of court, has power to make the appointment. (*Ball v. Goodenough*, 37 How. 479; *Hatch v. Weibur*, 8 id. 163; *Smith v. Johnson*, 7 id. 39.) This rule is applicable to county judges. (Id.) In theory, the application is made to the judge at the time the examination is taken, founded upon it, without any copy being made by, or for, either party. The examination is taken in the presence of the judge, and at its conclusion, the defendant being present, the plaintiff moves, upon it, at once. When the examination is directed to be taken before a referee, the application is still made upon the original examination, but the defendant must have notice of the time and place. (*Todd v. Crooke*, 4 Sandf. 694; S. C. 1 Code Rep., N. S. 324.) Where several creditors are proceeding against the judgment debtor, and one applies for the appointment of a receiver, the others are entitled to notice of the application, but not to a copy of the examinations on which it was founded. (Id.) The application to appoint a receiver is not a *motion*, within § 402 of the Code, so as to require a notice of eight days to be given, to another creditor. A shorter notice is sufficient. (*Leggett v. S'can*, 24 How. 479.)

The judgment debtor should be personally served with the order to appear and answer, on the examination, and with notice of the application for the appointment of a receiver. (*Barker v. Johnson*, 4 Ab. 435; *Dorr v. Noxon*, 5 How. Pr. 29; *Kemp v. Harding*, 4 id. 178; *Corning v. Tooker*, 5 id. 16.) A receiver cannot be appointed under § 298, without such notice. (*Andrews v. Glenville Woolen Co.*, 11 Ab., N. S. 78.)

A receiver may be appointed at any time after the supplementary proceedings authorized by § 292 have been instituted, and while the proceedings are pending. To give full effect to the proceedings, and to give the judgment creditor the full benefit thereof, he should promptly procure the appointment of a receiver. He is not obliged to wait until the examination of the judgment debtor is finished. (*The People ex rel. Fitch v. Mead*, 29 How. 360.)

The Code requires that the order should be a chamber order, and that it should be filed with the clerk. (*Ball v. Goodenough*, 37 How. 479.)

On an application for the appointment of a receiver, the court cannot go behind the judgment and execution, and inquire whether the judgment creditor was entitled to issue the execution. (*Lent v. McQueen*, 15 How. Pr. 313. See *Bingham v. Disbrow*, 37 Barb. 34; S. C. 14 Ab. 451; 5 Trans. Ap. 198.) Where a judgment debtor appears before a referee, and submits to an examination, without objection, this will amount to a waiver of any irregularity; and an order for the appointment of a receiver, founded on such voluntary appearance and waiver, will be valid, and cannot be affected by an objection to the jurisdiction, in an action brought by the receiver. (*Bingham v. Disbrow*, *supra*.) Irregularities in the appointment of a receiver which do not affect the jurisdiction of the appointing judge, cannot be made available collaterally—as in an action brought by such receiver against a third person. (*Tyler v. Whitney*, 12 Ab. 465; S. C. 33 Barb. 327, sub nom. *Tyler v. Willis*.)

The filing of the receiver's bond is necessary to the completion of the appointment. (*Banks v. Potter*, 21 How. Pr. 469; *Conger v. Sands*, 19 id. 8; *Voorhees v. Seymour*, 26 Barb. 569, 582; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Wilson v. Allen*, 6 Barb. 543; *West v. Fraser*, 5 Sandf. 653.) But if the receiver has given ample security upon his first appointment, there can be no occasion for requiring him to give security over again, in every proceeding which may be afterwards instituted. (*Banks v. Potter*, *supra*.)

A receiver appointed in supplementary proceedings is thereby vested with the title to all the personal property of the judgment debtor, whether in his own hands or in the hands of others. (*Bostwick v. Menck*, 40 N. Y. 383; *Rogers v. Corning*, 44 Barb. 229.) But it is otherwise as to property transferred or assigned by the debtor in fraud of creditors. Such an assignment is good against the receiver as merely the representative and successor of the judgment debtor; and as representative of the creditor he has no greater right than the creditor himself, with reference to the property fraudulently assigned; which right is to avoid and set aside such assignment, so far only as it shall be necessary to satisfy his debt and costs. (Id.) If the same person be appointed receiver in several proceedings for

several creditors, he is then trustee for them all, and clothed with power to set aside transfers fraudulent as against them, but only to an extent *sufficient to satisfy their demands*. (Id.) Accordingly, where a receiver brought a suit to set aside an assignment by the judgment debtor, as fraudulent against creditors, it was *held* that his recovery against the assignee should be limited to an amount sufficient to cover the judgment and interest, together with the costs and interest, although the assigned property in the hands of the latter was of much greater value. (Id.)

The title to the *personal* property of the judgment debtor passes to the receiver, without an assignment. (*Bostwick v. Menck*, *supra*; *Moak v. Coats*, 33 Barb. 498; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Porter v. Williams*, 9 id. 142; *People v. Hulbert*, 5 How. Pr. 446; S. C. 1 Code Rep., N. S. 75; 9 N. Y. Leg. Obs. 245; *Cooney v. Cooney*, 65 Barb. 524.) From the operation of this rule is excepted such property of the debtor as is by statute exempt from levy and sale on execution. (*Cooney v. Cooney*, 65 Barb. 524.) The judge cannot require an assignment of the personal property of the debtor. (*Ball v. Goodenough*, 37 How. 479; *Ter Broeck v. S'ao*, 13 id. 28; S. C. 2 Ab. 234; *Hulsaver v. Wiles*, 11 How. Pr. 446; *People v. Hulbert*, *supra*.)

But, as to the *real* estate of the debtor, it only vests in the receiver by virtue of a *conveyance* to him, which the court has power to compel. (*Moak v. Coats*, 33 Barb. 498; *Chautauque County Bank v. Risley*, 19 N. Y. 369, 374; *The People ex rel. Williams v. Hulbert*, 5 How. Pr. 446; S. C. 1 Code Rep., N. S. 75; 9 N. Y. Leg. Obs. 245. But see *Porter v. Williams*, 9 N. Y. 142; S. C. 12 How. Pr. 107, *contra*. See, also, *Beamish v. Hoyt*, 2 Rob. 307.)

A receiver appointed under § 298 does not become invested with the title to any property acquired by the debtor subsequent to the order of appointment. (*Graff v. Bonnett*, 25 How. 470; S. C. 2 Rob. 54; 31 N. Y. 9; *Becker v. Torrance*, 31 N. Y. 691.) Nor to any property acquired after the order for examination. (*Campbell v. Genet*, 2 Hilt. 290. See, also, *Bostwick v. Menck*, 40 N. Y. 383, 385.)

The title of the receiver takes effect only from the time of his appointment. Hence, where the property of the judgment debtor was levied on by one of his creditors, a few days subsequent to the commencement of supplementary proceedings by another creditor, but before the appointment of a receiver, it was *held* that the lien of the levy was superior to that of the receivership. (*Becker v. Torrance*, 31 N. Y. 631.) The *lien* of the receiver on property that has been assigned does not begin at the time of his appointment, but takes effect only when an action is commenced by such receiver. (*Field v. Sands*, 8 Bosw. 685; *Conger v. Sands*, 19 How. Pr. 8.) Delay in taking possession of property, the title to which vests in the receiver on his appointment, does not of itself render the lien of the receivership inferior to that of a levy on an execution issued subsequent to the appointment of such receiver. So *held* where there was a delay of ten months. (*Fessenden v. Woods*, 3 Bosw. 550.)

When the title to property has vested in a receiver, by virtue of his appointment, it is not in the power of the county judge, or of any judicial officer or court, to divest him of such title by a mere order in proceedings to which he is not a party. (*Rogers v. Corning*, 44 Barb. 229.)

A receiver is not, in general, clothed with any right to maintain an action which the parties, or the estate, which he represents, could not maintain. He must show a cause of action existing in those parties, and that by the appointment of the court, lawfully made in a matter where the court had jurisdiction, the power has been conferred on him, in his representative capacity as receiver, to prosecute the action. (*Coope v. Bowles*, 42 Barb. 88; S. C. 28 How. 10; 18 Ab. 442.) He must state, in his complaint, the equity of the parties whose rights, under the order of the court appointing him he represents, to maintain the action which he attempts to prosecute. (Id.) To authorize a receiver appointed in supplementary proceedings, to prosecute an action to set aside an assignment made by the debtor, the judgment and other facts necessary to maintain supplementary proceedings, must be set forth. It is not enough to allege, in the complaint, that the plaintiff was appointed receiver in supplementary proceedings. (Id.)

A receiver cannot recover the surplus of a trust fund, where the trust was created by a person other than the debtor. (*Campbell v. Foster*, 35 N. Y. 361; S. C. 16 How. Pr. 275.) But he may maintain an action against the judgment debtor for a conversion of the property vested in him by virtue of his appointment. (*Gardner v. Smith*, 29 Barb. 68.)

A receiver is subject to the order of the judge, and may be required to account for the property which comes to his hands. The jurisdiction of the judge necessarily

continues, until the judgment creditor is paid, or all the funds or property in the hands of the receiver applied on the judgment are exhausted. The judge may order the application of such funds upon the judgment, and has control over the assets in the hands of the receiver, so as to charge them with the costs of the proceedings under § 301. (*Webber v. Hobbie*, 13 How. Pr. 383.)

In *Dickerson v. Van Tine*, (1 Sand. 724,) where property found in the possession of the debtor was claimed by another, the receiver was ordered to release it to such claimant on the latter giving an undertaking to hold it subject to the order of the court.

The order forbidding the transfer of a defendant's property, issued under § 298, is not called an injunction in the Code, and is a different proceeding from injunctions granted in an action, as a provisional remedy. (*Green v. Bullard*, 8 How. Pr. 313.) Although there should doubtless be some reason given in the affidavit, before the judge should forbid a transfer or other disposition of the property of a judgment debtor, yet the Code being silent as to what facts should be stated, each case should be disposed of by the exercise of the sound discretion of the judge. (Id.) The judge can only forbid the transfer of debts owing to the judgment debtor, until the receiver can have an opportunity to sue, (*Ball v. Goodenough*, 37 How. 479; *People ex rel. Williams v. Hubbert*, 5 id. 446; S. C. 1 Code Rep., N. S. 75; 9 N. Y. Leg. Obs. 245.)

The usual injunction in supplementary proceedings only affects property received, earned or due before the making of the order. (*Atkinson v. Sewine*, 11 Ab., N. S. 384.)

Simply confessing a judgment is not a violation of the order issued under § 298. (*Ross v. Clusman*, 3 Sandf. 676; S. C. 1 Code Rep., N. S. 91.) But it will be regarded as a violation of the order if accompanied by other acts indicative of an intent to change the title to the property to the prejudice of the creditor. (Id.) The indorsement of a check, given previous to the order forbidding any transfer, is not a violation of the order, where such indorsement is all that is necessary to impart to the third person the authority to draw the money. (*Ireland v. Smith*, 3 How. Pr. 244; S. C. 1 Barb. 419.) Proceeding to judgment in a suit pending at the time of issuing the order, is not a violation of it. (*Parker v. Wakeman*, 10 Paige, 485.) Nor is the consummation of a previous assignment of a right of action. (*Richardson v. Rust*, 9 id. 243.)

To sustain an application for an attachment to punish a judgment debtor for disposing of moneys received by him after the service of an order, the creditor must show, affirmatively, that the money was already earned by, or due to, the debtor, when the order was served. (*Gerregani v. Wheelright*, 3 Ab., N. S. 264; *Potter v. Low*, 16 How. Pr. 549.) Money previously earned and due at the time of issuing the order, cannot be collected and applied to the purchase of family supplies, without subjecting the party to an attachment for contempt. (*Taggard v. Talcott*, 3 Edw. 628.)

A county court has jurisdiction to order a receiver, appointed by it, in these proceedings, to release to the debtor a judgment recovered by him for an unlawful seizure and sale of exempt property. (*Tillotson v. Wolcott*, 48 N. Y. 188.)

A judgment debtor, while the order made in supplementary proceedings is in force, has no right to violate it by transferring his property to employ an attorney to represent him in such proceedings. The creditor's lien is prior to that of the attorney. (*The Deposit Nat. Bank v. Wickham*, 44 How. 421.)

Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor. Section 299 of the Code applies only to cases in which proceedings have been instituted under the provisions of the chapter containing that section (§§ 292, 293, 294,) (*Goodyear v. Betts*, 7 How. Pr. 187; *King v. Tuska*, 1 Duer, 635;) and where the validity of the claim, or the title to the property discovered by such proceedings is disputed, are not clear. (Id.; *Rodman v. Herr*, 17 N. Y. 482; *Sherwood v. Buffalo & N. Y. City R. R. Co.* 12 How. Pr. 136; *Catlin v. Doughty*, id. 457; *People ex rel. Pease v. King*, 9 id. 97.) It applies only to actions against third persons; not to those between the judgment creditor and the judgment debtor, only. (*Catlin v. Doughty*, 12 How. Pr. 457.)

The action to recover demands against third persons, or property claimed by them, can only be maintained by a receiver appointed under the provisions of the Code. (*Edmonston v. McLoud*, 19 Barb. 357.) In *Catlin v. Doughty*, (*supra*,) however, it is said that the word "only" applies to the phrase "by action," and does not prohibit an action by the statutory creditor's bill.

When the claim to the property is disputed, or the indebtedness denied, the proper way is to restrain the defendant from transferring or disposing of such property. (*The People ex rel. Pease v. King*, 9 How. Pr. 97; *King v. Tuska*, 1 Dner, 635;) and have a receiver appointed. (Id.) But an order restraining a third person from disposing of property of the debtor cannot be made until such person has been made a party to the proceeding. (*King v. Tuska*, *supra*.)

The court has no power to order a third person to pay over money or property, on the allegation that it belongs to the debtor, if his right is disputed. And a bailee who, in compliance with such an order, applies his bailor's property as if it belonged to the debtor, is not protected by the order. (*Barnard v. Kobbe*, 3 Daly, 373.)

Reference by judge. Sections 296 and 300 of the Code are ample to confer the power of appointing a referee at the same time that the order for an examination is made. The judge acquires jurisdiction of the subject matter, and of the person of the defendant, for all the purposes of the appointment of a referee, by the presentation to him of an affidavit containing the facts required by § 292 to be stated in it, and by a motion of the creditor for the order. (*Green v. Bullard*, 8 How. Pr. 313; *Conway v. Hitchens*, 9 Barb. 378. But see *Hatch v. Weyburn*, 8 How. Pr. 163.)

On the defendant's appearing, and an examination being requisite before appointing a receiver, the cause will be sent to a referee, selected by the parties, to examine the defendants, report thereon, nominate a receiver, and ascertain the sufficiency of the surety. Upon his report, the court will appoint the receiver. (*Jones v. Lawlin*, 1 Sandf. 722.)

The referee possesses no control over the person of the defendant. He cannot compel an appearance, nor punish him for a disobedience of orders. He must report to the judge who appointed him. (*Green v. Bullard*, *supra*.)

The referee is to report the evidence, or the facts, to the judge who appointed him. (*Hatch v. Weyburn*, 8 How. Pr. 163; *Smith v. Johnson*, 7 id. 39; *Merritt v. Slocum*, 6 id. 350.) If he was appointed for the express purpose of reporting the facts, he must include the evidence at large. (*Dorr v. Noxon*, 5 How. Pr. 29.)

Whenever the parties agree to a reference, it will be ordered, of course. And the matter will be referred when it is apparent that it will be a protracted investigation, and the examiners are attended by counsel. (*Hollister v. Spofford*, 3 Sandf. 742.)

The referee is to decide what effects are to be delivered, and should specify particularly as to the manner of delivery. And where articles are mixed, he should specify what are exempt, and what the receiver may take. (*Dickerson v. Van Tine*, 1 Sandf. 724.) For it was not the design of the laws to allow the receiver to proceed and take what property he might choose. (Id.)

The referee may, in his discretion, allow corrections or explanations to be made, by any party to the examination, even after it has been concluded and certified by him. (*Corning v. Tooker*, 5 How. Pr. 16.)

An examination, in these proceedings, before a referee, when once closed, cannot be re-opened on the direction of the referee. It can only be opened on the special order of the judge. (*Orr's case*, 2 Ab. 457.) The power of the referee over the defendant is concluded with the conclusion of the examination. (Id.; *Hudson v. Plets*, 11 Paige, 180; S. C. 3 N. Y. Leg. Obs. 120.)

Costs of proceedings. Section 301 of the Code does not give the defendant costs, unless he has been examined. (*Engle v. Bonneau*, 2 Sandf. 679; S. C. 3 Code Rep. 205.) And when no property is found, the creditor should pay costs to the debtor, or party examined, in like manner as if the former had prosecuted the latter, in an action and failed therein. (*Anon.* 11 Ab. 109; S. C. 1 Code Rep., N. S. 113; 3 Sandf. 725.) When a third person is examined, and no property is discovered, he is entitled to the full amount, (\$30.) mentioned in § 301. (*Anon.* 11 Ab. 108.)

The application for costs cannot be made until the proceeding has been brought to an end in favor of the party applying. (*Davis v. Turner*, 4 How. Pr. 190.) The judge may order these costs to be paid out of the assets in the hands of the receiver, at any time before the final order disposing of such funds. (*Webber v. Hobbie*, 13 How. Pr. 382.)

A witness examined before a referee, in these proceedings, is entitled to the statutory allowance of fees to a witness. (*Davis v. Turner*, 4 How. Pr. 190; Laws of 1840, chap. 386, § 8.) He is entitled to his fees for attendance, for Sunday, as well as any other day during the sitting of a court. (*Muscott v. Runge*, 27 How. 85.)

In *Hulsaver v. Wiles*, (11 How. Pr. 446.) where the order allowed a fixed sum for "counsel fee," and also a fixed sum for "witnesses' fees," but omitted the words "as costs," it was held sufficient.

Disobedience of orders ; punishment for.] Before an attachment can issue, under § 302 of the Code, to bring a party before the judge for disobedience of an order, it must be made to appear that the order was lawful, and that it was duly served. The manner of service should be stated. (*De Witt v. Dennis*, 30 How. 131.) Where the only proof of service of an order was by the affidavit of an attorney, who specified several such orders without giving copies of any of them, and stated that certain of them had been personally served by the sheriff; it was held that this was not sufficient to grant an attachment. (Id.)

A service of an order, made without exhibiting the original order of the judge, is irregular, but not invalid, and cannot be entirely disregarded. The party served must object to the mode of service, by appearance, and his omission to do so will be regarded as a waiver. (*Billings v. Carrer*, 54 Barb. 40.) Where the proceeding to punish for a contempt is commenced by an order to show cause why an attachment should not issue, the service is sufficient if made upon the defendant's attorney. (*Pitt v. Davison*, 37 N. Y. 235; S. C. 34 How. 355; 3 Ab., N. S. 398; 4 Trans. Ap. 266.)

The proceeding to punish a party, under § 302, for disobedience, is a proceeding in the action, and not a special proceeding. (*Seeley v. Black*, 35 How. 369; *Dresser v. Van Pelt*, 15 id. 19; S. C. 6 Duer, 687.)

There are two modes of punishing a party for a contempt; either by granting the attachment in the first instance, or by issuing an order to show cause why an attachment should not be issued. (*Pitt v. Davison*, 37 N. Y. 235; S. C. 34 How. 355; 4 Trans. Ap. 266; 3 Ab., N. S. 398.) An order to show cause is the usual mode of commencing proceedings under this section, in the first district. (*Matter of Smethurst*, 2 Sandf. 724; S. C. 3 Code Rep. 55; 4 How. Pr. 369.) An order to show cause why an attachment should not issue against a party for the violation of an order is not the foundation of the power to commit. The jurisdiction is derived from the original order which has been disobeyed. (*Myers v. James*, 3 Ab. 301.)

The papers on an application for an attachment are usually entitled in the action. (*Pitt v. Davison*, *supra*.) Yet they may be entitled "People ex rel. — v. —" (*Brown v. Andrews*, 1 Barb. 227; *People ex rel. Young v. Craft*, 7 Paige, 325; *Stafford v. Brown*, 4 id. 360.) In case of an attachment against a witness, or one not a party to the suit, it was the practice, always, to entitle the papers according to the latter mode, in all proceedings subsequent to the attachment. (*Stafford v. Brown*, *supra*.)

On an application for an attachment, affidavits setting forth the grounds of such application should be presented, and a copy thereof should be served with the attachment. (*Ward v. Aronson*, 10 Bosw. 589; *Matter of Smethurst*, 2 Sandf. 724; S. C. 3 Code Rep. 55; 5 How. Pr. 369.)

The attachment should be made returnable before the judge who granted it. (*Kelly v. McCormick*, 28 N. Y. 318; S. C. 2 E. D. Smith, 503; *Dresser v. Van Pelt*, 15 How. Pr. 19; S. C. 6 Duer, 687; *Sheppard v. Dean*, 13 How. Pr. 173; S. C. 3 Ab. 424; *Matter of Smethurst*, 2 Sandf. 724; S. C. 3 Code Rep. 55.) And not before a judge at chambers. (Id.) But if the judge before whom the attachment is returnable happens to be holding a special term at the time the party is brought before him, this does not render the proceeding or process void. (Id.) An irregularity in making the attachment returnable before the wrong judge, or in the wrong manner, is not sufficient to render the proceeding void; it is simply voidable. (*Kelly v. McCormick*, *supra*.)

The witness against whom an attachment issues should be furnished with a copy of the interrogatories, when the contempt is denied, if he requires such copy. (*De Witt v. Dennis*, 30 How. 131.) But if the defendants are before the judge, on an order to show cause, and have been served with the affidavits and the order, and have full opportunity to answer, the interrogatories need not be filed. (*Lathrop v. Clapp*; 40 N. Y. 335; *Pitt v. Davison*, 37 id. 235; *Watson v. Fitzsimmons*, 5 Duer. 629.)

A party who violates an order forbidding the transfer, &c., of property, by confessing judgment to another for a fictitious debt, thus creating a lien upon his real estate in another state, is guilty of a contempt, and finable to the amount of the judgment. (*Fenner v. Sanborn*, 37 Barb. 610.) So if the judge finds the defendant able to pay the judgment, and orders him to pay the same within a specified time, and also to pay an amount of costs stated, if the defendant fails to comply with such order, he may be proceeded against as for contempt; and may be imprisoned until such order be complied with. (*Brush v. Lee*, 6 Ab., N. S. 50; *People ex rel. Prase v. King*, 9 How. Pr. 97.) It is not necessary that the proceedings be instituted by

attachment and interrogatories. Disobedience to an order for the payment of money may be immediately punished by a precept for the imprisonment of the defendant. But if an order to show cause be taken, the defendant is not entitled to object to that mode of proceeding. (Id.) On the return of such an order to show cause, he cannot insist on interrogatories, as in case of an attachment. (Id.)

Upon an application for an attachment to punish a person for disobedience of an order forbidding the transfer of funds, it is necessary to show that such money was due to, or earned by, such person at the time of the service of the order. (*Gerregani v. Wheelwright*, 3 Ab., N. S. 264.)

One who draws money from a bank, and applies it to the use of himself or family, after the service of an order forbidding any transfer, &c., of any funds, is liable to punishment therefor, although the fund in the bank was marked "in trust." (*People ex rel. Noel v. Kingsland*, 5 Ab., N. S. 90; S. C. 3 Keyes, 325; 1 Trans. Ap. 270.)

An order requiring a person to pay a fine or be committed, although informal, and not specifying clearly the grounds thereof, will be upheld; especially if there are accompanying papers showing that the party was convicted of having paid away money in violation of an order. (*Reynolds v. McElhone*, 20 How. Pr. 454.)

The bond, given under an attachment, requires two sureties; but if only one surety is given, it will not be void, but only irregular. (*Morton v. Campbell*, 14 Ab. 410; S. C. 37 Barb. 179.) But if the sheriff allows the prisoner to go, on such a bond, he is liable for an escape. (Id.) A bond, conforming to the requirements of the statute, with the exception of the omission of the seals, will be sustained, in an action thereon. (*Kelly v. McCormick*, 28 N. Y. 318.)

Disobedience of a subpoena, directed to a witness, requiring him to attend before a county judge and testify, in these proceedings, cannot be punished by such county judge, where the judgment was entered in the supreme court. (*People ex rel. Brunett v. Dutcher*, 3 Ab., N. S. 151.)

An order for commitment, which does not state the particular misconduct or offence to be punished, is void. (*DeWitt v. Dennis*, 30 How. 131.) But an order to punish a witness for contempt, in not answering before a referee, need not specify that the proceedings have been impeded, impaired, prejudiced or defeated by such misconduct. (*Lathrop v. Clapp*, 40 N. Y. 328; S. C. 23 How. 423.)

In *Billings v. Carver*, (54 Barb. 40,) where a defendant was adjudged guilty of a contempt in failing to appear and submit to an examination, as to his property, it being shown that such failure was caused by the advice of counsel, given in good faith, and in good faith relied upon by the defendant, the order was modified, so as to direct that the defendant be adjudged guilty of the contempt charged, and be fined, unless he appeared and submitted to an examination, under the original order, and made an affidavit to the effect that he had made no transfer of his property, since the order for his examination, except and unless under the provisions of the bankruptcy act.

Questions affecting the validity of the order disobeyed cannot be raised for the first time in opposition to a motion to commit for a contempt. They should be raised by the defendant on a motion to set aside the proceedings. (*Hilton v. Patterson*, 18 Ab. 245.) On a motion to commit for a contempt for disobedience, the only questions that can be raised are those affecting the regularity of the proceedings under the order, and the excuse for disobeying it. (Id.)

The abolishing of imprisonment for the non-payment of costs, does not apply to a judgment debtor, in supplementary proceedings who is in contempt for not paying a judgment and costs under an order previously granted. (*The People ex rel. Kearney v. Kelly*, 22 How. 309.) By the provisions of § 297, of the Code, which authorize a judge to order any property of a judgment debtor, due to him, to be applied to the satisfaction of the judgment, and of § 302, which authorize a person disobeying an order of a judge, to be punished as for a contempt, it was not intended to revive the remedy of imprisonment for debt; and under those provisions a judge has no authority to direct the imprisonment of one owing a debt to a judgment debtor, and who is unable or declines to pay. (*West Side Bank v. Pugsley*, 47 N. Y. 368.) The word "property," as used in § 297, does not include debts, but is limited to goods or specific money; and when these belong, indisputably, to the judgment debtor, a refusal to deliver them over as ordered would be a wilful contempt, and punishable as such. (Id.)

The provision of § 302 of the Code, bestowing upon the judge before whom supplementary proceedings are commenced, the power to punish disobedience to his order, made therein, does not deprive the court of its general power to punish such

CHAPTER III.

PROCEEDINGS UNDER DECREES AND ORDERS.

Sect. 1. UPON ISSUES AT LAW.

I. ISSUES UNDER THE ACT OF 1839.

II. FEIGNED ISSUES.

2. FOR AN ACTION AT LAW.

3. PROCEEDINGS IN THE MASTER'S OFFICE.

4. MASTER'S REPORT.

SECTION I.

PROCEEDINGS UPON ISSUES AT LAW.(1)

The various cases in which orders for issues at law may be allowed, and the proceedings to obtain such orders, we do not intend to enter into the consideration of, in this place. Reserving those branches of the subject for a future chapter, it is proposed to speak in this section, of the proceedings under decrees directing issues at law, from the time of the granting of the order for such issues.

disobedience. (*Kearney's case*, 13 Ab. 459; S. C. 22 How., sub nom. *People v Kearney*.)

A judgment debtor, while the order is in force, has no right to violate it by transferring his property to employ an attorney for him in the supplementary proceedings. The creditor's lien is prior to that of the attorney. (*The Deposit National Bank v. Wickham*, 44 How. 421.)

(1) The Code (§ 253) directs that an issue of law shall be tried by the court, unless it be referred, as provided in sections 270 and 271. An issue of fact, in an action for the recovery of money, only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in § 266, or a reference be ordered as provided in §§ 270 and 271.

Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in §§ 270 and 271, (1 Code, § 254.)

Rule 40 of the supreme court provides that in cases where the trial of issues of fact is not provided for in § 253 of the Code, if either party shall desire a trial by jury, he shall, within *ten days* after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury.

It has been *held* that title VIII, chap. 3, part 2 of the Code, relating to trial by jury, does not apply to the trial of issues in an equity action, but only to trials in

common law actions. (*Hatch v. Peuguet*, 64 Barb. 189.) In an equity action, even where certain issues have been submitted to a jury, still the action is to be tried by the court, and chapter 4, of the same title applies. (Id.)

On the trial of an issue of fact, in an equity case, the judge may submit to the jury such additional issues as are essential to bring to the view of the court, all the facts material to a just and intelligent decision. (*Farmers' & Mechanics' Bank of Genesee v. Jostlyn*, 37 N. Y. 353. See Code, § 261.)

It has been said that rule 40 of the supreme court, obviously contemplates an application to the court, for the settlement of issues in all cases where a trial by jury is to be had, in an equitable action. (*Van Sant. Eq. Pr.* 264.) Yet it has been held that the court has still the power, at the trial, as under the former practice, to order the whole issue, or any specific question of fact involved therein, to be tried by a jury, whether a prior application for issues has been made or not. (*Church v. Freeman*, 16 How. Pr. 394.) Though the power, therefore no doubt exists, to order an issue of fact, in an equity case, on the trial and without previous notice, to be tried by a jury, and is sometimes exercised, yet the safer course, in all cases, if either party desires such trial, is to move for a settlement of the issues within the time required by the rule. (*Van Sant. Eq. Pr.* 265. See *Wood v. Harrison*, 2 Sandf. 265.)

The motion for an issue may be made by any, or either of the parties to an action. When there are several defendants, united in interest, however, it should be made by all those who are so united. And notice of motion should be given to the attorneys of all the other parties who have appeared. (Id.)

The granting of issues is by no means a matter of course, but is now, as formerly, entirely discretionary with the court. (*Church v. Freeman*, 16 How. Pr. 294; *Apthorpe v. Comstock*, 2 Paige, 482.) In an equity case—except a suit for a divorce—a jury trial is not a matter of right. The judge may try all the issues, or he may, either upon the application of counsel, or upon his own motion, send any question upon which he prefers the judgment of a jury to that tribunal. From an order settling issues in an action of that character, no appeal lies. (*Wood v. The Mayor, &c., of New York*, 4 Ab., N. S. 152; S. C. 3 id. 467.) The whole purpose of framing an issue, and ordering it to be tried by a jury, is to inform the conscience of the court, and the equity judge may regard or disregard the verdict, may order a new trial of that issue, or a trial of an entirely different one; or he may proceed to hear the whole case himself. (Id.)

Where both legal and equitable causes of action are embraced in the same complaint, the judge, on the trial being moved, at special term, must determine whether any of the grounds upon which a recovery is sought are such as at the adoption of the constitution, were redressed solely by an action at law, and if so, should refuse to try the cause without a jury. Should he decide erroneously, and proceed to try a cause without, which should be tried by, a jury, it would not operate as a waiver of any of the legal rights of the plaintiff. And should the plaintiff fail to show himself entitled to any equitable relief, but should show a right to legal relief, the judge should not dismiss the complaint, but still order the cause to be tried by jury, as an action at law. (*Davis v. Morris*, 36 N. Y. 569; S. C. 35 Barb. 227; 3 Trans. Ap. 226.)

Where, in an action between partners, to settle copartnership matters, it becomes evident to the court that the several interests of the parties will, on the trial, involve much contradiction, perhaps questions of veracity, of mistake or fraud in the drawing of the papers, &c., and the question is one which business men, accustomed to examine facts, should decide, the court will direct the issues to be tried by a jury. (*Clark v. Brooks*, 26 How. 285.) And it is no objection to the granting of a proper application of that kind, that it is not made within ten days after issue joined, as provided by the rule of court. (Id.) But the application must be made before the trial has commenced; or it will be too late. (*People v. Albany & Susquehanna R. R. Co.* 7 Ab., N. S. 265; S. C. 38 How. 228; 55 Barb. 344; *O'Brien v. Bowes*, 10 Ab. 106; S. C. 4 Bosw. 657.) The court, however, may, for its own relief, at any time before the trial of the issues, invoke the aid of a jury, for their determination, or for the determination of any question of fact involved therein. (Id.) Under § 261 of the Code, it rests in the discretion of the presiding judge, at the trial, to submit such questions to the jury as, at the time, he thinks proper; and if, upon appeal, it appears evident that upon the whole verdict the respondent is entitled to judgment, the circumstance that, in addition to a finding upon material questions, there is also a finding upon some that are not material to any determination to be made by a jury, ought not to vitiate the verdict upon the questions properly submitted to them. (*Forest v. Forest*, 3 Ab. 144; S. C. 6 Duer, 102.)

It may be premised, however, that there are two methods of trying, in courts of law, issues joined in this court, viz., by feigned issues awarded in the old way, at the hearing, and by issues at law, under the act of May 2d, 1839. The chancellor has decided that that act does not deprive the court of the power it formerly possessed, to award an issue at the hearing, upon pleadings and proofs, where a material fact is rendered doubtful in consequence of conflicting testimony.(a)

I. OF ISSUES AT LAW UNDER THE ACT OF 1839.

Omitting, for the present, all the previous proceedings, we commence with the

Order for issue.] The 67th rule provides, that if the form of the issue to be tried is settled by the court, the order for such issue shall state the several questions to be passed upon by the jury, and the names of the parties to the issue, and which party is to be considered as holding the affirmative upon each question to be tried.

Filing copy of order.] Upon the filing of a certified copy of such order, with the clerk of the circuit court, or other court before which the trial is directed to be had, such court is to be deemed to be fully possessed of the cause for the trial thereof, in the same manner as if a formal record of a feigned issue had been made up and sent into such court to be tried.(b)

Noticing cause for trial.] Either party may give notice and bring on the trial, unless the trial is put off by the court on sufficient cause shown, as in other cases.(c)

Neglect of party to appear, &c.] If the party holding the affirmative of such issue neglects to appear, or to give evidence in support thereof, a verdict may be taken in favor of the adverse party.(d) But the probability of the absence of the complainant's counsel, at the time of the trial, has been held a reasonable ground for putting it off.(e)

Reference to a master to settle issues. If it is referred to a master to settle the form of the issue or issues to be tried, he must settle the same

(a) *New Orleans Gas Light & Banking Co. v. Dudley*, 8 Paige, 452.

(b) Rule 67.

(c) *Idem*.

(d) *Idem*.

(e) *Bearblock v. Tyler*, 1 Jac. & W. 225.

In an action for divorce on the ground of adultery, where issues are raised by the pleadings themselves, it is not necessary to frame issues to be tried by a jury; but the issues joined by the pleadings may be tried. (*Parker v. Parker*, 3 Ab. 478.)

An order directing the trial of issues as a substitute for a feigned issue is not an action. (*Snell v. Loucks*, 12 Barb. 385)

in the form of interrogatories to be answered by the verdict of the jury. Such interrogatories are to be stated at length in his report; and he must also state which party is to be considered as holding the affirmative of each question, or issue, upon the trial.(f) (2)

Where, upon a reference for the purpose of settling issues and determining in what county the trial should be had, each party swore to a great number of material witnesses residing in the counties where the parties respectively desired to have the issues tried; but they did not state, in their affidavits, the matters they expected to prove by such witnesses, it was *held*, that the master should have rejected, or disregarded, these affidavits on both sides. Or that he should have called the parties before him and examined them on oath as to the matters they expected and believed they would be able to prove by the witnesses respectively, and as to the grounds of such belief.(g) So, in an affidavit of the number and materiality of witnesses, in reference to the proper place for the trial of issues directed by the court, the party must state the substance of what he expects and believes he will be able to prove by the witnesses respectively; to enable the court or master to judge of their materiality.(h)

Filing copy order, and master's report.] Upon filing a certified copy of the order directing the issue, and of the master's report after it has become absolute, or has been confirmed, upon exceptions, the court

(f) Rule 67.

(g) *Meach v. Chappell*, 8 Paige, 135.

(h) *Meach v. Chappell*, 8 Paige, 135.

(2) Rule 40 of the supreme court provides that with notice of a motion that the whole issue, or any specific questions of fact involved therein, be tried by a jury, shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated in the order. And the court or judge may settle the issues, or may refer it to a referee to settle the same. Such issues must be settled in the form prescribed by § 72 of the Code.

The rule also provides that in all actions for a divorce, when issue is joined by the pleadings, upon the question of adultery, such issue shall not be tried by a jury until the issue to be tried shall be settled, in like manner as in other actions where issues arising out of the pleadings are required to be settled.

In the settlement of issues in a divorce case, the judge should not allow an issue as to whether the party was guilty of adultery with a specified person *at any time* before the commencement of the action. If the issue does not limit the time and place, it is defective. (*Strong v. Strong*, 1 Ab., N. S. 233; S. C. 3 Rob. 675.) But issues actually made in the pleadings, and inserted accordingly, without objection, in the issues as framed for trial, will not be expunged on motion, on the mere ground of indefiniteness as to time and place. (Id.)

In suits for divorce on the ground of adultery, feigned issues should be made up only for the trial of facts contested by the pleadings, such as are expressly alleged on one side and denied on the other. (*Morrell v. Morrell*, 3 Barb. 236; *Forest v. Forest*, 3 Ab. 144; S. C. 6 Duer. 102.) The Code has not rendered it necessary or proper that the question of alimony should be submitted to the jury. The amount of alimony, and the proper order for the custody and maintenance of the children, are matters for the consideration of the court. (Id.)

before which the trial is directed to be had shall be deemed to be possessed of the cause.⁽ⁱ⁾

In what court issue to be tried.] An issue at law may be tried either before a circuit court, a court of common pleas, mayor's court, or the superior court of the city of New York.^(k)

Under the above section of the statute the court has power to direct the trial to be had in any county of the state, according to the convenience of the parties. The court will, therefore, at the time of granting the order, either designate the place of trial in the order, or direct the master to inquire and report in what court and county the issue ought to be tried.

The revised statutes contain a provision that all issues of fact which shall be joined in the court of chancery, and which shall be sent to the supreme court for trial, shall be tried at a circuit court, or sittings of the supreme court, in the proper county; unless the supreme court shall, on the motion of either party, in cases of great difficulty, or which require great examination, order such trial to be had at the bar of the said court.^(l) (3)

(i) Rule 67.

(k) Laws of 1839, p. 292, § 2.

(l) 2 R. S. 409, § 1.

(3) The Code (§255) directs that all issues of fact, triable by a jury, shall be tried before a single judge. Issues of fact, in the supreme court, must be tried at a circuit court, when the trial is by jury, otherwise at a circuit court or special term, as the court may by its rules prescribe. Issues of law must be tried at a circuit court or special term, and shall, unless the court otherwise directs, have preference on the calendar.

Section 270 provides that all or any of the issues in an action, whether of fact or law, or both, may be *referred*, upon the written consent of the parties.

And section 271 authorizes compulsory references for the trial of issues, in the cases therein specified.

It has been held that the written consent to refer an action for divorce, required by § 270, is sufficient when the attorney for one of the parties draws an order of reference in the following form, and the attorney of the adverse party approves of the same: "Upon the consent of the attorneys for each of the above parties, given in open court, it is ordered that this action be and the same is hereby referred," &c. (*Waterman v. Waterman*, 37 How. 36.) The consent may be written by the parties, or their attorneys, or the clerk entering their consent in the minutes of the court, or by the referees in their minutes; such consent being made before them. The parties may also waive, by their acts, any further writing than the entry on the minutes of the referee, if more were otherwise necessary. (*Laycraft v. Fowler*, 7 How. Pr. 259. See *Diddell v. Diddell*, 3 Ab. 167.)

A consent in writing is necessary to refer issues, in all cases in which the court may not compel references; and hence a written consent is just as necessary to a valid reference under the Code as to a valid reference under the statutes relating to the reference of claims against executors and administrators. (*Bucklin v. Chapin*, 35 How. 155; S. C. 53 Barb. 488.)

In *Simmons v. Simmons*, (3 Rob. 642,) it was held that the court is not at liberty to divest itself of its obligations as guardian of the rights of married women, so far as to delegate the trial of an action for *divorce* to others; and that an order of reference "to try and determine the issues," in such an action, cannot be granted, even by consent.

Admissions.] In directing an issue, the court will order the parties to make such admissions as are necessary to raise the question to be determined.^(m)

Production of papers.] It will also order the parties to produce, at the trial, all documents in their possession, custody, or power, which the other parties may require or which the court may think necessary for a complete investigation;⁽ⁿ⁾ and if such order does not form part of the original order directing the issue, it may be obtained afterwards, upon motion.^(o)

In *The Earl of Fingal v. Blake*,^(p) an issue *devisavit vel non* being directed at the hearing, the lord chancellor, although he thought himself bound to follow the authorities, in the terms of his order upon the devisees to lodge papers, by confining it to papers relating to the matter, expressed an opinion that that comprised almost all papers, private letters, and memoranda of the testator; inasmuch as inferences might be drawn touching the state of his mind, or the influence exercised over it from apparently trifling or immaterial entries; declaring his preference, if the point were open, of an unqualified order for all papers of the testator, indiscriminately.

The court will order documents which are in the possession of another defendant to be produced on the trial of an issue;^(q) even though such defendant declines to be a party to the issue.^(r) But although the court has power over every party in the cause who is interested in the question to be tried, to compel such production as may be necessary for a complete trial, such production will not be ordered of documents which the party holds in a distinct character, such as mortgages, &c.^(s) In a case however, before the court of exchequer, the defendants in a tithe suit were ordered to produce, at the trial of an issue, deeds produced by them at the hearing, though belonging to their landlord, who was not a party, or to admit, at the trial, the facts which the deeds were produced on the hearing to prove.^(t)

It is to be remarked that the ordinary order for the production of books, papers, and writings before the master, will not be sufficient to compel their production at the trial. Such production must be specially ordered, and usually forms part of the order directing the

^(m) *Fenwick v. James*, *Seaton on Decrees*, 348.

⁽ⁿ⁾ *Carte v. Hodgkin*, *id.* 342.

^(o) *Marsh v. Sibbald*, 2 Ves. & B. 375.

^(p) 1 Molloy, 158.

^(q) *Marsh v. Sibbald*, *supra*.

^(r) *Pindar v. Smith*, *Mad. & Geld.* 48.

^(s) *Id. ib.*

^(t) *Pulley v. Hilton*, 10 Price, 118.

issue. Where that is not the case, a special application must be made to the court.(u)

It has been decided in Virginia that any papers may be read at the trial of an issue which were read upon the hearing of the cause, or at a former trial.(v)

Examination of parties.] Some doubt appears to exist with respect to the right of the court, when it directs an issue, to order the parties themselves to be examined, without their consent. The act of May 2d, 1839, and the rules of the court, are silent upon this point. Instances occur, however, in the books, in which orders for such examinations have been made;(w) and again there are others in which they have been refused.(x) Upon looking at these cases, however, it will be found that the rule is against the examination when the issue is directed at the hearing of the cause, or upon further directions; unless the party is merely a nominal one. But that, where the issue is directed upon an interlocutory application, on the ground that the affidavits on both sides are conflicting—as where an injunction is asked for upon the affidavit of one party, and opposed upon that of another, and an issue is in consequence directed—there it is considered quite fit that they should both be examined.(y)

Where the court directs a party to be examined as a witness, no objection is waived, except that which arises from his being a party in the cause;(z) and the meaning of the order is not that he should be a witness for the party himself, or for the other side, but that he should be a witness for the court;(a) in fact that he should undergo a *viva voce* examination for the purpose of eliciting the truth more clearly than can be done by affidavit or depositions in writing.(b)

Special jury.] By the English practice, if either of the parties require a special jury, a motion for one should be made to the court of chancery.(c)

View.] Where lands are in question, the court will sometimes order the jury to have a view; and where they are to have a view of a particular manor, the court will order them, in some instances, to take a view of the whole, and ascertain the bounds of it.(d)

(u) *Marsh v. Sibbald*, 2 Ves. & B. 275.

(v) *McCall v. Graham*, 1 Hen. & Munf. 13.

(w) *Vide Ex parte Dister*, Back, 231. 4 Mad. 236. *DeTastet v. Bordenave*, Jac. 518. *Perkins v. Minchin*, 2 Molloy, 24.

(x) *Vide Howard v. Braithwaite*, 1 Ves. & B. 374.

(y) *DeTastet v. Bordenave*, *supra*, 2 Dan. Pr. 789.

(z) *Rogerson v. Whittington*, 1 Swanst. 39.

(a) *DeTastet v. Brodenave*, *supra*.

(b) 2 Dan. 740.

(c) *Anon.*, 2 P. Wms. 68.

(d) *Prac. Reg.* 263.

Defendant to name an attorney.] According to the practice in the English courts, it is the duty of the defendant in the issue to name an attorney to appear for him in the court of law in which it is to be tried; and if he neglects to do so, an order may be obtained that he name an attorney in four days; and that in default, the issue be taken as tried and a verdict given for the complainant.(e)

Judge bound to try issue.] A judge at law before whom an issue has been ordered to be tried has no authority to decline trying it, or to refer it to another mode of trial, e. g. by arbitration. But if the parties think proper to refer it to arbitration, and a reference is adopted by consent, the effect is to abandon not merely the direction to try the issue, but the whole proceeding.(f)

Proceedings upon trial.] The course of proceedings upon the trial of an issue is generally the same as that adopted in ordinary trials at law; except where the court of chancery has given some special directions upon the subject.(g)

Examination of witnesses. It is to be observed, however, that where a devisee seeks to establish a will of real estate, against the heirs, the rule of the court requires that the due execution of the will should be proved by the examination of all the attesting witnesses to it who are in existence or capable of being examined; and that the same course is also necessarily required upon the trial of an issue *devisavit vel non* ;(h) except when the circumstances are such that, by the common rules of evidence, proof of the witness' hand-writing may be substituted for the testimony of the witness himself; as where the witness is dead or abroad, or is insane;(i) or where, after diligence search, he cannot be found.(k)

The rule above mentioned requiring all the witnesses to a will to be examined, applies, however, in general, only to the case of a bill filed to establish a will, and an issue directed by the court thereupon. Where the bill was filed by the heir at law, to restrain the devisee from setting up a legal estate as a bar to an ejectment, upon the hearing, and an issue *devisavit vel non* was directed—in which the devisee was plaintiff—upon a motion for a new trial, on the ground that all the attesting witnesses had not been examined, it was held that the case stood upon a ground directly opposed to that upon which the ordinary cases

(e) *Wilson v. Ginger*, 2 Dick. 521.

(f) *Woodley v. Johnson*, 1 Molloy, 394.

(g) 2 Dan. 742.

(h) *Id. ib.* *Townsend v. Ives*, 1 Wils. 216. *Ogle v. Cook*, 1 Ves. 178. *Bullen v. Michel*, 2 Price, 399. *Bootle v. Blandell*, 19 Ves. 494.

(i) *Powell v. Cleaver*, 2 Bro. C. C. 503. 5 Ves. 404. 9 id. 381.

(k) *James v. Farnell*, Tur. & Russ. 117.

of bills to establish wills rested ; and such was the form of his application, that if he failed upon that issue, he would not be bound himself.(l)

Where an order for an issue directs all the witnesses to be examined, but the plaintiff, conceiving his case to be made out, declines calling some of them, the judge himself will call them.(m)

Upon the trial of a feigned issue in a suit by a wife for a divorce, the judge may allow proof of acts of cruelty on the part of the defendant, for the purpose of showing that the affections of the husband were alienated from the wife ; that there was a course of abuse from the time of his connection with another woman, down to, and terminating in a separation from his wife ; and that such cruelty resulted from that connection and was part of the plan contrived between them to drive the wife from home, in order that the intimacy might be more easily carried on.(n)

New witnesses. In the case of *Apthorp v. Comstock*,(o) the order for an issue directed that no witnesses not before examined should be introduced on the trial, unless the party producing them should, at least fifteen days before such trial, give notice to the opposite party, or his solicitor or attorney, of his intention to produce such witnesses, with their names, additions, and usual place of abode. But this provision was not to extend to such new witnesses as were called to impeach other witnesses, nor where the judge should be satisfied there was a reasonable excuse for not giving such notice, or for giving a notice for a shorter period of time.

Reading depositions in the cause. In directing an issue, the court will order the depositions taken in the cause to be read at the trial of the issue ; without requiring a foundation to be laid, by proving examined copies of the bill and answer.(p) The object of the court, however, in making such an order, is merely that of dispensing with the strict legal proof of the record.(q) It is not intended to authorize the reading of the depositions of witnesses, in cases in which the court of law would not admit them to be read upon proof of the record in the ordinary way ; i. e. unless proof be given that the witness is dead, or abroad, or otherwise unable to attend. It therefore generally adds to the order a direction that the depositions of the witnesses shall be read at the trial of the issue, in case the witnesses, or either of them, shall

(l) *Tatham v. Wright*, 2 Russ. & My. 1.

(m) *Groom v. Chambers*, 2 Mont. & Ayr. 742.

(n) *Mulock v. Mulock*, 1 Edw. 14.

(o) 2 Paige, 485.

(p) 2 Dan. 744.

(q) *Gordon v. Gordon*, 1 Swanst. 170.

be dead at the time of the trial, or be proved at that time to be in such a state of health as not to be capable of attending the trial.(*r*)

In *Jones v. Jones*,(*s*) motion was made before Lord Thurlow, for leave to read the deposition of a witness in the cause, on the ground of his age or inability to attend; but his lordship thought the application should be made to the judge who tried the cause; and refused to make any order on the subject. It seems, however, that there is no absolute rule requiring that the inability of a witness to attend shall be left to the decision of the judge at *nisi prius*. Where, therefore, the court directing the issue can be satisfied that the question of the ability or inability of the witness to attend, can have but one conclusion, it will itself decide it.(*t*)

In a case where witnesses had been examined in the cause, and upon the hearing, an issue was directed, but, before the trial, the plaintiff in the issue died, having appointed one of the witnesses, who had been examined, his executrix, whose name, and that of her husband, were in consequence substituted for that of the testator, as plaintiffs in the issue, the court ordered that the depositions of the executrix, in the cause, should be read at the trial of the issue; on the ground that if she had died, her depositions would have been admissible, and that her becoming plaintiff was tantamount to her death.(*u*)

Where a witness who has been examined in a cause, and afterwards *viva voce* upon the trial of an issue, dies, and a new trial of the issue is directed, not only his deposition in the cause may be read at the new trial, but what he swore to at the former trial may be given in evidence.(*v*)

In the case of *Apthorp v. Comstock*,(*w*) the order for an issue directed that either party should be at liberty, at the trial, to re-examine any witness whose testimony had been read upon the hearing of the cause, or to read their depositions if they were dead, or out of the jurisdiction; as also to read the deposition of any witness of the opposite party.

Depositions taken de bene esse. It is the practice of the courts in England, not to allow the examination of a witness *de bene esse*, with a view to the trial of an issue, after the depositions of other witnesses in the cause have been published.(*x*) But where a witness who has

(*r*) *Palmer v. Lord Aylesbury*, 15 Ves. 176.

(*s*) 1 Cox, 184.

(*t*) 2 Dan. Pr. 744, 5. *Corbett v. Corbett*, 1 Ves. & B. 835.

(*u*) *Andrews v. Lady Beauchamp*, 7 Sim. 65.

(*v*) *Coker v. Ffnewell*, 2 P. Wms. 563.

(*w*) 2 Paige, 485.

(*x*) *Palmer v. Lord Aylesbury*, 15 Ves. 299.

not before been examined in the court of chancery, has been produced upon a trial at law, and another trial of the same matter is to be had, the court will entertain a motion for the examination of such witnesses *de bene esse* with a view to such second trial.(y)

And so, after the trial of an issue in the cause, an application on the part of the complainant for liberty to examine a witness who was above seventy years old, *de bene esse*, for the purpose of securing his testimony in case of his death, upon the ground that it was intended to move for a new trial, was granted.(z)

When depositions taken *de bene esse* have been read at the hearing of a cause, it is a matter of course to order them to be read at the trial of an issue, notwithstanding an irregularity in the examination. And the court will not discharge the order on the ground of such irregularity; although the party complaining of it did not know of the irregularity in question till after the hearing, and the time was very short between the publication of the depositions and the hearing of the cause; as the party complaining of the order might have applied for time to enable him to examine whether the depositions had been regularly taken.(a)

Who may attend trial of issue. A person who is interested in the result of an issue, but who refuses to be a party to it, may nevertheless be allowed to attend the trial, by counsel.(b) He will, in such case, be included in the order for the production of documents.(c)

Minutes of court below.] Where the trial of the issue is had under the act of May 2d, 1839, the court awarding the issue is to be informed of the proceedings upon, and result of, the trial, by the minutes of the court at law. The 67th rule provides that a copy of the minutes of the court before which the issue is tried, containing the verdict of the jury upon the issues, certified by the clerk, shall, upon the hearing in this court, be sufficient evidence of the trial and verdict.

Judge's certificate.] After the trial of a feigned issue, the judge certifies how the verdict was found, and whether the same was satisfactory to him, or not.

New trial, when to be applied for.] By the English practice, an application for a new trial of an issue must be made before the hearing on further directions.(d) But the rule is otherwise here. In *Apthorp*

(y) Anon. cited by Lord Eldon, Ibid.

(z) Anon. 6 Ves. 573.

(a) Gordon v. Gordon, 1 Swanst. 166.

(b) Pindar v. Smith, Mad. & Geld. 48.

(c) 2 Dan. 746, 752.

(d) Attorney Gen. v. Montgomery, 2 Atk. 378.

v. *Comstock*,^(e) and in *Van Alst v. Hunter*,^(f) the motion for a new trial was allowed to be made at the hearing upon the equity reserved. In the latter case the court say a new trial has been as often granted in that way as upon a previous petition, or distinct motion for the purpose.

The application for a new trial must be made within a reasonable time. Thus, in *Legard v. Daly*,^(g) where five years and a half had elapsed since the trial, the court refused the application upon that ground. And in *Van Alst v. Hunter*,^(h) a motion for a new trial, made the second term after the *nisi prius* record and certificate of the judge had been filed, on an *ex parte* statement of the evidence, was denied, on the ground of the delay and the want of proper documents.

New trial, how applied for. The 5th section of the act of May 2d, 1839, directs the chancellor, by general rules to prescribe the manner of proceeding to obtain a new trial of the issues, when necessary.⁽ⁱ⁾ In pursuance of this direction, the 67th rule provides that where a feigned issue, or any other issue, has been awarded and tried, if either party wishes to apply to this court for a new trial, on the ground of any erroneous decision or misdirection of the court or judge before whom the issue was tried, or that the verdict was against the weight of evidence, a case is to be made up and settled in the manner prescribed in the rules of the supreme court in relation to causes pending in that court. And where more than one judge was present at the trial of the issue, the case may be settled by the senior judge who was present and presided, or by the judge who may have been designated by the court for that purpose, upon the trial.⁽⁴⁾

(e) 2 Paige, 485.

(f) 5 John. Ch. Rep. 153.

(g) 1 Ves. 192.

(h) *Supra.*

(i) Laws of 1839, p. 293.

(4) Rule 40 of the supreme court directs that when any specific questions of fact involved in an action, or any question of fact not put in issue, is ordered to be tried by a jury, as a substitute for a feigned issue, and has been tried, or a reference other than of the whole issue has been ordered under § 271 of the Code, and a trial had, if either party shall desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence, (except when the judge directs such motion to be made upon his minutes, at the same term or court at which the issues are tried,) a case or exceptions shall be made, or a case containing exceptions, as the case may require; which case or exceptions shall be served and settled in the manner prescribed by the rules of court for the settlement of cases and exceptions in other cases.

Such motions shall be made, in the first instance, at special term, and if neither party moves for a new trial in such case, they shall be deemed to have acquiesced in the decision of the judge or referee, and the verdict of the jury or report of the referee, and the same shall not be questioned upon the final hearing of the cause, or in any subsequent proceeding therein.

Where this court directs a suit at law to be brought, the application for a new trial must be made to the court in which such action is pending. But where an issue is directed to be tried in a court of law, the application for a new trial must be made to the court of chancery. (k) The reason of this distinction is laid down by Lord Eldon to be, that if this court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a court of law, the opinion of a court of law is sought in such a form that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape; but upon an issue directed, this court reserves to itself the review of all that passes at law; and one principle upon which the motion for a new trial is made here, and not to the court of law, is, that this court regards the judge's report, with a view to determine whether the information collected before the jury, together with that which appears upon the record, is sufficient to enable it to proceed satisfactorily, to which it did not consider itself competent previously. (l)

The application for a new trial must be made to the chancellor or vice chancellor who directed the issue: i. e. to the same jurisdiction. (m)

The form of the issue will not be changed upon a motion for a new trial. If the party is desirous to question the form of the issue, he must do so by presenting a petition for a re-hearing of the decree or order directing it. (n) In *De Tastet v. Bordenave*, (o) a petition for a re-hearing was presented at the same time that a notice of motion was given for a new trial; and upon the hearing of the petition, Lord Eldon said that if it had been lodged before the trial, an application should have been made, by motion, to stay the trial; but that if the application for the re-hearing was not made till after the trial, it came too late.

(k) *Apthorp v. Comstock*, 2 Paige, 482. *Fowkes v. Chadd*, 2 Dick. 576.

(l) *Bootle v. Blundell*, 19 Ves. 500.

(m) See 2 Dan. Pr. 756. *Footner v. Figes*, 2 Sim. 319. See *Reece v. Reece*, 1 My. & Craig, 372.

(n) *White v. Lisle*, 3 Swanst. 351. See also *Legard v. Daly*, 1 Ves. 192.

(o) *Jacob*, 516.

For the error of the judge at the circuit, in excluding or admitting evidence on the trial of an issue ordered by the special or general term, to settle a disputed fact, arising on a motion, the remedy of the party aggrieved is by a motion to the general term, for a new trial of the issue, upon a case. (*Snell v. Loucks*, 12 Barb 885.)

An order made by a judge, at the circuit, refusing a new trial, upon his minutes, is not, in the case of a trial of special issues in an equity action, appealable. The defeated party must wait until after the trial of the action at special term or at least until after a motion at special term, for a new trial, has been heard. (*Hatch v. Peugnet*, 64 Barb. 189.) Such a case is not within section 264 of the Code, because it is not the trial of a *cause*, as provided in that section. (Id.)

In *White v. Lisle*,^(p) however, his lordship permitted a petition for a re-hearing to be brought on at the same time with a motion for a new trial.

New trial—when and for what reasons granted.] This court directs issues to be tried at law to inform the conscience of the court as to facts doubtful before, and therefore expects, in return, such a verdict, and on such a case, as shall satisfy the conscience of the court to found a decree upon. If, therefore, upon any material or weighty reason the verdict is not such as to satisfy the court that it ought to found a decree upon it, there are several cases in which this court has directed a new trial, for further satisfaction, notwithstanding it would not be granted in a court of common law; because it is *diverso intuitu*, and because the court proceeds on different grounds.^(q)

Verdict contrary to weight of evidence.] Accordingly, the court will grant a new trial not only in cases where the verdict is against evidence, but it will nicely balance the evidence on both sides; and where it finds that the verdict is contrary to the weight of evidence, it will direct the issue to be tried over again.^(r) Therefore, if the judge before whom the issue is tried certifies the verdict to be against evidence, the chancellor will direct a new trial.^(s) But it seems to be the general principle acted upon by the court, that if the application rests solely on the ground that the verdict given by the jury was against the weight of evidence, and the judge states that, upon the whole, he is not dissatisfied with that verdict, which is the usual form in which judges intimate their opinion that the verdict ought not to be disturbed, the court will not grant a new trial.^(t)

But even in that case the court will grant a new trial upon the production of new evidence which was not before the jury upon the original trial.^(u) So if, after a trial, a witness be convicted of perjury, or a party of forgery, this will be considered as a good ground for a new trial.^(v) The court, however, will not set aside a trial at law for any matter which might have been made use of at the trial;^(w) or when it is of opinion that the evidence, though newly discovered, will not afford a foundation for a different verdict.^(x)

Surprise.] Where it can be shown that a party has been taken by

(p) 3 Swanst. 342.

(q) *Stace v. Mabbot*, 2 Ves. 552.

(r) *Lord Faulconberg v. Pierce*, 1 Amb. 210. *Cleeve v. Gascoigne*, id. 323.

(s) *Southall v. McKeand*, 1 Wash. Virg. Rep. 336.

(t) *Gibbs v. Hooper*, 2 My. & Keen, 355.

(u) *Id. ib.*

(v) *Tilley v. Wharton*, 2 Vern. 378. See also *Coddington v. Webb*, id. 240. *Sewell v. Freestone*, 1 Ch. Ca. 65.

(w) *Curtess v. Smallridge*, 1 Ch. Ca. 23. 2 Freem. 178. *Montgomery v. Attorney Gen.* 9 Mod. 388.

(x) *Colgrave v. Juson*, 3 Atk. 197.

surprise, and evidence was produced at the trial which he could have no reason to expect would be produced, the court has directed the issue to be tried again. Thus, if after an issue is directed, the plaintiff obtains an order *ex parte*, to strike out the name of a co-plaintiff and makes use of him as a witness, and has a verdict, the court will set aside the trial.(y)

Fraud.] The court will also grant a new trial in cases in which a fraud has been practised upon the party applying.(z)

New evidence.] As it is the rule of the court that it will not grant a new trial upon the production of new evidence, unless it is shown that there has been some surprise or fraud upon the party applying,(a) still less will it do so where the party is in possession of the evidence, but either in the exercise of discretion or from neglect, does not produce it at the trial;(b) or where it can be shown that, though he was not in possession of it himself, he had full notice that it was in the power of the other party to produce it. Upon this ground, the circumstance of evidence having been made use of at the trial of an issue, which was discovered after the answer of the defendant was put in, the consequence of which was that the verdict was contrary to the answer, and to the true sense and meaning of the issue, was not held a sufficient reason for directing a new trial—there having been no surprise upon the party applying; who, before the trial, had opposed a motion made by the other party for the express purpose of having the trial postponed in order that the issue might be rectified.(c)

Where a party, upon the trial of an issue, produces evidence which is a surprise upon the other party, and which would have been sufficient, under other circumstances, to entitle him to the verdict, he will not be permitted, although the jury find against such evidence, to have a new trial.(d)

As the court will not grant a new trial upon the mere production of new evidence, unless it can be shown that there was a fraud or surprise upon the party applying, so it will not permit a party who has practised a fraud, and set up documents which were proved to be forgeries, and by that means prejudiced his own case, to say that, whether the documents were true or false, there is other evidence which makes them immaterial.(e)

(y) *Exton v. Turner*, 2 Ch. Ca. 80. See *Willis v. Farrar*, 3 Young & Jer. 264. *Gibbs v. Hooper*, 2 My. & Keen, 353.

(z) 2 Dan. 750.

(a) *Standen v. Edwards*, 1 Ves. Jun. 133.

(b) *Id.* ib.

(c) *Legard v. Daly*, 1 Ves. 192.

(d) *Carrington v. Jones*, 2 Sim. & Stu. 135.

(e) *Kemp v. Mackrell*, 2 Ves. 580.

Absence of material witness.] The court will grant a new trial on the ground that a material witness for the party was absent from the trial. But it will not do so on the mere ground that the testimony of the witness who was absent would only corroborate that of several others to a fact. It must be shown that there is something particular in his evidence which is of importance; and that it was not in the power of the party to have the trial put off.(*f*)

Misdirection of judge.] A new trial may also be granted on the ground of a misdirection of the jury by the judge who tried the issue. (*g*) So, if the court feels satisfied, from the report of the judge, that the points in the case have not been distinctly presented to the jury, it will, without entering into the question whether the verdict was or was not satisfactory upon the facts, direct a new trial.(*h*) But where an application is made for a new trial, on the ground of an improper summing up by the judge, the court will not accede to it if it is satisfied that, upon the evidence as it stands, the jury could not have given a different verdict, had the case been properly summed up.(*i*) Neither will a new trial be granted because the judge made to the jury an inaccurate representation of the defect of the defendants' answers.(*k*)

Misconduct of jury.] The court will also order a new trial of an issue where it sees reason to be dissatisfied with the conduct of the jury.(*l*)

Irregularity in the trial.] It has been said that to induce this court to set aside a former trial of an issue for an irregularity in the trial, and for that cause to grant a new one, there must, in general, be a certificate from the judge or court before whom it was tried, of a verdict against evidence, or other misbehavior of the jury, &c.(*m*) This, however, does not appear to be the present practice. Frequent instances occur in the books where the court has set aside the verdict in such cases, without any such certificate by the judge, and even in opposition to it, where he has expressed himself satisfied with the verdict.(*n*)

Improper reception or rejection of testimony.] The court will not direct a new trial of an issue merely on the ground that improper testimony was received on the trial; or that the judge rejected that which was proper; if, upon the whole facts and circumstances, the chancellor

(*f*) *Cleeve v. Gascoigne*, 1 Amb. 323.

(*g*) *Id. ib.* *Bearblock v. Tyler*, Jac 571.

(*h*) *Tatham v. Wright*, 2 Russ. & My. 31. *Vide Ringrose v. Todd*, 12 Price, 650.

(*i*) *Barker v. Ray*, 2 Russ. 63.

(*k*) *O'Connor v. Cook*, 8 Ves. 536.

(*l*) *East India Co. v. Bazett*, Jacob, 91. *Pleasants v. Ross*, 1 Wash. Virg. Rep. 156.

(*m*) *Prac. Reg.* 263.

(*n*) See *East India Co. v. Bazett*, *supra*.

is satisfied that the result ought not to have been different, had such testimony been rejected in the one case, or received in the other.(o)

▼ *Where verdict affects the inheritance.*] If the suit relates to the right to land, the court will frequently grant new trials of issues, even in cases in which the issue has been properly tried, and the verdict is satisfactory upon the evidence; the practice of the court being adverse to making a decree to bind the inheritance where there has been but one trial at law.(p) This is the case especially where the object is to establish a will against an heir at law; for as the heir, but for the interference of the court, would be entitled to take the opinions of successive juries by new ejectments, this court will not bind him by one trial only, but will direct a second.(q) And if it happens that one verdict goes one way and the other another way, the court will, ordinarily, on motion, order a third trial; which is commonly conclusive.(r)

After two concurring verdicts for the same party, the chancellor is not bound to direct a new trial, notwithstanding both verdicts were in opposition to the opinions of the judges before whom the issues were tried, and a verdict had originally been rendered in favor of the other party.(s)

In the case of a will, even after two trials in both of which the verdict has been in favor of the will, the court, where it was not satisfied with the manner in which the last trial was conducted, has directed a third trial; and that, even though it did not appear from the judge's report, that there was any reason to disturb the verdict.(t) It seems, also, that even after three trials, the court will, if it sees reason to be dissatisfied with the verdict, grant a fourth.(u)

In general, however, the court will not direct a new trial after a third, unless upon some special ground.(v)

It is to be remembered that it rests entirely in the discretion of the court to award a second trial of an issue, or not, according to the circumstances and testimony in the case.(w) Even in the case of suits to bind the inheritance, the court will not set aside the verdict and grant a new trial merely because it is asked for, without any ground laid for it.(x) It will, however, in cases of that nature, where the matter is of

(o) *Apthorp v. Comstock*, 2 Paige, 482. *Barker v. Ray*, 2 Russ. 63. *Hampson v. Hampson*, 3 Ves. & B. 41. *Bootle v. Blundell*, 19 Ves. 500.

(p) *Earl Darlington v. Bowes*, 1 Eden, 271. *Stace v. Mabbot*, 2 Ves. 353.

(q) *Winchelsea v. Wauchope*, 3 Russ. 441. *Van Alst v. Hunter*, 5 John. Ch. Rep. 152.

(r) *Prac. Reg.* 263.

(s) *McRae's ex'r v. Wood's ex'r*, 1 Hen. & Munf. 548.

(t) *Prac. Reg.* 263.

(u) 2 Dan. 754. *Pemberton v. Pemberton*, 13 Ves. 290.

(v) *Id. ib.* *Att'y Gen. v. Montgomery*, 2 Atk. 378. *Minor Canons of St. Pauls v. Morris*, 9 Ves. 155. *Bates v. Graves*, 2 Ves. jun., 287.

(w) *Van Alst v. Hunter*, 5 John. Ch. Rep. 152.

(x) *White v. Wilson*, 13 Ves. 88.

great importance, direct a second trial, for the solemn determination of the matter, without setting aside the first verdict. The effect of which is that the first verdict may be given in evidence upon the second trial, and will have its weight with the jury.(y)

It seems that in such cases, the court makes it a condition of granting a second trial, that the applicant shall pay to the other party the costs of the first.(z)

If the judge certifies that he is dissatisfied with the verdict, the court does not, as of course, grant a new trial, though it is the ordinary practice to do so.(a)

Effect of a verdict on first trial, upon the second trial.] Where a verdict upon a former trial is given in evidence upon a second trial, it is necessary for the person who gives it in evidence to show upon what title it was obtained. And, on the other side, they are at liberty to show on what kind of proofs it was given, which, if there is any thing impeaching the evidence on which the first verdict was given, will be very material.(b) And even where the person who is guardian to an infant party to an issue, has been guilty of mal-practices to obtain the verdict, that fact may be given in evidence to impeach it.(c)

Further directions.] After the issues at law have been tried, the cause, unless a new trial is moved for and granted, must be heard for further directions, upon the equity reserved. By the English practice, this cannot be done until after the first four days of the term next after the trial have elapsed, in order that the party against whom the verdict has been found, may have an opportunity of moving for a new trial.(d)

The cause then comes on in the regular course, when such final or other decree as the cause calls for will be pronounced.

The decree of the court is usually in accordance with the finding of the jury upon the issue, or, if there have been more trials than one, with the last verdict. The court, however, will, even then, if it thinks that the issue as tried does not answer the purpose for which it was intended, direct a new issue or issues, in such form as may suit the justice of the case.(e) And in *Armstrong v. Armstrong*,(f) the master of the rolls, without directing a new issue, decided at once against the parties in whose favor the verdict was found; and his decision was sustained upon appeal.

(y) *Baker v. Hart*, 3 Atk. 542.

(z) *Id. ib.* See also *Edwin v. Thomas*, 1 Vern. 489.

(a) *Faulconberg v. Pierce*, Amb. 210. *Atkins v. Drake*, 1 McCle. & Y. 229.

(b) *Id. ib.*

(c) *Id. ib.*

(d) 2 Dan. 758.

(e) *Id. ib.* *Blackburn v. Gregson*, 1 Bro. C. C. 423, 4.

(f) 3 My. & Keen, 45.

Although the court will not make a decree contrary to a positive denial, on oath, by the defendant's answer, upon the evidence of one witness only, but will, where the evidence of such witness is supported by corroborating circumstances, send the matter to an issue,^(g) it will nevertheless make a decree upon the verdict, although it appears by the postea that only one witness was examined.^(h)

If, after an issue has been directed, the cause is brought on for further directions, and it appears that the parties have not gone to trial of the issue, the court, if it is dissatisfied with the grounds upon which the trial of the issue was not suffered to take place, will still direct it to be tried. Thus, where an issue was directed to try the validity of a debt claimed against a testator's estate, and at the trial of the issue, the executor entered into a compromise with the debtor, subject to the opinion of the court; and upon the case coming on again for hearing, the master of the rolls was of opinion that the compromise was improper, and directed the parties to proceed to try the issue, the executor paying all the costs of the former proceedings at law.⁽ⁱ⁾

So if it appears that the judge, before whom the issue was to be tried, declines trying it, and refers it to arbitration, the court will make an order to have an issue tried, if the party dissatisfied with the award applies for a new trial.^(k) The case is otherwise, however, where the reference is adopted by consent of both parties.^(l)

Costs of issues at law.] The costs of a feigned issue do not follow the verdict as a matter of course, but the finding of the jury is returned to this court, and the costs are in the discretion of the court.^(m)

These costs cannot be obtained upon motion, but the cause must be set down upon further directions.⁽ⁿ⁾ And where a person, not a party to the suit, went before the master, under the decree, claiming to be a party interested, and, upon an issue directed, obtained a verdict, it was said that if the court decided against a new trial, he must be made a party, for the purpose of bringing him before the court upon further directions.^(o)

But the general rule is, that the costs of an issue follow the event, and are given to the party who prevails at law.^(p) There are excep-

(g) *Pember v. Matthews* 1 Bro. C. C. 52. 2 Dan. 404, 406. *East India Co. v. Donald*, 9 Ves. 275.

(h) 2 Dan. 758.

(i) *Legh v. Holloway*, 8. Ves. 213.

(k) *Woodley v. Johnson*, 1 Molloy, 394.

(l) *Id. ib.*

(m) 2 Harr. Pr. 570. 2 Dan. 759.

(n) *Standen v. Edwards*, 1 Ves. jun. 135.

(o) *Id. ib.*

(p) *Beames on Costs*, 234. *Prac. Reg.* 152. 2 Dan. Pr. 760.

tions to this rule, however. Thus, in the case of a bill to establish a will against an heir at law, he has a right to know how he is disinherited; and if an issue is directed to try the will, he will have his costs, although the will is established; unless there are peculiar circumstances in the case which will induce the court to refuse them.(q)

In some cases, an heir will be ordered to pay the costs of an issue, but it must be a very strong case to induce the court to charge him—such as the spoliation or secreting of a will;(r) or where he vexatiously contests the will, by falsely setting up insanity in the testator.(s) On the ground of vexation, also, the court will decree the costs of an issue against an heir who fails, where he himself has filed a bill to set aside a will for insanity, instead of proceeding by ejectment.(t)

Where the plaintiff in an issue gives notice of trial, but does not proceed, the costs for not going to trial should be moved for in this court, and not in the court of law.(u) The proper course in such cases is to apply, by motion, for an order that the plaintiff may proceed to trial at a specified time, or that the issue be taken *pro confesso*.(v)

When a new trial of an issue is directed, the court usually reserves the consideration of the costs of the former trial.(w) But in *Standen v Edwards*,(x) an order was made that the defendants, who were infants, on whose behalf the application for the new trial was made, might pay the costs of the former trial, before they proceeded to a new trial.(y)

Costs of motion for new trial.] Where the motion for a new trial is denied, the costs are not costs in the cause, and cannot be recovered by the successful party, unless the motion is expressed to be denied, with costs.(z)

II. FEIGNED ISSUES.

It has been before remarked that the act of May 2d, 1839, regulating the trial by jury, &c. does not deprive the court of the power it previously had, to award feigned issues at the hearing upon pleadings and proofs.(a) (5)

(q) *Berney v. Eyre*, 3 Atkyns, 387. *Wright v. Wright*, 5 Sim. 449. *White v. Wilson*, 13 Ves. 92.

(r) *Berney v. Eyre*, *supra*.

(s) *White v. Wilson*, 13 Ves. 92.

(t) *Webb v. Claverden*, 2 Atk. 424. *Scaife v. Scaife*, 4 Russ. 309.

(u) *Anon.* 2 P. Wms. 68.

(v) *Bearblock v. Tyler*, 1 Jac. & W. 225. 2 Dan. Pr. 762.

(w) *Beames on Costs*, Appx. xv. 369.

(x) 1 Ves. jun. 135.

(y) See also *Edwin v. Thomas*, 1 Vern. 459.

(z) *White v. Lisle*, 4 Mad. 214. See also *Devie v. Lord Brownlow*, 2 Dick. 796.

(a) See *ante*, p. 446.

(5) By the Code, (§ 72,) feigned issues are abolished, and it is provided that in the cases where the power previously existed to order a feigned issue, or when a ques-

Drawing up and settling a feigned issue.] Upon granting an order for a feigned issue, a draft of the pleadings in an action of assumpsit is prepared by the plaintiff's solicitor, (or by the solicitor of whichever party is ordered by the court to prepare it.) In the declaration, the pretended plaintiff declares that he laid a wager of a certain amount, with the defendant, on the question in dispute; and avers that the fact is as he contended it was, and that he therefore brings his suit for the amount of the wager. The defendant, by his plea, admits the wager, but avers the contrary to be the fact. Whereupon the issue is joined which is ordered to be tried.(b)

When the complainant's solicitor has prepared the pleadings, he serves a copy upon the defendant's solicitor. If the parties are unable to agree upon the issue, it is to be settled by a master; and the order usually contains a direction to that effect. For this purpose a copy of the pleadings is made and left in the master's office; who thereupon issues a summons for the other party to attend; on the return of which the issue is settled by the master.(c)

When the issue has been settled, the master certifies accordingly; which certificate is filed in the proper office.

Service of issue as settled.] A copy of the issue as settled, with notice of trial endorsed, is then served upon the opposite party.(d)

Proceedings in court of law.] After the issue is agreed upon, or settled by the master, the subsequent proceedings are regulated by the practice of the court in which it is to be tried; subject, however, to the control of this court over the parties as to the mode and terms of trying such issue.(e)

The decree or order directing the feigned issue, either specifies the time when it is to be tried, or directs the master to fix the time. But it seems the court has no power to make a compulsory order to force the parties to proceed on the issue. If, however, the plaintiff makes default in taking the record down for trial at the time appointed, the court will order the issue to be taken *pro confesso* against him.(f) Yet,

(b) 2 Smith, 80.

(c) See Act of May 14th, 1840, abolishing circuit rolls, &c. Laws of 1840, p. 334, § 21.

(d) 2 Smith Pr. 81.

(e) 1 Turn. Pr. 450.

(f) Bearblock v. Tyler, 1 Jac. & W. 225.

tion of fact, not put in issue by the pleadings, is to be tried by a jury. an order for the trial may be made, stating, distinctly and plainly, the question of fact to be tried, and such order shall be the only authority necessary for a trial.

It has been *held* that this section can have no application to an action for a divorce for adultery, in which an issue of fact is raised by the pleadings. (*Parker v. Parker*, 3 Ab. 478.)

when there is a reasonable ground shown for the indulgence, the court will, upon application, give the plaintiff leave to postpone the trial.(g) After an order to take the issue *pro confesso*, the cause should be set down for further directions, and to have the issue taken *pro confesso* pursuant to the order.(h)

The practice with respect to the production of documents, the examination of parties, and of witnesses, and in short, with respect to all the proceedings upon the trial of a feigned issue, is nearly the same as that upon the trial of issues at law under the act of 1839.

According to the former practice, after the verdict was rendered, the same was endorsed on the postea, and the record brought into this court and filed with the register; upon which the cause was noticed for hearing on further directions.(i) But the act of May 14th, 1840, concerning costs and fees in courts of law, &c. has abolished the circuit roll and postea, and directed the copy of the pleadings furnished for the court upon the trial, with a certified copy of the minutes of trial annexed, to be filed instead.(k)

Proceedings in this court after trial.] The party obtaining the verdict must, under this section, obtain from the clerk of the court in which the cause was tried, a certified copy of the minutes of trial, annex it to the pleadings, file the papers in the register's or clerk's office, and thereupon notice the cause for hearing upon further directions.

If a new trial of a feigned issue is sought for by either party, it is to be applied for in the same manner as in the case of an issue at law, and will be granted for the like causes.(l)

It seems that the plaintiff in an issue may suffer a *nonsuit*, and that if he does so advisedly, in consequence of any unforeseen occurrence at the trial which would have rendered further proceeding with it unsafe, the court will grant him a new trial, notwithstanding the nonsuit.(m)

After the trial of an issue, the plaintiff cannot move to dismiss his own bill, with costs; although he might have done it before the trial actually took place.(n)

(g) *Id. ib.*

(h) 1 Newl. Pr. 352.

(i) *Van Alst v. Hunter*, 5 John. Ch. Rep. 150.

(j) Laws of 1840, p. 534, § 21.

(k) See ante, p. 454, *et seq.*

(m) *Richards v. Symes*, 2 Atk. 319.

(n) *Carrington v. Holly*, 1 Dick. 281.

SECTION II.

ACTION AT LAW.

In what cases directed.] Wherever the foundation of a claim is a legal demand, and the question whether a new trial should or should not be had, can be discussed with more satisfaction in a court of law than in a court of equity, this court will direct an action at law.(o)

The court in dismissing the complainant's bill, will sometimes do so without prejudice to his right to proceed at law.(p) It will also, where the complainant's right to equitable relief depends upon a legal title, retain the bill for a certain period—giving the complainant liberty, in the meantime, to bring an action for the purpose of establishing his right at law, in order to found the equitable relief.(q)

The cases in which the court retains the bill, with liberty to the complainant to proceed at law, are those in which it is necessary for him to establish his right at law in order to found the equitable relief.(r) And the practice cannot be made use of to enable the complainant first to try whether he has any claim at law, and then, if he fails there, to come into this court to try to raise an equity.(s)

Where the bill is retained, with liberty to the complainant to bring an action at law, within a limited time, the bill will be dismissed unless an action is brought within the time limited; further directions being reserved only in the event of a trial taking place.(t)

Form of action.] In directing an action at law, the court always directs it to be brought in such a form that the result shall be regarded as conclusive.(u)

Special directions.] The court will also provide for a satisfactory trial by restraining the parties from setting up any legal obstacles to the fair trial of the case; such as outstanding terms, or the statute of limitations, or a bankruptcy.(v) It will also order the parties to make such admissions at the trial as may be necessary to bring the matter in dispute properly before the court.(w) And it will give the same directions as to the examination of the parties, and the reading of depositions, and the production of documents, as are given upon directing issues.(x)

(o) 2 Dan. 763.

(p) Id. 639. Mortlock v. Buller, 10 Ves. 292. McNamara v. Arthur, 2 Ball & B. 349.

(q) Id. ib. Seaton on Decrees, 356.

(r) Walton v. Law, 6 Ves. 150.

(s) Id. ib.

(t) 2 Dan. 640, 763.

(u) Bootle v. Blundell, 19 Ves. 500.

(v) Pemberton v. Pemberton, 13 Ves. 298. Stevens v. Praed, 2 Ves. jun., 519.

(w) Id. ib.

(x) See ante, p. 448, et seq.

The rule as to producing papers on a trial at law directed by this court is this: If the court directs a trial, it is directed in such a way that all productions which the court conceives to be useful upon that trial, the creature of its own direction, shall be made. Upon this principle the court will order documents which are in possession of another defendant, to be produced on a trial at law directed by the court.(y)

Where the bill seeks relief, as well as discovery, the court will not, upon motion, aid the complainant in proceeding at law without the authority and control of the court. Any such proceeding must be under the authority and control of this court. Therefore, in such a case this court would not, on motion, order that an outstanding term should not be set up by the defendant against an ejectment brought by the complainant;(z) or direct the defendant to produce deeds, &c. on the trial of the suit at law.(a)

Where an action at law was directed to be brought, and it was ordered that the defendant should not insist upon a title set aside by the decree, which order he disobeyed; whereupon the plaintiff read the decree, but was nevertheless nonsuited; upon his application to the court for a commitment of the defendant for the contempt, and to be established in the possession, the same was ordered accordingly.(b) And in the case of *Bayley v. Morris*,(c) where no special direction was given as to not setting up a legal title, and the defendant in the action set up a legal title in trustees; whereupon the plaintiff was nonsuited, the court, upon petition, ordered the defendant to pay the costs of the nonsuit.

Parties.] As the action can only be between the parties who are interested in the legal estate, the court, for the protection of those who are equitably interested, will make it part of the order that they shall be at liberty to attend the trial by counsel, &c. to make such defence as they may be advised.(d)

In such cases, if an abatement in the suit occurs before the trial of the action, by the death of any of the defendants who are at liberty to attend the trial, the suit should be revived before the trial takes place. But it is otherwise where the abatement occurs by the death of a defendant who has no such liberty.(e)

(y) *Marsh v. Sibbald*, 2 Ves. & B. 375.

(z) *Hylton v. Morgan*, 6 Ves. 293.

(a) *Aston v. Lord Exeter*, id. 288.

(b) *Anon.* 1 Ch. Ca. 267.

(c) 4 Ves. 788.

(d) See the decree in *Buxton v. Sidebotham*, 2 Ves. jun., 521, n.

(e) *Humphreys v. Hollis*, Jacob, 73.

Trial, and subsequent proceedings.] The action is tried in the usual manner. If a new trial is desired by either party, it must be moved for in the court in which the action is brought, and not in this court.(*f*) And this rule applies even to cases in which the court has given special direction with regard to the trial; such as for the examination of the parties, &c.(*g*)

If a new trial is not moved for, or if a new trial is had, after the verdict thereon, the cause should be set down for further directions, in the same manner as after the trial of an issue.(*h*) And in the meantime no proceedings should be taken at law in consequence of the verdict, except moving for a new trial, without the sanction of the court.

The hearing upon further directions is not the time when any mistake committed at the trial below can be rectified. Therefore, where, upon further directions, the complainant applied to have the damages given by the verdict at law increased, on the suggestion that interest was omitted to be given, through a mistaken supposition that it would be given in equity, the court refused to interfere with the verdict.(*i*)

If, in the course of an action directed by this court, this mode is misconceived, application should be made to this court, by petition, to enable it to do justice.(*k*)

Costs.] The consideration of the costs of an action at law is generally reserved, by the order directing or permitting the action, together with the other costs of the suit, till the cause comes on upon further directions; when the court will make such order respecting them as the justice of the case requires. In general, however, the costs of the action follow the verdict; as in the case of issues.(*l*)

Where an action is directed to be brought in a court of law, and the plaintiff in an action resides abroad, the motion that he may give security for costs should be made in this court.(*m*)

(*f*) *Apthorp v. Comstock*, 2 Paige, 482. *Fowkes v. Chadd*, 2 Dick. 576.

(*g*) *Ex parte Kensington*, Coop. Ch. Rep. 96.

(*h*) 2 Smith, 92. See ante, p. 460.

(*i*) *Stevens v. Praed*, 2 Ves. jun., 519.

(*k*) *Holworthy v. Mortlock*, 1 Cox, 141.

(*l*) 2 Dan. 768. *Stevens v. Praed*, *supra*.

(*m*) *Desprez v. Mitchell*, 5 Mad. 87.

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